

## NOTES

### “CAN I POST THIS?”: A CALL FOR NUANCED INTERPRETATION OF DMCA ENFORCEMENT IN THE AGE OF SOCIAL MEDIA

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*This Note advances recent scholarship critiquing the notice-and-takedown procedures used by online service providers (OSPs) under the safe-harbor provision of the Digital Millennium Copyright Act (DMCA)—specifically in the context of user-generated content (UGC) posted by end users on social media. Rights holders have increasingly put legal pressure on technology platforms to fortify their copyright protection mechanisms. Over the past decade, this imperative has manifested through an increased use of automated content recognition (ACR) technology to remove allegedly infringing UGC. ACR technology has gradually overtaken the manual, human review of UGC that the DMCA envisioned.*

*However, reliance on mass automated takedowns of UGC creates a legal conflict. *Lenz v. Universal Music Corp.* established that rights holders must evaluate fair use before submitting a takedown notice to an OSP to avoid misrepresentation. Since automated takedowns remove the required review component, this Note questions their legality. This Note also examines recent litigation surrounding fair use and proposes to expand the definition of fair use to account for social media as one of many copyright battlefields of the 2020s. Such an expansion would fortify UGC creators’ rights on social media, thus ensuring equity between rights holders and users.*

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#### INTRODUCTION

In a profile for the New York Times on renowned parody singer-songwriter Weird Al Yankovic, Michael Schur, creator of *The Good Place* and cocreator of *Parks and Recreation*,<sup>1</sup> commented on the “deep

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1. *The Good Place* and *Parks and Recreation* were both comedy series that ran on NBC. See *The Good Place*, NBC, <https://www.nbc.com/the-good-place/about> [https://perma.cc/7FWP-6MZ6] (last visited Nov. 3, 2023); *Parks and Recreation*, IMDB, <https://www.imdb.com/title/tt1266020/> [https://perma.cc/Y287-WL5U] (last visited Nov. 3, 2023).

egalitarian spirit of [American] culture” that Weird Al’s works represented in the milieu of their releases.<sup>2</sup> On Weird Al’s “Smells Like Nirvana,” a parody of Nirvana’s “Smells Like Teen Spirit,” Schur reflected: “We as a culture are genuflecting at the altar of these rock stars, and Weird Al comes out with this crazy curly hair and an accordion, and he just blows it all into smithereens by singing about Spam. It’s wonderful.”<sup>3</sup>

Weird Al’s famous catalog represents one example of parody—a cultural element so integral that the U.S. Supreme Court protects it.<sup>4</sup> In *Campbell v. Acuff-Rose Music, Inc.*,<sup>5</sup> Acuff-Rose Music, Inc., the entity holding copyright in Roy Orbison’s rock song, “Oh, Pretty Woman,” brought an action against rap group 2 Live Crew and their record company for infringement.<sup>6</sup> The allegedly infringing work was 2 Live Crew’s song “Pretty Woman,” a parody of Orbison’s song.<sup>7</sup> However, statutory protection for parody dates back to 1976, codified in the legal doctrine of fair use.<sup>8</sup> For those accused of copyright infringement, fair use acts as a defense that may apply if the copyright use is for a transformative purpose, such as commentary, criticism, or parody.<sup>9</sup> Courts evaluate other factors when determining whether a work is fair use, such as whether the use was noncommercial.<sup>10</sup> Since 2 Live Crew’s song was commercial, the U.S. Court of Appeals for the Sixth Circuit did not find fair use; precedent presumed unfairness for commercial uses because of their potential to cause market harm.<sup>11</sup> However, the Supreme Court reversed.<sup>12</sup> The Court held that the commercial nature of the parody song did not create a presumption against fair use because the presumption of market harm only applies when a commercial use merely duplicates the original.<sup>13</sup> Furthermore, even if parody causes market harm to the original, it “does not produce a harm cognizable under the Copyright Act.”<sup>14</sup>

In the social media era, transformative uses of media such as parody, criticism, and commentary have evolved and become cultural mainstays.<sup>15</sup> Consider the ubiquity of internet memes, the majority of which involve the rapid sharing of online content that users transform to convey a new

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2. See Sam Anderson, *The Weirdly Enduring Appeal of Weird Al Yankovic*, NEW YORK TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/magazine/weird-al-yankovic.html> [<https://perma.cc/PMW5-AS4J>].

3. See *id.*

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

5. 510 U.S. 569 (1994).

6. See *id.* at 569.

7. See *id.*

8. See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 569.

9. See 17 U.S.C. § 107.

10. See *id.*

11. See *Campbell*, 510 U.S. at 574 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

12. See *id.* at 572.

13. See *id.* at 591.

14. See *id.* at 592 (noting that although biting criticism merely suppresses demand, copyright infringement usurps it).

15. See, e.g., Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 457 (2022).

meaning.<sup>16</sup> Consider also the common practice of reposting an image to a forum such as Instagram, overlaying commentary or criticism through a caption.<sup>17</sup> Professor Lawrence Lessig of Harvard Law School conveys this growing phenomenon of the transformative use of user-generated content (UGC) on the Internet with the term “remix culture,” which he introduced in his scholarship even before social media’s mainstream usage.<sup>18</sup> However, digital copyright protection complicates this vision; where some online observers see “remix culture,” rights holders may see a lawsuit.<sup>19</sup>

Enacted in 1998, the Digital Millennium Copyright Act<sup>20</sup> (DMCA) both extended copyright law to cover digital works and limited the liability of online service providers (OSPs) for hosting copyright-infringing material on their websites.<sup>21</sup> Section 512(c) provides OSPs a safe harbor from liability for hosting infringing UGC.<sup>22</sup> That safe harbor is contingent on efforts made by the OSP to “expeditiously” remove the material.<sup>23</sup> These efforts include removal when a rights holder notifies the OSP of infringing material.<sup>24</sup> Courts refer to the procedures outlined in § 512(c) as the DMCA’s “takedown procedures.”<sup>25</sup>

In the decades since the DMCA’s enactment, courts have applied the evolving doctrine of fair use to issues involving DMCA enforcement.<sup>26</sup> The

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16. See Cathay Y. N. Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 GEO. L.J. ONLINE 142, 144 (2021). The word “meme” originated with evolutionary biologist Richard Dawkins, who defined it as any “‘unit of cultural transmission’ that stays alive by ‘leaping from brain to brain.’” See *id.* (quoting RICHARD DAWKINS, *THE SELFISH GENE* 249 (2016)).

17. See *O’Neil v. Ratajkowski*, 563 F. Supp. 3d 112, 129 (S.D.N.Y. 2021) (determining that genuine issue of material fact existed as to whether the celebrity’s use of a copyrighted photograph, by posting it to Instagram Stories with added flowers covering her face and body and with caption “mood forever,” was transformative).

18. Compare LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 11–14 (2008) (sharing a conversation he had around 2007 with an experimental “mash up” musician who predicted the ubiquity of his type of music shared across the Internet in a similar manner as media manipulated via Photoshop), with Warren B. Chik, *Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 J. MARSHALL REV. INTEL. PROP. L. 240, 243 (2011) (citing the “rise of powerful internet giants like Facebook for social networking” as one of the reasons for the proliferation of UGC). See also Chik, *supra* note 18, at 242 (defining the term “UGC” as user-generated content).

19. See LESSIG, *supra* note 18; Alexandra Peers, *Online Creators Hit with IP and Copyright Lawsuits*, CNN BUS. (Oct. 22, 2022, 9:18 AM), <https://www.cnn.com/2022/10/22/tech/copycats-new-media-gets-sued-over-ip-copyright/index.html> [<https://perma.cc/DVW6-7RT2>] (attributing the uptick in copyright lawsuits over online user-generated content to the “rise of remix culture”).

20. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of the U.S.C.).

21. See 17 U.S.C. § 512.

22. See *id.* § 512(c).

23. See *id.* § 512(c)(1)(A)(iii).

24. See *id.* § 512(c)(1)(C).

25. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016).

26. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313 (5th Cir. 2022); *Hunley v. Instagram, LLC*, 73 F.4th 1060 (9th Cir. 2023).

general public is most likely to encounter the DMCA's influence through social media. For example, *Lenz v. Universal Music Corp.*<sup>27</sup> challenged YouTube's "extrajudicial" removal process for UGC that allegedly infringes copyright under the DMCA.<sup>28</sup> In 2007, Stephanie Lenz uploaded a 29-second home video of her young child dancing in the kitchen while "Let's Go Crazy" by Prince played in the background.<sup>29</sup> YouTube removed the video after receiving a takedown notice from Universal Music Group, the rights manager of the song.<sup>30</sup> Lenz brought the action because Universal failed to consider whether her video's use of the song was fair.<sup>31</sup> A nine-year court battle ensued. Finally, in 2016, the U.S. Court of Appeals for the Ninth Circuit held that rights holders must consider fair use before issuing takedown notices to websites such as YouTube.<sup>32</sup>

The *Lenz* holding sent a message to social media OSPs to be mindful when manually reviewing UGC for copyright infringement. However, more recent jurisprudence on this issue has failed to catch up to the current technologies that social media platforms strategically employ to monitor UGC.<sup>33</sup> In the fifteen years since *Lenz* was first brought, social media platforms have used technological advancements such as automated content recognition (ACR) systems to handle the removal of potentially infringing social media content under the DMCA.<sup>34</sup> More recently, the discourse surrounding the European Union's Directive on Copyright in the Digital Single Market—regarded as a stricter version of the DMCA—has brought to light the difficulties that social media consumers face in appealing takedowns. Critics of the directive voiced concerns about removing UGC as artificial intelligence increases and the ability to communicate with the humans running the OSP decreases.<sup>35</sup>

This Note argues that the automation of social media platforms' takedown procedures entrenches the inequities that exist between titans of the entertainment and technology industry and social media consumers. *Lenz* established that rights holders must consider fair use before issuing takedown

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27. 815 F.3d 1145 (9th Cir. 2016).

28. *See id.* at 1148.

29. *See id.*

30. *See id.* at 1149–50.

31. *See id.* at 1150.

32. *See id.* at 1151.

33. *See* Ian Lopez, *Battling Bots in the Age of Automated DMCA Takedown Notices*, LEGALTECH NEWS (Aug. 30, 2018, 10:00 AM), <https://www.law.com/legaltechnews/2018/08/30/battling-bots-in-the-age-of-automated-dmca-takedown-notice/> [<https://perma.cc/B534-VTP5>].

34. *See, e.g., How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/7CBS-FDV4>] (last visited Nov. 3, 2023); Lopez, *supra* note 33; Annemarie Bridy, *The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform*, 22 VAND. J. ENT. & TECH. L. 323, 329 (2020) (using the acronym "ACR" to describe this system).

35. *See, e.g.,* Matt Reynolds, *What Is Article 13?: The EU's Divisive New Copyright Plan Explained*, WIRED (May 24, 2019, 11:00 AM), <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban> [<https://perma.cc/A8LE-2SZ8>].

notices to social media platforms.<sup>36</sup> Thus, courts today should put a greater onus on the platforms themselves to ensure that automated takedowns do not capture fair uses of content.

Part I of this Note provides background information on past litigation regarding social media content removal under the DMCA. Whereas Part I recounts prior issues relating to *manual* takedown procedures, Part II grapples with the current issue of *automated* takedown procedures. Part II of this Note also explores the approaches that corporations, lawmakers, and courts take to resolve the tension between rights holders and users on social media. Additionally, Part II highlights the ideological arguments for and against the increased policing of copyright infringement under the DMCA that accompany these various approaches. Litigation contesting ACR technology has not yet become prevalent, but courts' application of fair use analysis to novel technologies proves instructive. Finally, in Part III, this Note contends that a judicial framework with specific considerations for fair use on social media best ensures that consumers retain their rights to the free flow of information and expression while still minding platforms' concerns over complying with the DMCA. In addition, Part III questions the legality of ACR systems on social media under the DMCA's "misrepresentation" provision.<sup>37</sup>

#### I. CONTEXTUALIZING CURRENT STANDARDS FOR COPYRIGHT PROTECTION ON SOCIAL MEDIA

This part discusses the history of fair use and the DMCA. Part I.A introduces the statute codifying fair use, 17 U.S.C. § 107. Part I.A then elaborates on the "takedown" and "put-back" provisions of the DMCA, § 512(c) and § 512(g). Part I.B discusses the preliminary legal issues in DMCA-related litigation, which inform the current critiques of DMCA compliance discussed in Part II. Part I.C provides historical background to the ongoing debate surrounding the ethics and legality of social media platforms using ACR systems instead of manual takedowns.

##### *A. Preliminary Legal Context to Fair Use and the DMCA*

Part I.A contextualizes the historical balance between copyright and fair use sought in the United States and explains its applicability to UGC on social media. It begins by introducing the theory and statute behind fair use as a defense to copyright infringement. Then, it discusses the Supreme Court's protection of commercial parody in *Campbell*, which many social media-related cases cite. Finally, it contextualizes the three provisions of the DMCA most relevant to this Note.

Legal protection for published material in the United States originates in the Copyright Clause—Article I, Section 8, Clause 8 of the U.S. Constitution—which empowers Congress to secure copyrights for authors to

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36. *Lenz*, 815 F.3d at 1151–52.

37. *See* 17 U.S.C. § 512(f).

promote “the Progress of Science and useful Arts.”<sup>38</sup> Specifically, the framers believed that the Copyright Clause would incentivize the free expression of new ideas by allowing authors to monetize those ideas through protected rights.<sup>39</sup> However, over time, the Supreme Court has recognized “built-in First Amendment accommodations” that intend to promote free expression by limiting the scope of the clause.<sup>40</sup> One such accommodation is fair use, codified at 17 U.S.C. § 107.<sup>41</sup> Enacted in 1976, § 107 lists reproduction of a copyrighted work for “criticism, comment, news reporting, teaching . . . scholarship, or research” as fair use of the work.<sup>42</sup> To evaluate whether a reproduction is a fair use, courts consider the following: (1) the “purpose” and “character” of the use, including whether the use is commercial or noncommercial; (2) the “nature of the copyrighted work”; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) whether or not the use will hinder the market value of the original copyrighted work.<sup>43</sup>

Since the enactment of § 107, courts have liberally applied fair use.<sup>44</sup> Notably, in *Campbell*, the Supreme Court recognized that parody is a form of commentary, holding that the song parody in the case at bar did not lower the market value of the original.<sup>45</sup>

Technological advancements in the publication of copyrighted material drove Congress to reckon with new modes of copyright infringement.<sup>46</sup> After the rise of the internet, Congress enacted the DMCA in 1998, which holds OSPs liable to authors of copyrighted work for hosting unauthorized uses of the work.<sup>47</sup>

There is, however, a “safe harbor” provision in the DMCA—§ 512(c)—which shields the OSP from liability if the provider acts in a specified sequence of events regarding the infringing material.<sup>48</sup> To receive the safe

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38. U.S. CONST. art. I, § 8, cl. 8.

39. See *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 558 (1985).

40. *Golan v. Holder*, 565 U.S. 302, 328 (2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)); see also *Harper & Row*, 471 U.S. at 560.

41. See *Golan*, 565 U.S. at 329.

42. See 17 U.S.C. § 107.

43. See *id.*; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).

44. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Authors Guild*, 804 F.3d at 207 (holding that the defendant’s hosting verbatim excerpts of authors’ written publications on its Google Books database constituted fair use).

45. See *Campbell*, 510 U.S. at 591–93. But see *id.* at 592 (“We do not, of course, suggest that a parody may not harm the market at all . . .”).

46. See S. REP. NO. 105-190, at 1 (1998).

47. See 17 U.S.C. § 512. The term “service provider” extends not only to internet access services but also to websites, especially those which act as a platform for individual users’ posts or listings. See, e.g., *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *In re DMCA § 512(h) Subpoena to Twitter, Inc.*, No. 20-MC-80214-VC, 2022 WL 2205476 (N.D. Cal. June 21, 2022).

48. 17 U.S.C. § 512(c). The copyright owner bears the burden of demonstrating that the elements of the safe harbor provision did not take place. See *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 92 (2d Cir. 2016) (citing *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 95 (2d Cir. 2016)).

harbor's protections, the provider must (1) lack "actual knowledge"<sup>49</sup> and (2) be unaware of facts or circumstances that make it clear that the material on its site is infringing.<sup>50</sup> If the provider had such knowledge or awareness, it must have (3) "act[ed] expeditiously to remove, or disable access to," the infringing material.<sup>51</sup> Additionally, if the OSP can control whether or not it profits from hosting the infringing material, it must not profit.<sup>52</sup> Finally, once the copyright owner (or a third party) notifies the OSP of claimed infringement, the provider must "respond[] expeditiously to remove, or disable access to," the material targeted by the claim.<sup>53</sup> Thus, even under the DMCA's safe harbor provision, OSPs such as social media platforms have some responsibility to rid themselves of copyright-infringing content. Otherwise, these platforms face lawsuits by rights holders.<sup>54</sup>

In contrast to the "takedown process," the "put-back process," outlined in § 512(g) of the DMCA, provides a way for an OSP to restore the content it took down.<sup>55</sup> Generally, an OSP has no liability for good faith removal of content.<sup>56</sup> However, if the OSP receives a proper "counter notification" from the user, contesting that their content was removed by "mistake or misidentification," the OSP must restore the content in ten to fourteen business days.<sup>57</sup> An OSP's removal of content that is fair use constitutes a "mistake or misidentification."<sup>58</sup>

When operating through mechanisms such as reporting systems and takedown procedures, rights holders and social media platforms often fail to evaluate whether a content creator's use of the copyrighted material is fair before taking down their post.<sup>59</sup> This is a basis for litigation by social media users contesting DMCA takedown procedures.

Under § 512(f),<sup>60</sup> any person who "knowingly materially misrepresents" that online content is either infringing or was "removed or disabled by mistake or misidentification" shall be liable for damages.<sup>61</sup> The poster

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49. 17 U.S.C. § 512(c)(1)(A)(i).

50. *Id.* § 512(c)(1)(A)(ii).

51. *Id.* § 512(c)(1)(A)(iii).

52. *Id.* § 512(c)(1)(B).

53. *Id.* § 512(c)(1)(C). The notification process referenced here is colloquially known as "flagging." See Xiaoren Wang, *YouTube Creativity and the Regulator's Dilemma: An Assessment of Factors Shaping Creative Production on Video-Sharing Platforms*, 32 ALB. L.J. SCI. & TECH. 197, 251 n.494 (2022).

54. See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

55. See 17 U.S.C. § 512(g); *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016).

56. See 17 U.S.C. § 512(g)(1).

57. See *id.* § 512(g)(2)–(3).

58. See *Lenz*, 815 F.3d at 1151 (quoting 17 U.S.C. § 512(g)(3)(C)).

59. See *id.* at 1149; Sarah Fischer, *My Sad Facebook Story — How My Page Got Permanently Banned for Something Completely Legal*, DIGITAL MUSIC NEWS (Mar. 20, 2018), <https://www.digitalmusicnews.com/2018/03/20/facebook-page-banned/> [perma.cc/K4AZ-ZH3M] (recounting how Facebook permanently banned a singer-songwriter for uploading three cover songs); *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 41 (S.D.N.Y. 2017).

60. See 17 U.S.C. § 512.

61. See *id.*



injured by the infringement allegation would receive resulting damages.<sup>62</sup> Social media platforms typically provide direct links to web forms by which individuals can submit copyright removal requests.<sup>63</sup> One example of “material misrepresentation” would be if an individual impersonated a rights holder when submitting this form.<sup>64</sup> Courts acknowledge additional examples of misrepresentation<sup>65</sup> but seldom award damages to parties injured by misrepresentation under § 512(f) in the context of social media.<sup>66</sup>

*B. Traditional Media Versus Social Media:  
The Complications of Commercial Use*

Part I.B examines the nuanced relationship between social media technology and courts’ evaluation of fair use, specifically the commercial nature of the use. The legal complications surrounding the DMCA and fair use on social media are not relegated to niche disputes. Rather, they interplay with the activity of multibillion-dollar industries and the online public. Importantly, not all UGC on social media is monetizable or commercial in nature.<sup>67</sup> Even when assessing fair use for noncommercial UGC, courts must determine whether the UGC harmed the market value of the original.<sup>68</sup> Thus,

62. *See id.*

63. *See, e.g., Reporting Copyright Infringements*, INSTAGRAM HELP CTR., <https://help.instagram.com/454951664593304> [<https://perma.cc/F6JK-XSZK>] (last visited Nov. 3, 2023); *Copyright Policy*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/copyright-policy> [<https://perma.cc/EBF2-MQRN>] (last visited Nov. 3, 2023); *Submit a Copyright Removal Request*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807622> [<https://perma.cc/V6RG-FP88>] (last visited Nov. 3, 2023).

64. *See, e.g., First Amended Complaint at 8, Bungie, Inc. v. Minor*, No. 22-CV-371 (W.D. Wash. June 22, 2022), ECF No. 19 (“*Ninety-six* separate times, Minor used his fake ‘CSC’ Gmail addresses to exploit the hole in YouTube’s DMCA-process security that allows anyone at all to claim to be representing a rights holder for purposes of issuing a takedown, with no real safeguards against fraud.” (emphasis in original)); Owen S. Good, *Bungie Hits Youtuber with a \$7.6 Million Lawsuit for Fake DMCA Claims*, POLYGON (June 23, 2022, 3:06 PM), <https://www.polygon.com/23180433/bungie-youtube-dmca-takedowns-lawsuit-lord-nazo> [<https://perma.cc/G5QD-XCCG>].

65. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153–55 (9th Cir. 2016).

66. *See, e.g., Yout, LLC v. Recording Indus. Ass’n of Am.*, 633 F. Supp 3d 650, 679 (D. Conn. 2022); *White v. UMG Recordings, Inc.*, No. 20-CV-9971, 2021 WL 6052106 (S.D.N.Y. Dec. 21, 2021); *Hawkins v. Knobbe*, No. 05-20-00224-CV, 2020 WL 7693111, at \*5 (Tex. App. Dec. 28, 2020) (“As for the DMCA complaint, we initially agree with Knobbe that the general public, or more accurately the reasonable reader, likely is not aware of what a ‘DMCA claim’ [is] or what the acronym DMCA even means.”); *Raven v. Molyneux*, No. 14-CV-08288, 2015 WL 12827760 (C.D. Cal. Jan. 27, 2015) (dismissing claim that defendants misrepresented DMCA claims against plaintiff as a political adversary due to plaintiff’s lack of evidence that defendants conspired).

67. *Compare Leonore ten Hulsen, Privacy on Social Media—Regulating Online Personal Spaces*, 24 J. INTERNET L. 1, 20 (2020) (distinguishing between “personal” and “commercial” use of social media), with *Instagram Content Monetization Policies*, INSTAGRAM HELP CTR., <https://help.instagram.com/2635536099905516> [<https://perma.cc/R7V6-NJCY>] (last visited Nov. 3, 2023) (enumerating Instagram’s limitations on the types of content that its users can monetize).

68. *See, e.g., Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 324–26 (5th Cir. 2022) (holding that a public high school softball team’s tweets quoting a motivational passage from a published book did not infringe the book author’s copyright). Analysis of 17

in court, commercial UGC faces two challenges related to economic impact.<sup>69</sup> Section I.B.1 discusses the growth of social media usage and its implications on how creators can monetize their posts on social media platforms to clarify the relevance of “commercial use” in copyright infringement litigation pertaining to social media. Section I.B.2 focuses on litigants whose commercial use on social media complicated their fair use defenses.

### 1. Contrasting Social Media with Traditional Media

The current rate of DMCA takedowns undertaken by social media platforms touches several corners of the entertainment and technology industries. Entertainment transformed with the advent of social media<sup>70</sup>—between 2012 and 2020, twenty-five million Americans canceled their cable and satellite television subscriptions.<sup>71</sup> This decline induced major reorganizations by rights holders such as Disney, NBCUniversal, WarnerMedia, and ViacomCBS.<sup>72</sup> During that same eight-year period, the percentage of American adults using at least one social media platform rose from 53 percent to 72 percent.<sup>73</sup> In 2021, one-third of youth globally used TikTok daily, compared to only 10 percent who listened to curated playlists on streaming services such as Spotify.<sup>74</sup>

Unlike the majority of users who consume and post UGC on social media noncommercially, many individuals in creative fields rely on social media as a vehicle for self-promotion.<sup>75</sup> As more musicians publicly express their frustration with the conservative, gatekeeping practices of major record labels, others have released their music independently—even experimenting with avenues riskier than social media, such as blockchain.<sup>76</sup>

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U.S.C. § 107(4) favored the school district because the widespread tweeting of the book’s passage would not “result in a substantially adverse impact on the potential market” for the book.” See *id.* at 324 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

69. See 17 U.S.C. § 107(1); 17 U.S.C. § 107(4).

70. See Caroline E. Kim, *Insta-Fringement: What Is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 103 (2018) (“In the Age of the Internet, social media is the primary channel for interaction and cultural engagement.”).

71. See Alex Sherman, *Media Executives Are Finally Accepting the Decline of Cable TV as They Plot a New Path Forward*, CNBC (Oct. 27, 2020, 12:02 PM), <https://www.cnbc.com/2020/10/24/big-media-companies-reorganize-for-world-of-50-million-tv-subscribers.html> [<https://perma.cc/BGF5-2ARF>].

72. See *id.*

73. See *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/E932-BK88>].

74. See Tim Ingham, *So . . . How Much Did TikTok Actually Pay the Music Industry from Its \$4bn in Revenues Last Year?*, MUSIC BUS. WORLDWIDE (July 14, 2022), <https://www.musicbusinessworldwide.com/so-how-much-did-tiktok-actually-pay-the-music-industry-from-its-4bn-in-revenues-last-year/> [<https://perma.cc/69G9-MGJ4>].

75. See, e.g., Fischer, *supra* note 59; *White v. UMG Recordings, Inc.*, No. 20-CV-9971, 2021 WL 6052106, at \*3 (S.D.N.Y. Dec. 21, 2021) (“It is plausible that Plaintiff’s inability to post about ‘Oi!’ on Twitter deprived him of an opportunity to promote his music, which, in turn, could lead to damages.”).

76. See Rhian Jones, *‘I Had No Confidence, No Money’: The Pop Stars Kept in Limbo by Major Labels*, GUARDIAN (Aug. 11, 2021, 7:19 AM), <https://www.theguardian.com>.

Thus, artists have increasingly used social media to promote their work independently. Social media platform executives even acknowledge the role of their sites in amplifying the careers of now-mainstream artists.<sup>77</sup> In addition to musicians, other types of artists and entertainers promote their work on social media and may even earn money from their posts.<sup>78</sup> Different social media platforms provide differing monetization schemes for individual user accounts who seek commercial gain. For professional content creators of all genres, colloquially known as “YouTubers,”<sup>79</sup> YouTube launched the YouTube Partner Program in 2017, paying creators 55 percent of advertising revenue on their videos.<sup>80</sup> Twitch, a live stream broadcasting platform, implements a similar mechanism called the Twitch Partnership Program.<sup>81</sup> Meanwhile, less broadcast-focused platforms, such as Instagram, do not directly compensate their share of content creators; rather, these individuals, known as “influencers,” receive compensation for popular posts by marketing for third parties.<sup>82</sup> Further, business owners, commonly within the aforementioned creative industries, utilize social media to promote their work.<sup>83</sup>

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com/music/2021/aug/11/i-had-no-confidence-no-money-the-pop-stars-kept-in-limbo-by-major-labels [https://perma.cc/YEU4-8VEH] (describing how record labels’ limitations on artists’ expression “may disproportionately affect women and people of colour”); Jack Irvin, *Kim Petras Says Her Album Release Is Stalled, Approves Fans Listening to Leaks: ‘I Just Wanna Quit,’* PEOPLE (Aug. 4, 2022, 4:00 PM), <https://people.com/music/kim-petras-says-her-album-release-is-stalled/> [https://perma.cc/QL6Z-RURX] (relaying a trans pop singer’s frustration as Republic Records indefinitely stalls her debut album’s release); Amy X. Wang, *An Indie Music Expert Explains Why Artists Are Turning Away from Record Deals*, ROLLING STONE (Nov. 1, 2018), <https://www.rollingstone.com/pro/news/ditto-music-lee-parsons-interview-749510/> [https://perma.cc/R9YN-6K5A].

77. See Susan Wojcicki, *A Final Update on Our Priorities for 2018*, YOUTUBE OFF. BLOG (Oct. 22, 2018), <https://blog.youtube/inside-youtube/a-final-update-on-our-priorities-for/> [https://perma.cc/BU8B-PMQY].

78. Compare Wang, *supra* note 54, at 200 (describing how end-users may directly profit from YouTube videos), with Chik, *supra* note 18, at 280 (distinguishing direct profit from indirect profit derived from UGC), and Adler & Fromer, *supra* note 15, at 512 (describing the small number of Instagram “meme” accounts, with large followings, that indirectly profit from their posts via sponsorships).

79. See Complaint & Demand for Jury Trial ¶ 5, *Raven v. Molyneux*, No. 14-CV-08288 (C.D. Cal. Jan. 27, 2015), ECF No. 1.

80. See Wang, *supra* note 54, at 229. Qualified channels must have one thousand subscribers and four thousand hours of viewership within twelve months. See *id.* YouTube deploys an automatic copyright filter system, called Content ID, to check uploaded videos against the visual and auditory fingerprints of copyrighted videos. See *id.* at 231–32. Once the system finds a match to the owners’ video, the owner of the copyright can choose to block the video, track the video, or monetize the video for themselves through advertising revenue. *Id.* Therefore, the notice-and-takedown of videos pursuant to Content ID interferes with a channel’s ability to earn revenue for videos allegedly containing infringing material. See *id.*

81. See *Twitch Interactive, Inc. v. Johnston*, No. 16-CV-03404, 2019 WL 3387977, at \*2 (N.D. Cal. July 26, 2019).

82. See Kim, *supra* note 70, at 103; Michael W. Carroll, *Rules of Engagement: Copyright and Automated Gatekeepers’ Influence on Creative Expression*, 52 SETON HALL L. REV. 1137, 1141–42 (2022).

83. See, e.g., *Sedlik v. Von Drachenberg*, No. CV 21-1102, 2022 U.S. Dist. LEXIS 129018, at \*3 (C.D. Cal. May 31, 2022).

There are several reasons why UGC on social media presents an economic threat to traditional media rights holders. First, consumption of social media has begun to outpace consumption of traditional media as a source of entertainment.<sup>84</sup> Second, various UGC monetization schemes on social media platforms have allowed more artists to viably gain recognition without traditional backers such as record labels.<sup>85</sup> Third, traditional media rights holders directly compete with UGC creators for engagement on social media.<sup>86</sup>

## 2. How Commercial Use Complicates Fair Use on Social Media

Since social media and traditional media differ in terms of creators' possible revenue streams, the way that courts evaluate fair use differs for UGC on social media. This section analyzes cases that exemplify how social media complicates courts' evaluations of whether the use in a copyright infringement case is commercial.<sup>87</sup> Following *Campbell*, courts evaluating the first fair use prong for a social media post generally emphasize the transformative nature of the use more than the commercial nature.<sup>88</sup>

Given that some individuals rely on social media for their livelihood, their disputes comprise a substantial portion of copyright infringement litigation on social media.<sup>89</sup> Defendants who post UGC for a commercial purpose face an additional hurdle in courts' fair use analysis because that analysis favors noncommercial use.<sup>90</sup> However, because of the Supreme Court's decision in *Campbell*, courts can prioritize the transformative nature of the defendant's work as a more important factor than commercialism.<sup>91</sup>

Cases evaluating fair use on social media outside of notice-and-takedown under the DMCA safe harbor provision<sup>92</sup> often cite to *Perfect 10, Inc. v.*

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84. See, e.g., Ingham, *supra* note 74.

85. See *supra* notes 77–83 and accompanying text.

86. See, e.g., Warner Music Group (@warnermusic), YOUTUBE, <https://www.youtube.com/@warnermusic> [<https://perma.cc/2X4G-TJZM>] (last visited Nov. 3, 2023) (using YouTube as a record label to promote its signed artists).

87. See 17 U.S.C. § 107(1). Additionally, the difference in social media monetization pertains to the use's potential market harm of the original work. See *id.* § 107(4).

88. See *infra* Part I.B.2.

89. See, e.g., *Sedlik*, 2022 U.S. Dist. LEXIS 129018, at \*1 (acknowledging defendant as a tattoo artist and reality television personality); *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1062 (9th Cir. 2023) (acknowledging plaintiffs as professional photographers); *O'Neil v. Ratajkowski*, 563 F. Supp. 3d 112, 122 (S.D.N.Y. 2021) (acknowledging defendant as a professional model and actress).

90. See 17 U.S.C. § 107.

91. See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (noting that Google's making a digital copy of published books to enable the search for terms of interest within those books involved a "highly transformative purpose"); see also Lauren Levinson, Comment, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1063 (2017) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

92. See 17 U.S.C. § 512(c)(3).

*Amazon.com, Inc.*<sup>93</sup> In *Perfect 10*, the Ninth Circuit explored the “transformative” prong of fair use, holding that an online entity’s exact copy of a protected work may be transformative as long as “the copy serves a different function than the original work.”<sup>94</sup> One example of a case using the *Campbell* and *Perfect 10* frameworks is *Sedlik v. Von Drachenberg*.<sup>95</sup> In *Sedlik*, the court evaluated whether a tattoo artist’s Instagram post showcasing her tattoo rendition of a photographer’s portrait constituted fair use.<sup>96</sup> The court concluded that a jury should answer this question.<sup>97</sup>

*O’Neil v. Ratajkowski*<sup>98</sup> also grappled with the unique questions that Instagram generates regarding an image’s transformative and commercial nature.<sup>99</sup> A paparazzo sued model Emily Ratajkowski for copyright infringement after she reposted his photograph of her on her Instagram Story.<sup>100</sup> The photo depicted Ratajkowski hiding behind a flower bouquet for privacy, and she argued that the caption she added, “mood forever,” was sufficiently transformative because it commented on and criticized paparazzi following her.<sup>101</sup> On a motion for summary judgment, the court concluded that this was a genuine issue of material fact for the jury to decide.<sup>102</sup> Regarding commercial use, the court noted that Ratajkowski’s history of profiting from sponsored Instagram Stories favored the plaintiff.<sup>103</sup> However, the plaintiff did not necessarily “win” on the commercial use prong because Ratajkowski was not paid to post this Instagram Story.<sup>104</sup> Thus, the court appeared to have deemed the commercial use analysis less important than the transformative use analysis in this case.<sup>105</sup>

Cases involving creators’ independent copyright infringement actions over internet posts are instructive in their examination of fair use as applied to social media.<sup>106</sup> For those who use social media commercially, the “transformative” component of fair use analysis becomes all the more important. Notably, the nuance that social media adds to questions of an image’s commercial and transformative nature often necessitates that the case go before a jury.<sup>107</sup>

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93. 508 F.3d 1146 (9th Cir. 2007). *See, e.g., Sedlik*, 2022 U.S. Dist. LEXIS 129018; *Hunley v. Instagram, LLC*, No. 21-CV-03778, 2021 WL 4243385 (N.D. Cal. Sept. 17, 2021), *aff’d*, 73 F.4th 1060 (9th Cir. 2023).

94. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

95. No. CV 21-1102, 2022 U.S. Dist. LEXIS 129018 (C.D. Cal. May 31, 2022).

96. *See id.*

97. *See id.*

98. 563 F. Supp. 3d 112 (S.D.N.Y. 2021).

99. *See id.*

100. *See id.* at 122.

101. *See id.* at 129.

102. *See id.*

103. *See id.* at 130.

104. *See id.*

105. *See id.*

106. *See supra* notes 89–105.

107. *See supra* note 96; *O’Neil*, 563 F. Supp. 3d 112.

*C. Tension Between Under-policing and Over-policing  
Social Media Infringement*

Part I.C bridges the summary of manual DMCA takedowns in Part I and the discourse on automated DMCA takedowns discussed below in Part II. Part I.C.1 contextualizes the advent of ACR technology to detect and remove alleged infringement on social media platforms. Then, Part I.C.2 summarizes *Lenz v. Universal Music Corp.*<sup>108</sup> and emphasizes how thoroughly the court examined whether the UGC infringed. In this manner, the court’s opinion in *Lenz* contrasts with the sweeping nature of ACR technology.

1. Platforms’ New Strategies for Infringement Prevention:  
ACR and “Proactive Policing”

This section contextualizes the resurgence of automated DMCA takedowns in the place of manual DMCA takedowns in response to allegations of willful blindness to infringement.<sup>109</sup> Social media platforms employ ACR systems to automatically detect and remove infringing posts. These ACR systems are colloquially known as “bots.”<sup>110</sup> The oldest of these ACR systems is YouTube’s Content ID, launched in 2007 following a billion-dollar lawsuit.<sup>111</sup> Other social media sites, including Facebook, Instagram, and Twitch, also use ACR technology.<sup>112</sup>

The first instance of a social media platform implementing ACR technology was in response to *Viacom v. YouTube*.<sup>113</sup> In 2007, Viacom and several other traditional media corporations sued YouTube—then a startup—for copyright infringement under the DMCA.<sup>114</sup> The suit alleged that YouTube violated its safe harbor provision by taking no action to remove infringing videos even though it was aware of their existence.<sup>115</sup> Viacom, seeking \$1 billion in damages, provided a survey by YouTube employees estimating that 75 to 80 percent of uploads on the platform contained copyrighted material.<sup>116</sup> Viacom also presented a 2006 internal report from

108. 815 F.3d 1145 (9th Cir. 2016).

109. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

110. See Rebecca Alderfer Rock, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 703 (2014).

111. See John Paul Titlow, *YouTube Is Using AI to Police Copyright—to the Tune of \$2 Billion in Payouts*, FAST COMPANY (July 13, 2016), <https://www.fastcompany.com/4013603/youtube-is-using-ai-to-police-copyright-to-the-tune-of-2-billion-in-payouts> [<https://perma.cc/E8JK-SVA6>]; Bridy, *supra* note 34, at 329.

112. See *Rights Manager*, META FOR CREATORS, <https://www.facebook.com/creators/tools/rights-manager> [[perma.cc/HK2Y-FEPW](https://perma.cc/HK2Y-FEPW)] (last visited Nov. 3, 2023); Adriana Saldaña, *Audible Magic the First to Surpass 100 Million Music Tracks*, BUS. WIRE (Feb. 23, 2021, 5:00 AM), <https://www.businesswire.com/news/home/20210223005327/en/Audible-Magic-the-First-to-Surpass-100-Million-Music-Tracks> [[perma.cc/7J5G-4BRB](https://perma.cc/7J5G-4BRB)].

113. 676 F.3d 19 (2d Cir. 2012); see Wang, *supra* note 54, at 231.

114. See *Viacom*, 676 F.3d at 28; Bridy, *supra* note 34, at 328.

115. See *Viacom*, 676 F.3d at 29–30.

116. See *Viacom Will Sue YouTube for \$1bn*, BBC NEWS (Mar. 13, 2007, 11:17 PM), <http://news.bbc.co.uk/2/hi/business/6446193.stm> [<https://perma.cc/PU3U-WTVK>]; *Viacom*, 676 F.3d at 32.

one of YouTube's founders acknowledging that unauthorized uploads of full-length episodes of Viacom television shows existed on the site.<sup>117</sup> The U.S. Court of Appeals for the Second Circuit held that rights holders cannot require OSPs like YouTube to monitor for infringement.<sup>118</sup> However, it also held that rights holders can still hold OSPs liable for willful blindness to infringing material that it hosts.<sup>119</sup> Although the U.S. District Court for the Southern District of New York ultimately granted YouTube's motion to dismiss on remand, the Second Circuit's findings put YouTube on edge.<sup>120</sup>

In 2007, the wake of this litigation, YouTube implemented their ACR system, Content ID.<sup>121</sup> The system operates by comparing a database of select copyright owners' audio and visual material against videos uploaded to YouTube by other users.<sup>122</sup> If Content ID detects a match, it automatically puts a Content ID claim on the alleged infringer's video.<sup>123</sup> YouTube has claimed that, in recent years, Content ID has improved at accurately detecting infringement due to improved machine learning technology.<sup>124</sup> YouTube even touts Content ID's ability to detect melodies due to a database of "more than six hundred years of audio and visual reference content."<sup>125</sup>

Depending on the copyright owner's settings, the claim can block the targeted video from viewership, run advertisements on the video from which the copyright owner can generate revenue, or track viewership statistics.<sup>126</sup> On YouTube, a video's Content ID claim may affect it differently in one country or region than in another.<sup>127</sup> YouTube differentiates between a Content ID claim and a copyright strike—the takedown of a YouTube video and penalties on the channel that result when a rights holder manually submits a "complete and valid legal takedown request" to YouTube.<sup>128</sup> However, Content ID claims and copyright strikes may intersect when copyright owners send takedown notices because of ACR detections without manually reviewing the videos for infringing material.<sup>129</sup>

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117. See *Viacom*, 676 F.3d at 33. Said founder also wrote in a 2005 email exchange to his cofounders, regarding a copyright-infringing upload, "the CNN space shuttle clip, I like. we can remove it once we're bigger and better known, but for now that clip is fine." See *id.*

118. See *id.* at 35 (citing 17 U.S.C. § 512(m)).

119. See *id.*

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

121. See Wang, *supra* note 54, at 231.

122. See *How Content ID Works*, *supra* note 34; Lopez, *supra* note 33.

123. See *How Content ID Works*, *supra* note 34.

124. See Titlow, *supra* note 111.

125. See *id.*

126. See *How Content ID Works*, *supra* note 34; Lopez, *supra* note 33.

127. See *Learn About Content ID Claims*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/FRN9-RTF2>] (last visited Nov. 3, 2023).

128. See *Copyright Strike Basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000> [<https://perma.cc/QQJ8-G7C5>] (last visited Nov. 3, 2023).

129. See Steven Seidenberg, *Copyright in the Age of YouTube*, 95 A.B.A. J. 46, 49 (2009) ("We've seen instance after instance where videos on YouTube, perfectly legal and perfectly fine . . . get taken down . . . . Copyright owners are not doing due diligence on these takedown requests." (quoting Corynne McSherry, staff attorney for the Electronic Frontier Foundation in San Francisco)).

YouTube is not the only social media platform that employs an ACR system for infringement monitoring. Meta, the entity that operates Facebook and Instagram, has published some information regarding its copyright infringement reporting and takedown procedures.<sup>130</sup> Users on either platform can manually report posts—including stories and live streams—for intellectual property infringement per the platforms’ terms of service.<sup>131</sup> However, Facebook and Instagram also have an ACR system called Rights Manager.<sup>132</sup> Rights Manager is an audio and visual fingerprinting system that automatically matches any potentially infringing media to a rights holder’s “reference files.”<sup>133</sup> Rights holders use Rights Manager to “take action” on their behalf.<sup>134</sup> Rights Manager operates similarly to YouTube’s Content ID in that rights holders can upload their material to a database and generate revenue from advertisements on infringing users’ posts.<sup>135</sup> Facebook and Instagram may also automatically mute, block, or remove users’ posts if the sites deem the posts to contain copyright-infringing material.<sup>136</sup> Instagram has extended this detection system to live streams.<sup>137</sup> In its user guidelines, Instagram advised that it may automatically take down videos that broadcast recorded music, even in the background.<sup>138</sup> However, Instagram pointed users toward Facebook’s Sound Collection of royalty-free music and assured that “[m]usic in stories and traditional live music performances . . . are permitted.”<sup>139</sup>

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130. See, e.g., *Copyright*, INSTAGRAM HELP CTR., <https://help.instagram.com/126382350847838> [<https://perma.cc/H9KE-DELV>] (last visited Nov. 3, 2023); *Content I Posted on Facebook Was Removed Because It Was Reported for Intellectual Property Infringement*, FACEBOOK HELP CTR., <https://www.facebook.com/help/36511110185763> [<https://perma.cc/94XE-29XM>] (last visited Nov. 3, 2023).

131. See *Instagram Community Guidelines FAQs*, INSTAGRAM (Apr. 19, 2018), <https://about.instagram.com/blog/announcements/instagram-community-guidelines-faqs> [<https://perma.cc/Z6W9-EHK2>]; *Terms of Service*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/P62H-NCY7>] (July 26, 2022). “Stories” are seconds-long, user-generated photos and videos that disappear after twenty-four hours. See *Introducing Instagram Stories*, INSTAGRAM (Aug. 2, 2016), <https://about.instagram.com/blog/announcements/introducing-instagram-stories> [<https://perma.cc/942V-SLB5>]. Stories appear separately from an account’s feed or profile grid, and individuals view these stories in a format similar to a slideshow. See *id.*

132. See *Rights Manager*, *supra* note 112.

133. See *Rights Manager*, META, <https://rightsmanager.fb.com/> [<https://perma.cc/U7WC-PC7W>] (last visited Nov. 3, 2023).

134. See *id.*

135. See *Collect Ad Earnings in Rights Manager*, META, <https://www.facebook.com/business/help/891090414760198?id=237023724106807> [<https://perma.cc/ESE5-CAYV>] (last visited Nov. 3, 2023).

136. See *Updates and Guidelines for Including Music in Video*, INSTAGRAM (May 20, 2020), <https://about.instagram.com/blog/tips-and-tricks/updates-and-guidelines-for-including-music-in-video/> [<https://perma.cc/N38X-M2T4>]; *A Video I Posted on Facebook Was Removed Immediately. What Happened, and What Are My Options?*, FACEBOOK HELP CENTER, <https://www.facebook.com/help/444933372561104> [<https://perma.cc/KU4B-YG7Z>] (last visited Nov. 3, 2023).

137. See *Updates and Guidelines for Including Music in Video*, *supra* note 136.

138. See *id.*

139. *Id.*



In addition to using bots, platforms and rights holders outsource the DMCA notice process to third-party content monitoring companies such as Topple Track.<sup>140</sup> Facebook and Twitch use another third-party content catalog called Audible Magic to detect audio that its ACR technology deems infringing.<sup>141</sup>

## 2. Lack of Fair Use Evaluation as Misrepresentation

In the same years that the growth of ACR technology occurred on social media platforms, courts heard *Lenz v. Universal Music Corp.*,<sup>142</sup> a seminal fair use case involving alleged misrepresentation under § 512(f) for lack of fair use evaluation in a manual takedown.<sup>143</sup> In a notice letter, Universal included Lenz's home video of her child dancing to music among over two hundred other videos that it instructed YouTube to remove for copyright infringement.<sup>144</sup> Universal did not consider whether these videos made fair use of the song.<sup>145</sup> YouTube removed Lenz's video at Universal's behest.<sup>146</sup> YouTube restored the video after Lenz sent it multiple counter-notifications.<sup>147</sup> Then, Lenz brought action against Universal under § 512(f), claiming that Universal made a material misrepresentation by sending the notification without considering fair use.<sup>148</sup> Ultimately—even without concluding whether the use was fair<sup>149</sup>—the Ninth Circuit held that under the DMCA, copyright holders must consider fair use before they send a takedown notification to the OSP.<sup>150</sup>

The court acknowledged that the DMCA stipulates that OSPs can initiate takedown procedures, and it further noted the potential for abuse within these procedures.<sup>151</sup> Thus, although *Lenz* examined the legality of a *manual* DMCA takedown, its holding also pertains to the legality of *automated* DMCA takedowns.<sup>152</sup>

## II. CURRENT DISCOURSE ON THE DMCA'S SOCIAL MEDIA SHORTCOMINGS

Part II of this Note outlines the implications and opposing arguments regarding recent developments of notice-and-takedown technology on social media, especially within the past five years. Specifically, Part II examines

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140. *See* Lopez, *supra* note 33.

141. *See* Saldaña, *supra* note 112.

142. 815 F.3d 1145 (9th Cir. 2016).

143. *See id.* at 1148.

144. *See id.*

145. *See id.*

146. *See id.* at 1149–50.

147. *See id.* at 1150.

148. *See id.*

149. *See id.* at 1153 (“This inquiry lies not in whether a court would adjudge the video as a fair use, but whether Universal formed a good faith belief that it was not.”).

150. *See id.* at 1157 (“Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law.”).

151. *See id.* at 1148–51.

152. *See id.*

the controversy surrounding social media platforms' increased use of ACR technology to proactively police and remove UGC. Recent attempts to contextualize the DMCA's applicability in the age of social media fall under one of three categories: self-governance, legislative, and judicial.<sup>153</sup> Part II.A evaluates the self-governance solutions, relaying arguments for and against the current content policies fashioned by each of the prominent social media platforms. Part II.A also elaborates on the additional challenges within takedown litigation when ACR technology enters the equation. Part II.B discusses the inception and criticism of the European Union's Article 17, a legislative approach to reducing copyright-infringing UGC that implicitly requires an increase in ACR technology. Part II.C returns to the United States to evaluate judicial approaches. It examines case law that evaluates fair use, illustrating how courts have struggled to ascertain where to draw the line. Not all these cases involve social media, and none involve ACR technology. However, these cases' recency and authority render them useful tools in determining how to strengthen fair use's applicability to social media end-users. A stronger judicial emphasis on social media fair use may dismantle the widespread use of ACR technology.

*A. Man Versus Machine: Criticism of ACR as  
Social Media's Corporate Compliance Mechanism*

This section examines criticism of social media platforms' use of ACR technology to proactively police allegedly infringing UGC. Indeed, the DMCA does not require that sites hosting user-generated content—for example, social media platforms—engage in this policing preemptive of any notices that they may receive.<sup>154</sup> Nonetheless, ACR has become the standard alternative to manual review across social media platforms to keep up with the sheer volume of content posted on these platforms daily.<sup>155</sup>

Section II.A.1 examines the legal conflicts stemming from mass automated takedowns of UGC. A principal complaint is the inability of ACR systems to evaluate UGC for fair use before issuing takedown notices. Social media end-users also share difficulty in appealing automated takedown notices to social media platforms in the shadow of the law.<sup>156</sup> Meanwhile, countering

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153. This scholarly framework draws from Professor Lessig's "modalities of regulation" that apply to regulation of the Internet: law, architecture, norms, and the market. See LAWRENCE LESSIG, CODE: VERSION 2.0, at 121–26 (2006).

154. See generally 17 U.S.C. § 512; see Geeta Dayal, *The Algorithmic Copyright Cops: Streaming Video's Robotic Overlords*, WIRED (Sept. 6, 2012, 6:00 AM), <https://archive.org/details/wired.comthreatlevel201209streaming-videos-robotic-overlords-algorithmic-copyright-cops2> [<https://perma.cc/QE84-DUNM>].

155. See Rock, *supra* note 110, at 702–03.

156. The term "shadow of the law" refers to the private enforcement of the law outside the courtroom. Theoretically, the potential for litigation looms over the procedures, if no resolution is reached. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979); Ming Hsu Chen, *Regulatory Rights: Civil Rights Agencies, Courts, and the Entrenchment of Language Rights*, in THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. 100, 110 n.41 (Lynda G. Dodd ed., 2018).

UGC creators' criticisms regarding over-policing content, rights holders still allege the insufficiency of ACR systems. Section II.A.2 evaluates takedown litigation and its challenges from a legal realist perspective. Namely, most takedown appeals occur in the shadow of the law due to the notorious expense of takedown litigation against the world's largest technology companies. Section II.A.3 revisits the practice of misrepresentative DMCA infringement claims in the era of ACR. In recent years, reports have surfaced of law enforcement officers intentionally playing copyrighted music to trigger social media ACR takedowns and suppress video evidence of their misconduct.<sup>157</sup>

### 1. Pushing Past the Bots: Extrajudicial Fair Use Appeals

General criticism of the DMCA's safe harbor provision is not new.<sup>158</sup> Contemporaneously to the early stages of *Lenz*, experts criticized the safe harbor provision's general incompatibility with the Internet a decade after the DMCA's enactment.<sup>159</sup> Professor Paul Goldstein argued that Congress did not intend to require OSPs to police millions of online postings per day through takedown notices when it enacted the DMCA in 1998.<sup>160</sup> Similarly, Jeffrey Neuburger, an attorney in New York City, noted that UGC websites did not exist when drafters wrote the DMCA.<sup>161</sup> Within the past decade, critiques of ACR technology for infringement detection on social media sites mirror this earlier critique of the DMCA because both concern the problems that arise from DMCA compliance by OSPs on a scale unforeseeable in 1998. Social media platforms' initial purpose in deploying ACR programs was to keep up with the demands of rights holders to take down millions of posts per day.<sup>162</sup>

For over a decade, scholars have criticized social media platforms for using ACR technology as the first line of copyright infringement detection, on account of the technology's inability to evaluate for fair use in the same capacity as a human.<sup>163</sup> Professor Kembrew McLeod argues that ACR technologies "do an end run around fair use" because of this inability.<sup>164</sup> Companies can instantly remove the detected UGC from public viewing

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157. See Julian Mark, *Police Under Review for Blasting Disney Songs in Alleged Attempt to Keep Videos off Social Media*, WASH. POST (Apr. 12, 2022, 7:28 AM), <https://www.washingtonpost.com/nation/2022/04/12/santa-ana-police-disney-music/> [<https://perma.cc/GJ5H-TWR7>]; Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime's 'Santeria' to Avoid Being Live-Streamed?*, VICE NEWS (Feb. 9, 2021, 1:49 PM), <https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed> [<https://perma.cc/9AKS-H8Q3>].

158. See *supra* Part I.B.1.

159. See Seidenberg, *supra* note 129, at 48.

160. See *id.*

161. See *id.*

162. See *supra* Part II.A.1.

163. See, e.g., Dayal, *supra* note 154; Anjanette H. Raymond, *Heavyweight Bots in the Clouds: The Wrong Incentives and Poorly Crafted Balances That Lead to the Blocking of Information Online*, 11 NW. J. TECH. & INTELL. PROP. 473, 480 (2013).

164. *Id.*

through ACR technology and large databases, which disadvantages those seeking to contest the takedowns with a fair use argument.<sup>165</sup> Since ACR technology removes the human-to-human adversarial procedures contemplated by the DMCA, it makes fair use evaluations practically impossible.<sup>166</sup>

Indeed, different ACR systems have received criticism for their inability to accurately determine whether material is infringement.<sup>167</sup> Topple Track, for example, has received criticism for mass-issuing “bogus” notices to incorrect parties.<sup>168</sup> Although platforms like YouTube claim that ACR technology has become more precise in detecting audiovisual content, this precision does not always translate to accurately detecting infringement.<sup>169</sup> For example, when Adrian Spence, director of a chamber music ensemble, broadcasted his group’s performance of Mozart’s Trio in E-flat, K. 498, over Facebook, a copyright bot cut off the live stream midway through the performance.<sup>170</sup> Although Mozart’s music is all in the public domain, the bot matched the audio from the live stream to a recording of the same piece by a different group.<sup>171</sup> This is just one of several reported instances in which Facebook’s ACR system executed inaccurate takedowns based on audio matches.<sup>172</sup>

Naturally, ACR’s technical difficulties extend beyond the niche of public domain music. In 2021, several users on the website formerly known as Twitter shared their experiences of receiving takedown notices applied retroactively for content that they had posted years ago, including user-made videos in which copyrighted music played in the background (similar to *Lenz*) and memes including images of celebrities.<sup>173</sup> Twitter Support implicitly acknowledged that background music does not inherently infringe on copyright when it “ceased withholding” a video with background music after the user argued that it was not published for commercial purposes and

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165. *See id.*

166. *See id.*

167. *See Lopez, supra* note 33.

168. *See id.*

169. *Compare Titlow, supra* note 111 (reporting that “Content ID has been updated to use smarter fingerprinting”), with Michael Andor Brodeur, *Copyright Bots and Classical Musicians Are Fighting Online. The Bots Are Winning*, WASH. POST (May 21, 2020, 8:00 AM), [https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886\\_story.html](https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html) [<https://perma.cc/3D4Y-DH39>] (reporting on how Facebook and YouTube block videos and live streams of classical musicians’ performances of public domain music due to their ACR systems mistaking the performances for copyrighted recordings by other musicians).

170. *See Brodeur, supra* note 169.

171. *See id.*

172. *See id.* (reporting that a bot blocked pianist Michael Sheppard’s Facebook Live performance of Beethoven’s No. 3, Op. 2, in C, and Facebook notified Sheppard that it had detected French pianist Jean-Efflam Bavouzet’s recording of the same sonata).

173. Ax Sharma, *Twitter Slaps Many with DMCA Takedown Notices for Years Old Violations*, SEC. REP. (June 17, 2021), <https://securityreport.com/twitter-slaps-many-with-dmca-takedown-notices-for-years-old-violations/> [<https://perma.cc/97ZE-2UMF>].

did not cause market harm.<sup>174</sup> As founder of Creative Commons, Professor Lawrence Lessig maintained back in 2008 that “[t]here is no market in licensing music to amateur video.”<sup>175</sup> The posting and sharing of memes is generally not actionable under copyright law if the posts are noncommercial, as the use of an image or other medium within the meme is transformative.<sup>176</sup> Overall, social media users are left to battle against the bots, despite the *Lenz* court’s requirement that rights holders must make a good faith effort to consider whether fair use exists in the use of the copyrighted work before sending a takedown notice to the OSP.<sup>177</sup>

Since *Lenz*, takedown litigation over the issue of fair use has been sparse.<sup>178</sup> However, the prevalence of disputes in the shadow of the law regarding DMCA takedowns on social media remains. On Twitter, for example, the number of accounts affected by DMCA takedowns between January and June 2021 peaked at 799,400, with 1.1 million posts withheld.<sup>179</sup> Some social media platforms allow users to submit DMCA counter-notifications challenging the removal of their content, and occasionally users succeed in having their content reinstated using this appeals process through direct communication with the platform.<sup>180</sup> However, this appeals process inevitably fails for some users, including a singer-songwriter whose Facebook page was terminated for including cover versions of songs permitted by licensing agreements between Facebook and the rights holders.<sup>181</sup> Social media platforms may also privilege high-earning content creators in the appeals process.<sup>182</sup> On YouTube, an account that receives three copyright strikes is subject to termination, and YouTube

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174. Mark Joseph Stern, *I Have Achieved a Glorious Victory Against the Music Industry and Twitter*, SLATE (Nov. 10, 2021, 4:16 PM), <https://slate.com/technology/2021/11/twitter-dmca-takedown-nsync-ifpi-victory.html> [<https://perma.cc/LM6G-FLSC>] (describing one user’s successful appeals process in which Twitter forwarded his counter-notice, arguing fair use, to the industry trade group whose automated system flagged the video).

175. See LESSIG, *supra* note 18, at 3.

176. See Adler & Fromer, *supra* note 15, at 509–10 (distinguishing the meme creator, who “wants to lose control of their work and to open it up to constant revisions, reuses, and misuses,” from the creator that copyright law envisions); Benjamin D. Schwartz, *Who Owns Memes?*, NAT’L L. REV. (Aug. 5, 2022), <https://www.natlawreview.com/article/who-owns-memes> [<https://perma.cc/RZN6-P7UP>].

177. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016).

178. Westlaw displays only sixty-nine citing cases for *Lenz*. See *Citing References*, WESTLAW PRECISION, <https://1.next.westlaw.com/RelatedInformation/Ie2f62617ec9611e5b86bd602cb8781fa/kcCitingReferences.html> [<https://perma.cc/ZGJ7-DF57>] (last visited Nov. 3, 2023).

179. See *Copyright Notices*, TWITTER TRANSPARENCY (Jan. 11, 2022), <https://transparency.twitter.com/en/reports/copyright-notices.html#2021-jan-jun> [<https://perma.cc/W8X6-GNEP>].

180. See, e.g., *How Do I Appeal the Removal of Content on Instagram for Copyright Reasons?*, INSTAGRAM HELP CTR., <https://www.facebook.com/help/instagram/1417735471763678/> [<https://perma.cc/2MA2-GX5J>] (last visited Nov. 3, 2023); Stern, *supra* note 174 (describing one user’s successful appeals process in which Twitter forwarded his counter-notice, arguing fair use, to the industry trade group whose ACR system flagged the video).

181. See Fischer, *supra* note 59.

182. See, e.g., *Copyright Strike Basics*, *supra* note 128.

removes every video posted by the account.<sup>183</sup> If the individual is a member of the YouTube Partner Program, however, they have a “courtesy period” of seven days to submit a counter-notification before YouTube penalizes their account.<sup>184</sup>

Despite some public consensus that ACR technology over-polices UGC on social media, opposing critics argue that platforms still do not do enough.<sup>185</sup> In fact, these social media platforms still face allegations, both in the press and in the courtroom, of willful ignorance toward hosting copyright infringement en masse.<sup>186</sup> For example, a research report by former Facebook senior data scientist Jeff Allen revealed that, at one point in 2018, traffic to pages that plagiarized most of their content accounted for 40 percent of all traffic to Facebook pages.<sup>187</sup> Allen also alleged that, unlike YouTube, Facebook minimized “proactively policing” infringing users—taking down the posts before the rights holders sent notices—because it surmised, from its reading of the DMCA, that this practice would invite lawsuits.<sup>188</sup> In the years since Jeff Allen’s research, Facebook created more technology to proactively detect and remove copyright violations and began reporting the number of these violations caught by the technology in May 2021.<sup>189</sup>

Rights holders have also deemed corporate DMCA compliance policies insufficient. In 2020, record labels threatened to sue TikTok for cataloging unlicensed songs for accounts to use in their posts, as well as for letting accounts use unlicensed recordings of songs in their “Sounds.”<sup>190</sup> These disputes were resolved in 2021 when TikTok paid the licensing fees to use snippets of the rights holders’ songs for \$179 million.<sup>191</sup> TikTok refers to this series of payments to the rights holders as “blind checks,” and it is

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183. *See id.*

184. *See id.*

185. *See* *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 32–33 (2d Cir. 2012) (citing a 2005 email in which one founder of YouTube proposed waiting until after the platform increased in popularity to manually send takedown notices to infringing videos).

186. *See* Keach Hagey & Jeff Horwitz, *Facebook Allows Stolen Content to Flourish, Its Researchers Warned*, WALL ST. J. (Nov. 9, 2021, 4:43 PM), <https://www.wsj.com/articles/facebook-stolen-content-copyright-infringement-facebook-files-11636493887> [<https://perma.cc/24EN-QT6K>]. One recent allegation surpasses that of willful ignorance. *See* Complaint & Demand for Jury Trial ¶ 1, *Epidemic Sound, AB v. Meta Platforms, Inc.*, No. 22-CV-4223 (N.D. Cal. July 20, 2022), ECF No. 1 (“Meta has created tools whose primary purpose is to increase the amount of theft on Facebook and Instagram.”).

187. *See* Hagey & Horwitz, *supra* note 186. Allen’s primary concern with regard to this volume of stolen content—aside from potential copyright violation—was that “troll farms” (groups that coordinate to spread propaganda to social media) employed the strategy of plagiarizing “viral” posts on other pages to receive boosts from Facebook’s algorithm. *Id.*; *see also* Karen Hao, *Troll Farms Reached 140 Million Americans a Month on Facebook Before 2020 Election, Internal Report Shows*, M.I.T. TECH. REV. (Sept. 16, 2021), <https://www.technologyreview.com/2021/09/16/1035851/facebook-troll-farms-report-us-2020-election/> [<https://perma.cc/7YKZ-V6HN>].

188. *See* Hagey & Horwitz, *supra* note 186.

189. *See id.*

190. *See* Anna Nicolaou, *Music Companies Threaten to Sue TikTok over Copyright*, FIN. TIMES (Apr. 4, 2020), <https://www.ft.com/content/1b3b78ea-32a3-4237-8b79-3595820eeb63> [<https://perma.cc/X34R-NAX2>].

191. *See* Ingham, *supra* note 74.

unconfirmed whether recording artists received a share of this payment.<sup>192</sup> Unlike YouTube, TikTok does not pay recording artists royalties generated through advertising—which, on TikTok, amounted to \$4.6 billion in 2021.<sup>193</sup>

Epidemic Sound, a rights holder for millions of songs, similarly took issue with Meta’s alleged lack of compliance.<sup>194</sup> Epidemic filed suit against Meta for copyright violation and, in their words, “theft.”<sup>195</sup> Beyond the mere allegation that Meta ignored users’ infringement, Epidemic additionally claimed that Meta abetted the infringement through the “Original Audio” and “Reels Remix” features on Instagram Reels—which “encourage and allow its users to steal Epidemic’s music from another user’s posted video content and use in their own subsequent videos.”<sup>196</sup> Additionally, Epidemic alleged that Meta infringed by allowing accounts to use its music through Facebook and Instagram’s music libraries without a license or authorization, while Meta licensed songs from other rights holders.<sup>197</sup> Thus, even TikTok and Meta’s “music library” solution may not satisfy rights holders if the court rules for Epidemic and holds that reposting and remixing user-generated videos containing copyrighted music constitutes copyright infringement.

Neither social media users nor traditional media rights holders find platforms’ ACR technology satisfactory in their current iterations. From a user’s perspective, the technology misidentifies material as infringing too often, thus removing fair use consideration from the equation.<sup>198</sup> From the platforms’ perspective, the technology is necessary to keep up with the increasing demands of rights holders.<sup>199</sup> Rights holders continue to voice their demands in court, but individual social media users lack similar leverage.<sup>200</sup>

## 2. The Realities of Litigating Automated Takedowns

Legal scholarship concerning takedown litigation has noted the resource divide inherent in social media platforms’ takedown procedures.<sup>201</sup> Platforms’ rights management systems impose a “digital lock,” which disadvantages social media users who cannot to afford litigation arising from their UGC.<sup>202</sup>

On the one hand, rights holders profit immensely from ACR takedown programs such as YouTube’s Content ID. In 2014, Content ID paid out \$1

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192. *See id.*

193. *See id.*

194. *See* Complaint and Demand for Jury Trial, *supra* note 186, ¶ 1.

195. *See id.*

196. *See id.* ¶ 7. Instagram Reels are short videos which a user can edit in-app and to which the user can add third-party sounds and music from a designated library. *See Introducing Instagram Reels*, INSTAGRAM (Aug. 5, 2020), <https://about.instagram.com/blog/announcements/introducing-instagram-reels-announcement> [<https://perma.cc/J53R-6XL8>].

197. *See* Complaint and Demand for Jury Trial, *supra* note 186, ¶ 7.

198. *See supra* notes 161–73 and accompanying text.

199. *See supra* notes 183–93 and accompanying text.

200. *See infra* Part I.C.2.

201. *See* Chik, *supra* note 18, at 255.

202. *See id.* at 256.

billion to copyright holders; in 2016, it paid out \$2 billion.<sup>203</sup> From June 2020 to 2021 alone, YouTube paid out \$4 billion to the music industry, much of which the platform derived from advertising revenue.<sup>204</sup> Similarly, Meta advertises that eligible rights holders may “increase [their] earning potential” through Rights Manager.<sup>205</sup> Before the prevalence of ACR technology, rights holders’ expenditures in claiming copyright included paying legal teams to send manual takedown notices or bringing infringement actions in court.<sup>206</sup> Although many rights holders certainly still pursue litigation, ACR systems such as Content ID and Rights Manager offset the number of infringement actions that some rights holding entities need to bring by automatically and extrajudicially claiming infringement.

On the other hand, social media users who decide to litigate their DMCA takedown disputes often appear pro se against defendant social media platforms represented by sophisticated teams of attorneys.<sup>207</sup> Ascertaining what claims to state against the social media platforms poses a challenge for plaintiffs who lack an attorney.<sup>208</sup> As an additional challenge, the burden is on the end-user plaintiff to prove that their post was fair use.<sup>209</sup> Even in 2003, the cost of discovery alone for litigating “low-stakes” copyright infringement suits exceeded \$100,000.<sup>210</sup> The lack of litigation challenging DMCA takedowns on social media indicates a financial barrier to entry and underrepresents the aggregate user experience.<sup>211</sup> Because the costs of litigating DMCA takedowns often outweigh the benefits, especially for noncommercial users, the judicial system has not settled on an interpretation of what constitutes fair use on social media.<sup>212</sup>

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203. Ben Popper, *YouTube to the Music Industry: Here's the Money*, VERGE (July 13, 2016, 6:58 AM), <https://www.theverge.com/2016/7/13/12165194/youtube-content-id-2-billion-paid> [<https://perma.cc/4BQW-U6AS>].

204. See Murray Stassen, *YouTube Says It Paid the Music Industry over \$4bn in the Last 12 Months*, MUSIC BUS. WORLDWIDE (June 2, 2021), <https://www.musicbusinessworldwide.com/youtube-says-it-paid-the-music-industry-over-4bn-in-the-last-12-months/> [<https://perma.cc/2KMA-5LKX>].

205. See *Rights Manager*, *supra* note 133.

206. See, e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2016); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25–26 (2d Cir. 2012).

207. See, e.g., *DeLima v. Google, Inc.*, 561 F. Supp. 3d 123 (D.N.H. 2021); *Finley v. YouTube, LLC*, No. 20-CV-04888, 2022 WL 704835 (N.D. Cal. Mar. 9, 2022).

208. See *DeLima*, 561 F. Supp. 3d at 128 (granting defendants’ motion to dismiss for failure to state a claim); *Finley*, 2022 WL 704835, at \*2 (dismissing plaintiff’s claim with prejudice for “defective” claims); see also Chik, *supra* note 18, at 250 (“For the downstream creator who re-uses existing works, there is a lack of any guidance or a clear legal right to re-create copyrighted works. The legal environment is not only murky, it is also hostile.”).

209. See *In re DMCA Subpoena to Reddit, Inc.*, 383 F. Supp. 3d 900, 912 n.2 (N.D. Cal. 2019), *report and recommendation rejected*, 441 F. Supp. 3d 875 (N.D. Cal. 2020).

210. See Levinson, *supra* note 91, at 1041 n.5.

211. See *id.*

212. Since commercial users (professional “content creators”) have a greater financial stake in keeping their social media posts live, they tend to be at the forefront of any litigation. See, e.g., *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34 (S.D.N.Y. 2017). Individuals with a large following often also express particular fervor for the protection of creative and ideological expression. See *id.*; *Complaint and Demand for Jury Trial*, *supra* note 79.



These barriers to litigation especially present an issue if a significant number of takedown notices are inaccurate.<sup>213</sup> As far back as 2006, the Chilling Effects Project conducted a study of manual DMCA takedown notices and found that 31 percent presented “significant questions related to the underlying copyright claim, including fair use defenses, other substantive defenses, very thin copyright, or non-copyrightable subject matter.”<sup>214</sup> Social media platforms’ replacement of human monitoring with ACR technology may increase takedown inaccuracy, as accurate evaluation for fair use hinges on human review.<sup>215</sup> Thus, deploying ACR technology as the extrajudicial arbiter of copyright infringement creates a double standard between rights holders and users on social media. The ACR technology can inaccurately claim infringement outside the courtroom on behalf of the rights holder.<sup>216</sup> Meanwhile, the user must accurately dispute this claim—an objective typically hinging on financial capital or above-average technical know-how.<sup>217</sup>

### 3. ACR and the New Era of Misrepresentation

This section illustrates how ACR facilitates bad faith use of structures created by the DMCA. Previously, individuals seeking to remove an internet adversary’s content could submit misrepresentative DMCA claims that resulted in removal.<sup>218</sup> Now, individuals can let bots do that work for them.

Beyond issues of artistic expression, individuals’ intentional exploitation of ACR bots’ faults and lack of human review on social media platforms lead to grave ramifications.<sup>219</sup> In Santa Ana, California, police cruisers blared songs from Disney films to ensure that bots would remove video recordings of their interactions with residents from YouTube.<sup>220</sup> This tactic appears to be a trend. In February 2021, Beverly Hills Police Department Sargent Billy Fair played the song “Santeria” by Sublime when activist Sennett Devermont live streamed his interactions in the police station, allegedly attempting to

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213. *Cf.* Raymond, *supra* note 163, at 497 (arguing that ACR technology “(1) over captures information and communications; (2) is biased in favor of mere assertions of intellectual property rights holders; (3) has no oversight concerning data entry; and (4) uses little to no human intervention or context based determinations in the take-down process”).

214. *See* Rock, *supra* note 110, at 701 (quoting Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 667 (2006)).

215. *See* Raymond, *supra* note 163, at 497 (noting that fully automated digital fingerprinting systems have “[n]o [c]ommon [s]ense [b]utton”).

216. *See id.*

217. *See* Chik, *supra* note 19, at 250; *cf.* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1150 (9th Cir. 2016) (noting that Lenz’s § 512(g)(3) counter-notifications to YouTube did not yield success until she obtained pro bono counsel).

218. *See* First Amended Complaint at 8, *supra* note 64; *cf.* Complaint and Demand for Jury Trial, *supra* note 79, ¶ 8.

219. *See* Mark, *supra* note 157.

220. *See id.* (“The officer replied it had to do with ‘copyright infringement’ as he pointed toward the man filming the video. [Councilman] Hernandez took that to mean the officer was trying to keep the video off social media.”).

trigger Instagram’s copyright algorithm.<sup>221</sup> In July 2021, an Oakland, California, sheriff’s deputy blared the song “Blank Space” by Taylor Swift when the activist group Anti Police-Terror Project began filming him.<sup>222</sup> The common knowledge of the main flaw in the corporate governance response to DMCA liability on social media—the lack of human review—leads to exploitation and misuse that extends beyond copyright law.

The examples in this section illustrate the more insidious ways that individuals take advantage of the inaccuracy of ACR technology on social media. Part II.B discusses modalities of regulation via codified law, just as Part II.A discussed the market modalities. This examination of legislative responses continues to draw from Professor Lessig’s “modalities of regulation” that apply to the Internet: law, architecture, norms, and the market.<sup>223</sup>

### *B. Legislative Responses to Update Digital Copyright Law*

This section explores how legislators have responded to ensure copyright protection in the rise of online UGC. Whereas Congress has not modified the DMCA since 1998, the European Union (EU) issued a directive bolstering copyright protection on the Internet in 2019.<sup>224</sup> Known as Article 17 of the Digital Single Market (DSM) Directive, this legislation fulfilled the music industry’s wishes but received criticism from internet activists.<sup>225</sup> The criticism abounded regarding Article 17’s earlier iteration, Article 13.<sup>226</sup> Ultimately, Article 17 addresses several concerns that critics had about Article 13, but it remains subject to scrutiny.<sup>227</sup>

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221. See Thomas, *supra* note 157 (noting that although Instagram’s policies on copyrighted music may or may not encompass this video based on the length of the song played, Instagram’s enforcement of said policies “seems to be unpredictable and inconsistent”); see also Sennett Devermont (@mrcheckpoint\_), INSTAGRAM (Feb. 6, 2021), <https://www.instagram.com/p/CK9s6LUDmQd/> [<https://perma.cc/UDR2-3RVB>].

222. See Julian Mark, *An Officer Played A Taylor Swift Song to Keep His Recording off YouTube. Instead It Went Viral*, WASH. POST (July 2, 2021, 7:40 AM), <https://www.washingtonpost.com/nation/2021/07/02/taylor-swift-california-cop/> [<https://perma.cc/TZ7Y-UWZ9>] (“You can record all you want, I just know it can’t be posted on YouTube.”).

223. See LESSIG, *supra* note 153, at 121–26.

224. See 17 U.S.C. § 512; Council Directive 2019/790, art. 17, 2019 O.J. (L 130/92) (EU). Although no legislative reform of the DMCA has passed since 1998, United States congresspeople have proposed modifications, such as the Digital Media Consumers’ Rights Act of 2005, and a draft revision to the DMCA in 2021. See, e.g., H.R. 1201, 109th Cong. (2005); THOM TILLIS, 12/18 DISCUSSION DRAFT FOR STAKEHOLDER COMMENTS ONLY (2020), <https://www.tillis.senate.gov/services/files/97A73ED6-EBDF-4206-ADEB-6A745015C14B> [<https://perma.cc/AEW6-G3YW>] (draft of Digital Copyright Act of 2021, proposed amendment to the DMCA, circulated for comment).

225. See Bridy, *supra* note 34, at 333; Foo Yun Chee, *Critics Still Unhappy as EU Clarifies Revamped Copyright Rules*, REUTERS (June 4, 2021, 2:57 PM), <https://www.reuters.com/world/europe/eu-commission-clarifies-revamped-copyright-rules-amid-criticism-2021-06-04/> [<https://perma.cc/A8LN-YY46>].

226. See Reynolds, *supra* note 35.

227. See Bridy, *supra* note 34, at 328; Chee, *supra* note 225.

Traditionally, scholars have noted the differences in the theories on which American and European governing bodies have based their jurisdictions' needs for copyright protection.<sup>228</sup> The framers of the U.S. Constitution included copyright protection to incentivize “the Progress of Science and useful Arts.”<sup>229</sup> Conversely, earlier European copyright protections stemmed from concepts such as authors' natural rights to the results of their labor and original creators' right to remuneration for others' use of their work.<sup>230</sup> The French term “droit moral” (“moral right”) refers to the author's right to restrict the alienability of their work: whether, how, when, and by whom their work is presented.<sup>231</sup> The German term “Urheberpersönlichkeitsrecht” (“author's rights of personality”) similarly describes these rights.<sup>232</sup> These theories comprise what legal scholarship refers to as the Continental European copyright doctrine, or Continental doctrine.<sup>233</sup> The foundations of the Continental doctrine influenced the 1886 Berne Convention for the Protection of Literary and Artistic Works—an early attempt to harmonize copyright law in Europe.<sup>234</sup> On a policy level, the Continental doctrine enables the EU to champion authors' rights beyond the economic incentives of copyright.<sup>235</sup> Additionally, legal scholarship predicted a “Europeanization” of U.S. copyright law even prior to the enactment of the DMCA.<sup>236</sup>

In recent years, European policy has trended toward placing a greater onus on social media platforms to rid their sites of infringing material.<sup>237</sup> This often translates to these sites using ACR systems that further decrease an individual poster's ability to appeal takedowns.<sup>238</sup> Namely, on April 17, 2019, the EU issued the “Directive . . . on Copyright . . . in the Digital Single

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228. See Simone Schroff, *The Purpose of Copyright—Moving Beyond the Theory*, 16 J. INTEL. PROP. L. & PRAC. 1262, 1263 (2021) (citing GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST (2022)).

229. U.S. CONST. art. I, § 8, cl. 8; see Lee J. Matalon, *Modern Problems Require Modern Solutions: Internet Memes and Copyright*, 98 TEX. L. REV. 405, 409 (2019) (“The basic argument [of the economic-incentives framework] views the granting of legal rights in intellectual works as an ex ante incentive to create and disseminate those works.”).

230. See Gillian Davies, *Copyright and the Public Interest* 12–23 (Apr. 7, 1997) (Ph.D. dissertation, Aberystwyth University) (on file with Aberystwyth University), [http://pure.aber.ac.uk/ws/files/28931738/Davies\\_phd.pdf](http://pure.aber.ac.uk/ws/files/28931738/Davies_phd.pdf) [<https://perma.cc/35J7-HWNG>]; see also Peter Baldwin, *The Battle Between Anglo-American Copyright and European Authors' Rights*, in *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 14, 15 (2014) (contrasting the Anglo-American concept of “copyright” from the continental European concept of “authors' rights”).

231. See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 & n.6 (1994).

232. See *id.*

233. See *id.*

234. See GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 26–27 (2008).

235. See Schroff, *supra* note 228.

236. See Netanel, *supra* note 231, at 3.

237. See Reynolds, *supra* note 35.

238. See *id.*

Market . . .,” including a controversial section entitled Article 17.<sup>239</sup> Entertainment industry lobbyists alleged that YouTube paid artists less for their work than the streaming service Spotify.<sup>240</sup> More than 1,300 recording artists, including Paul McCartney, James Blunt, and opera star Placido Domingo, signed an open letter to the European Parliament supporting the DSM Directive due to this “value gap” theory.<sup>241</sup>

In response, the EU enacted Article 17. Article 17 makes “online content-sharing service providers” with more than five million monthly visitors directly liable for any of its users’ copyright-infringing material.<sup>242</sup> The specificity of “content-sharing” targets Facebook, Instagram, YouTube, and other large social media platforms.<sup>243</sup> Sections 1 through 3 require OSPs to obtain licenses from rights holders before making the rights holders’ copyrighted works “or other protected subject matter” available to the public.<sup>244</sup> Section 4 states that the OSP is liable for “unauthori[z]ed acts of communicat[ing]” these works, including publicly hosting them.<sup>245</sup> However, OSPs are exempt from this liability if they adhere to a list of requirements.<sup>246</sup> The OSP must have taken down or prevented public access to the works.<sup>247</sup> It must have made “best efforts” to (a) obtain authorization, (b) “ensure the unavailability” of the works “in accordance with high industry standards of professional diligence,” and (c) prevent future uploads.<sup>248</sup> The Directive asks the OSP to consult “the relevant and necessary information” provided by rights holders in order to accomplish requisite (b).<sup>249</sup>

Notably, Article 13,<sup>250</sup> an earlier draft of Article 17, received widespread criticism from open internet activists and U.S.-based technology companies alike.<sup>251</sup> Critics predicted that the “vague” language of Article 13 would inevitably force websites targeted by the directive to implement upload filters automatically removing content even before it is posted to avoid liability.<sup>252</sup> An open letter to President of the European Parliament Antonio Tajani

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239. See Council Directive 2019/790, *supra* note 224; Reynolds, *supra* note 35. The article was previously known to the public as Article 13, referring to an earlier draft. See Reynolds, *supra* note 35.

240. See Bridy, *supra* note 34, at 326, 328 (elaborating on and discrediting the “value gap” theory).

241. See Scott Roxborough, *Paul McCartney, James Blunt Back New European Copyright Law*, HOLLYWOOD REP. (July 4, 2018, 4:36 AM), <https://www.hollywoodreporter.com/news/music-news/paul-mccartney-james-blunt-back-new-european-copyright-law-1124974/> [<https://perma.cc/2DCG-3XL4>].

242. See Council Directive 2019/790, *supra* note 224; Reynolds, *supra* note 35.

243. See Chee, *supra* note 225.

244. See Council Directive 2019/790, *supra* note 224.

245. *Id.*

246. *See id.*

247. *See id.*

248. *Id.*

249. *Id.*

250. See EUR. PARL. DOC. (COM 593) (2016).

251. James Vincent, *Europe’s Controversial Overhaul of Online Copyright Receives Final Approval*, VERGE (Mar. 26, 2019, 8:00 AM), <https://www.theverge.com/2019/3/26/18280726/europe-copyright-directive> [<https://perma.cc/3T5T-X7G6>].

252. *See id.*

regarding Article 13—signed by Sir Tim Berners-Lee, inventor of the World Wide Web, among others—reads:

By requiring Internet platforms to perform automatic filtering all of the content that their users upload, Article 13 takes an unprecedented step towards the transformation of the Internet from an open platform for sharing and innovation, into a tool for the automated surveillance and control of its users.<sup>253</sup>

Critics predicted the inevitability of “notice and stay down” automatic upload filters because the text of Article 13 was eliminated in Article 17.<sup>254</sup> Whereas Article 17 referred to “high industry standards of professional diligence . . . to ensure the unavailability of specific works for which the rightsholders have provided the . . . relevant and necessary information,” Article 13 specifies the means of policing as “effective content recognition technologies.”<sup>255</sup> Where Article 17 requires “suitable and effective means,” Article 13 specifies “deployed technologies.”<sup>256</sup> Although the European Parliament later amended Article 13 to assure that the directive does not necessitate the automatic blocking of content, the original lacked that assurance.<sup>257</sup> Furthermore, Article 13 appeared to impose a “general monitoring obligation” on OSPs, whereas Article 17 clarified that the obligation was just for “specific works.”<sup>258</sup> Even then, the United Kingdom (post-Brexit) interpreted Article 17 to allow “notice and stay-down.”<sup>259</sup> Legal scholars hypothesize that rewording these terms in Article 17 intentionally introduces “plausible deniability” and permits OSPs to avail themselves of upload filters.<sup>260</sup>

Additionally, Article 13, unlike Article 17, did not include a provision stating that the article shall not apply to (a) “quotation, criticism, review,” or (b) “use for the purpose of caricature, parody or pastiche”—the European

253. Open Letter to Antonio Tajani MEP, President of the European Parliament (June 12, 2018) (on file with the Electronic Frontier Foundation), <https://www.eff.org/files/2018/06/12/article13letter.pdf> [<https://perma.cc/4P9R-MNJP>].

254. See Bridy, *supra* note 34, at 354; see also Aleksandra Kuczerawy, *From ‘Notice and Takedown’ to ‘Notice and Stay Down’: Risks and Safeguards for Freedom of Expression*, in OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed., 2020) (employing the term “notice and stay down”).

255. See Council Directive 2019/790, *supra* note 224; EUR. PARL. DOC. (COM 593) (2016); Bridy, *supra* note 34, at 353. During the public consultation preceding Article 13’s drafting, a British trade association that represents record labels, music publishers, and concert promoters filed a comment to the commission stating that “[s]olutions can be based on technology which is readily available such as the Content ID software programme.” Bridy, *supra* note 34, at 342.

256. See Council Directive 2019/790, *supra* note 224; EUR. PARL. DOC. (COM 593) (2016); Bridy, *supra* note 34, at 353.

257. Compare Resolution on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, EUR. PARL. DOC. P8\_TA(2018)0337 (2018), with EUR. PARL. DOC. (COM 593) (2016).

258. See Bridy, *supra* note 34, at 354; Council Directive 2019/790, *supra* note 224.

259. See DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, 2021-2, HC 50-2, at 87–89 (UK).

260. See Bridy, *supra* note 34, at 353.

equivalent of the content protected by fair use in the United States.<sup>261</sup> With no carve-out for fair use and the alleged obligation of upload filters, it would have been impossible for users to appeal if the ACR mistakenly blocked legitimate content.<sup>262</sup> Thus, the online public panicked that Article 13 would effectively “ban” content like internet memes, which legal scholars have widely analyzed under the fair use doctrine.<sup>263</sup>

Other groups had more grave concerns. Even after the enactment of Article 17, the international advocacy group European Digital Rights noted the potential of authoritarian governments to abuse the automated blocking of content to silence critics.<sup>264</sup>

Ultimately, the EU modified Article 17 to appease Article 13 critics by adding an additional section, Section 9.<sup>265</sup> Section 9 clarifies that Article 17 “shall not lead to any identification of individual users nor to the processing of personal data.”<sup>266</sup> This privacy requirement differs from the DMCA, which allows rights holders to request a subpoena to identify an infringer.<sup>267</sup>

The EU’s directive serves as one example of how governments can acknowledge social media’s impact on the landscape of copyright online and remain a step ahead of corporations in terms of their obligation to enforce copyright.<sup>268</sup> At the same time, the reaction to the directive amplified discussions regarding the legal flaws of social media platforms’ extrajudicial infringement takedown policies. Indeed, in 2020, one U.S. Senator proposed a “notice-and-stay-down” requirement similar to what Article 17 critics feared.<sup>269</sup> However, the bill that originated from that draft has not passed in the Senate.<sup>270</sup>

### C. *The Current State of Fair Use in the Judiciary*

This section evaluates the impact of the two most recent Supreme Court cases on fair use and their applicability to social media. Given the challenges

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261. See EUR. PARL. DOC. (COM 593) (2016); Council Directive 2019/790, *supra* note 224; 17 U.S.C. § 107.

262. Specifically, there would be no process analogous to the user appeals process outlined in the DMCA because the filters would prevent the posts from ever existing. See 17 U.S.C. § 512; Reynolds, *supra* note 35.

263. See Adler & Fromer, *supra* note 15, at 535; David Tan & Angus Wilson, *Copyright Fair Use and the Digital Carnavalesque: Towards a New Lexicon of Transformative Internet Memes*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 864, 910 (2021); Smith & Lantagne, *supra* note 16, at 143; Reynolds, *supra* note 35.

264. See Chee, *supra* note 225.

265. See *id.*

266. See Council Directive 2019/790, *supra* note 224.

267. See 17 U.S.C. § 512(h); see also *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 877 (N.D. Cal. 2020); *In re DMCA Section 512(h) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 513 (S.D.N.Y. 2022).

268. See Council Directive 2019/790, *supra* note 224 ; see also DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, *supra* note 259 (discussing the takeaways of the directive for the United Kingdom after it left the EU and decided not to adopt the directive).

269. See Tillis, *supra* note 224, ¶ 2.

270. See Strengthening Measures to Advance Rights Technologies Copyright Act, S. 3880, 117th Cong. (2022).

of litigating issues about DMCA enforcement on social media on a case-by-case basis, one cannot overstate the importance of examining the fair use doctrine.<sup>271</sup> In takedown litigation and extrajudicial appeals of social media takedowns, the fair use doctrine is commonly the sharpest tool in the defendant's arsenal.<sup>272</sup> However, the U.S. Copyright Office offers the public little institutional guidance as to what constitutes fair use.<sup>273</sup> Thus, fair use precedent not involving notice and takedown under the DMCA helps fill in the gaps left unaddressed by takedown litigation.

Decided in 2021, *Google LLC v. Oracle America, Inc.*<sup>274</sup> marked the Supreme Court's first opinion regarding fair use in the twenty-seven years since *Campbell*. *Google* involved the copyrightability of computer code.<sup>275</sup> However, its holding on the adaptability of fair use doctrine to new technologies may signal the adaptability of fair use doctrine to social media.<sup>276</sup> Furthermore, the Supreme Court recently decided *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.<sup>277</sup> As the first Supreme Court case about fair use in art since *Campbell*, *Andy Warhol Foundation* involved cutting-edge litigation that practitioners predicted could completely alter the ability of social media users to defend their UGC as fair use.<sup>278</sup> Part II.C first briefly addresses the impact of *Google* on fair use in the internet's current iteration. Then, it addresses the potential impact of *Andy Warhol Foundation* on fair use in social media.

In *Google*,<sup>279</sup> the Supreme Court finally heard a case that brought the issue of fair use into "Web 2.0."<sup>280</sup> The narrow issue that the Court considered was whether Google's unauthorized use of Oracle's application programming interface (API) package to access the programming language Java SE, for which Oracle held the copyright, was fair.<sup>281</sup> The Court held that since Google used only the parts of the API necessary for a "new and transformative program," its use was fair as a matter of law.<sup>282</sup> On its

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271. See, e.g., Catherine Seibel, *Justices Stand to Clarify Social Media Fair Use in Warhol Case*, LAW360 (May 27, 2022, 4:37 PM), <https://www.law360.com/articles/1496953/justices-stand-to-clarify-social-media-fair-use-in-warhol-case> [<https://perma.cc/TF4C-KHHE>] (analyzing the implications that *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 142 S. Ct. 1412 (2022), may have on issues of fair use on social media).

272. See *supra* Part I.B (observing the contrast between courts' treatment of fair use cases and courts' treatment of § 512(h) cases).

273. See Kim, *supra* note 70, at 110 n.70 ("[T]he Copyright Office is unable to provide specific legal advice to individual members of the public about questions of fair use." (quoting *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/2PW2-V85J>] (last visited Nov. 3, 2023))).

274. 141 S. Ct. 1183 (2021).

275. See *id.*

276. See *infra* Part III; see also *Google*, 141 S. Ct. at 1198.

277. 143 S. Ct. 1258 (2023).

278. See Seibel, *supra* note 271.

279. 141 S. Ct. 1183 (2021).

280. See Chik, *supra* note 18, at 245 ("The main feature of Web 2.0 is this focus on the decentralization of power, individual engagement, developing a 'digital society,' and 'grassroots culture building' in the internet environment.").

281. See 141 S. Ct. at 1195–209.

282. See *id.* at 1186.

surface, this case may seem inapplicable to other digital interfaces such as social media, which involve the sharing of UGC as opposed to the creation of software itself. However, the Court set an advantageous precedent in writing that fair use analysis of the copyrightability can “distinguish among technologies.”<sup>283</sup> Here, specifically, the Court pointed to Congress’s past concerns regarding whether computer program copyright monopolies would create too many market harms.<sup>284</sup> The Court concluded that fair use analysis of software copyrights would keep this issue context-dependent, thus ensuring that the scope of software copyrights would never become too broad.<sup>285</sup> Likewise, with social media, the line between copyright infringement and fair use depends on several contextual factors, such as audiovisual components within a post or the platform’s systems for content monetization.<sup>286</sup> Therefore, a tailored fair use analysis that examines the differing technological elements at play within the realm of social media may ensure that social media corporations avoid implementing blanket, overbroad copyright policies that extend the monopolies of corporate rights holders beyond the scope of the DMCA or any other current copyright law.<sup>287</sup>

*Andy Warhol Foundation* generated much discussion not only on fair use in the contemporary fine arts world, but also on the implications regarding fair use in popular culture.<sup>288</sup> Photographer Lynn Goldsmith photographed the musical artist Prince in 1981 and licensed one of the photographs to *Vanity Fair* as an “artist reference” in 1984.<sup>289</sup> *Vanity Fair* commissioned Andy Warhol to illustrate the source photograph and, unbeknownst to Goldsmith, Warhol created fourteen additional prints and two pencil sketches based on the photograph for his “Prince Series.”<sup>290</sup> Goldsmith did not know about Warhol’s derivative works until Prince died in 2016 and Condé Nast

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283. *See id.* at 1198.

284. *See id.*

285. *See id.* at 1199.

286. *See* Wang, *supra* note 54, at 200; Chik, *supra* note 18, at 280; Adler & Fromer, *supra* note 15, at 512.

287. *See Google*, 141 S. Ct. at 1198 (“[Fair use] can help to distinguish among technologies.”); Levinson, *supra* note 91, at 1051 (“Despite the codification of fair use criteria, the lack of clarity regarding what is and is not a fair use and the bias of copyright law towards commercial interests often means fair use . . . does not go far enough towards protecting public uses of copyrighted materials.” (quoting Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 937 (2009))).

288. *See id.*; Amy Adler, *Q&A: With Warhol Foundation v. Goldsmith on the Supreme Court Docket, Amy Adler Discusses Fair Use in Contemporary Art Law*, NYU L. (Aug. 10, 2022), <https://www.law.nyu.edu/news/-amy-adler-warhol-goldsmith-art-law> [<https://perma.cc/LBH4-65AL>]; *see also* Bruce E. Boyden, *The Stakes in Andy Warhol Foundation v. Goldsmith*, MARQUETTE UNIV. L. SCH. FAC. BLOG (Oct. 3, 2022), <https://law.marquette.edu/facultyblog/2022/10/the-stakes-in-andy-warhol-foundation-v-goldsmith/> [<https://perma.cc/GJA9-VSGQ>]; *cf.* Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous*, 80 UNIV. CHI. L. REV. ONLINE 88 (2013), [https://chicagounbound.uchicago.edu/uclrev\\_online/vol80/iss1/6/](https://chicagounbound.uchicago.edu/uclrev_online/vol80/iss1/6/) [<https://perma.cc/YEG3-WGDA>].

289. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 33–34 (2d Cir. 2021), *aff’d*, 143 S. Ct. 1258 (2023). An “artist reference” license enables a publisher to commission an artist to create an illustration based on the image. *See id.* at 34.

290. *See id.* at 35.



used one of Warhol's prints on the cover of *Vanity Fair* via a commercial license from the Andy Warhol Foundation (AWF).<sup>291</sup> The AWF preemptively sued Goldsmith, seeking declaratory judgment of noninfringement, and Goldsmith counterclaimed for copyright infringement.<sup>292</sup> The Supreme Court granted certiorari to the AWF on appeal from a Second Circuit decision in favor of Goldsmith.<sup>293</sup>

Lower courts' decisions for *Andy Warhol Foundation* modified the authority of the holding set forth in *Cariou v. Prince*,<sup>294</sup> which courts have cited in social media-related fair use cases.<sup>295</sup> In *Cariou*, a photographer brought action against "appropriation artist" Richard Prince for copyright infringement of his art.<sup>296</sup> Prince took Cariou's photographs from his book, enlarged them, and distorted them for a gallery exhibit.<sup>297</sup> The Second Circuit held in favor of Prince, articulating the broad standard from *Campbell* that a new work "generally must alter the original with 'new expression, meaning, or message.'"<sup>298</sup> Thus, the Second Circuit observed that "appropriation art" may be inherently transformative.<sup>299</sup> However, the Second Circuit modified this holding in *Andy Warhol Foundation*, referring to Warhol's series as derivative work and distinguishing derivative works from the paintings adjudged as "transformative" in *Cariou*.<sup>300</sup>

Catherine I. Seibel, an associate at Ballard Spahr LLP writing about *Andy Warhol Foundation*, finds a link between Warhol's use of Goldsmith's photograph and social media: the concept of appropriation itself.<sup>301</sup> The Tate Modern museum in London defines appropriation in art and history as "the practice of artists using pre-existing objects or images in their art with little transformation of the original."<sup>302</sup> The museum cites works from

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291. *See id.*

292. *See id.*

293. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 142 S. Ct. 1412 (2022) (mem).

294. 714 F.3d 694 (2d Cir. 2013), *modified*, 992 F.3d 99 (2d Cir. 2021), *and modified*, 11 F.4th 26 (2d Cir. 2021).

295. *See* Hosseinzadeh v. Klein, 276 F. Supp. 3d 34, 42 (S.D.N.Y. 2017) (citing *Cariou*, 714 F.3d at 710); O'Neil v. Ratajkowski, 563 F. Supp. 3d 112, 129 (S.D.N.Y. 2021) (citing *Cariou*, 714 F.3d at 707). *But see* Graham v. Prince, 265 F. Supp. 3d 366, 380–82 (S.D.N.Y. 2017) (holding that genuine issue of material fact existed as to whether a "reasonable viewer" would see Prince's alteration of Donald Graham's Instagram post—enlarging it as if it were a screenshot and adding a "comment," for display in an exhibit commentating on Instagram itself—as providing "new expression, meaning, or message").

296. *See Cariou*, 714 F.3d at 699.

297. *See id.* at 699–704.

298. *See id.* at 706 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). *Contra* *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011) (holding, more narrowly, that the secondary use must criticize, comment, or relate to the historical context of the original), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

299. *See Cariou*, 714 F.3d at 699–704.

300. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 37–42 (2d Cir. 2021), *aff'd*, 143 S. Ct. 1258 (2023).

301. *See* Seibel, *supra* note 271. Not to be confused with Judge Cathy Seibel of the U.S. District Court for the Southern District of New York.

302. *See Appropriation*, TATE, <https://www.tate.org.uk/art/art-terms/a/appropriation> [<https://perma.cc/PJ6S-2UD6>] (last visited Nov. 3, 2023).

Salvador Dalí, the pop art movement, and Jeff Koons as examples.<sup>303</sup> Seibel argues that social media apps such as TikTok and Instagram “amplify the concept of appropriation for everyday people.”<sup>304</sup> Namely, these apps contain features that encourage the reuse of preexisting images, sounds, and videos by new accounts.<sup>305</sup> Seibel presented two possible issues that the Supreme Court could have considered in *Andy Warhol Foundation*, which would affect fair use considerations for social media: the subjective intent of the user and the extent to which the original work must change for the second work to be “transformative.”<sup>306</sup> Prior to the Court’s decision in *Andy Warhol Foundation*, a circuit split existed regarding both of these issues.<sup>307</sup> Whereas the Ninth Circuit considered the user’s subjective intent in a fair use analysis, the Second Circuit did not.<sup>308</sup> The Second Circuit in the Warhol case found that the recognizability of Goldsmith’s original series in Warhol’s work weighed against a finding of a transformative nature.<sup>309</sup> On the other hand, the Ninth Circuit held that even if the second work makes few physical alterations to the original work, it can be transformative if it contains a new, apparent message or expression.<sup>310</sup> Similarly, the Andy Warhol Foundation, in its petition for certiorari, cited *Campbell* and *Google* as holding that the transformative nature of a work hinges not on significant alteration of the original, but rather the addition of something new.<sup>311</sup> Legal scholarship prior to the Court’s decision posited that if the Supreme Court adopts the same reasoning as the Ninth Circuit and the Andy Warhol Foundation—that meaning and new additions underlie transformation—social media users aggrieved by takedowns might argue fair use more easily.<sup>312</sup>

Additionally, legal scholars note that in previous court findings of fair use or lack thereof, the fame and wealth of the plaintiff or the defendant has influenced whose interests the courts have favored.<sup>313</sup> For example, the facts

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303. *See id.*

304. *See* Seibel, *supra* note 271.

305. *See id.*; *Introducing Instagram Stories*, *supra* note 130 (allowing users to modify uploaded photos through text and drawing tools); *Stitch*, TIKTOK SUPPORT, <https://support.tiktok.com/en/using-tiktok/creating-videos/stitch> [<https://perma.cc/7PPK-9HK7>] (last visited Nov. 3, 2023) (allowing users to combine another account’s video with their own).

306. *See generally* Seibel, *supra* note 271.

307. *See id.*

308. *Compare* *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1174 (9th Cir. 2013) (allowing defendant to explain his goal and interpretation in making a video for the band Green Day), *with* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021) (“[T]he district judge should not assume the role of art critic and seek to ascertain the intent.”), *aff’d*, 143 S. Ct. 1258 (2023).

309. *See* Seibel, *supra* note 271 (citing *Andy Warhol Found.*, 11 F.4th at 43).

310. *See* *Seltzer*, 725 F.3d at 1177.

311. *See* Seibel, *supra* note 271 (citing *Petition for a Writ of Certiorari, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869)).

312. *See id.* (“Social media users and their counsel may hope the Supreme Court takes up the question of meaning.”).

313. *See* *Gilden & Greene*, *supra* note 288 (comparing *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009), with *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011)).

of both *Cariou* and *Graham v. Prince*<sup>314</sup> are controversial, in part due to the disparity in recognition and profits between the rights holder and the user.<sup>315</sup> Professor Bruce E. Boyden posited that the celebrity status of either party, a factor which Andrew Gilden and Timothy Greene term “rich and fabulous,” might unduly influence whether a household name like Andy Warhol could prevail over relatively unknown artists and other rights holders—like Lynn Goldsmith—in a fair use case involving art or media.<sup>316</sup> On the other hand, amici of the Andy Warhol Foundation warned that if Goldsmith prevailed, it could render virtually any potentially fair use of a rights holder’s work impossible without paying costly licensing fees to the rights holder.<sup>317</sup> Thus, from this legal realist analysis, either outcome might have had ramifications on the question of fair use on social media, where a disparity already exists between corporations and individual users and where “likes” and “followers” are virtual currency.<sup>318</sup>

Ultimately, the Court affirmed the Second Circuit’s decision in favor of Lynn Goldsmith, holding that the Andy Warhol Foundation’s use of her photograph in a commercial license to a magazine publisher did not favor the foundation’s fair use defense.<sup>319</sup> The Court reemphasized that transformativeness does not merely concern whether the secondary work is a “new expression” that conveys a different meaning or message, according to its artist, than the primary work.<sup>320</sup> Rather, it concerns the degree to which the secondary use has a sufficiently distinct purpose or character, and courts must weigh that consideration against the commercial nature of the use.<sup>321</sup> The Court noted that when Condé Nast paid AWF \$10,000 for the license to the photograph, Goldsmith received neither a fee nor a source credit.<sup>322</sup> However, Condé Nast could have given her both, as *People* magazine did for

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314. 265 F. Supp. 3d 366 (S.D.N.Y. 2017).

315. See Gregory Day, *The Infringement of Free Art*, 107 IOWA L. REV. 747, 749–51 (2022) (observing how “appropriation art[ist]” Richard Prince took posts from the SuicideGirls’ public Instagram account, reproduced them in a gallery exhibit, and sold the prints for \$90,000 each); see also Jessie Heyman, *SuicideGirls Respond to Richard Prince in the Best Way Possible*, VOGUE (May 28, 2015), <https://www.vogue.com/article/suicidegirls-richard-prince> [<https://perma.cc/839U-78VY>] (quoting SuicideGirls founder Missy Suicide, “The difference is that Andy Warhol was stealing from a corporation and Prince is stealing from a kid . . . . He’s appropriating a culture.”); Andrew R. Chow, *Copyright Case over Richard Prince Instagram Show to Go Forward*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html> [<https://perma.cc/TWQ8-DYFT>]; Josh Russell, *Proof Is in the Pixels for Appropriation Artist Richard Prince*, COURTHOUSE NEWS SERV. (July 28, 2020), <https://www.courthousenews.com/proof-is-in-the-pixels-for-appropriation-artist-richard-prince/> [<https://perma.cc/3ZAG-DDEP>].

316. See Boyden, *supra* note 288.

317. See *id.* (citing Brief of Art L. Profs. for the Andy Warhol Found. as Amici Curiae, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869)).

318. See *id.*

319. See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1287 (2023).

320. *Id.* at 1273.

321. *Id.*

322. *Id.* at 1269.

its special edition on Prince.<sup>323</sup> The doctrine established by *Campbell* remained intact; in fact, the Court in *Andy Warhol Foundation* cites *Campbell* throughout the opinion.<sup>324</sup> Distinguishing *Campbell*, the Court noted that both Lynn Goldsmith's and Condé Nast's use of the photograph "share substantially the same purpose": to depict a celebrity and to accompany a magazine article about said celebrity.<sup>325</sup> Additionally, the Court acknowledged the concerns articulated by scholars about the undue influence of celebrity status.<sup>326</sup>

### III. PROPOSED SOLUTIONS FOR MORE EQUITABLE FAIR USE EVALUATIONS OF UGC ON SOCIAL MEDIA

Part III proposes a path courts should take to address the inequities generated by current compliance with the DMCA by social media platforms. Part III.A of this Note acknowledges the importance of the DMCA's existence and copyright protections on social media. At the same time, it argues that courts need to formally recognize that copyright issues inherent to social media are distinct from general digital copyright issues. Namely, the use of ACR technology on social media to extrajudicially police copyright-infringing UGC contravenes the central fair use holding of *Lenz*.<sup>327</sup> Now that the Supreme Court has acknowledged the ability to tailor fair use analysis to new technologies in *Google*,<sup>328</sup> courts are in a prime position to consider a set of fair use factors specific to UGC on social media, in addition to the four statutory factors of 17 U.S.C. § 107. Part III.B proposes these factors based on takeaways from prior case law, the European Union DSM Directive, and the technological ecosystem of social media. Finally, Part III.C proposes a method that courts should use to interpret ACR takedown systems on social media as violating the DMCA's misrepresentation provision.

#### A. Advocating for a Judicial Framework to Address Social Media Takedown Issues

This section argues that courts, as opposed to the legislature, should address two principal issues about the measures that social media platforms currently take to remain within the DMCA's safe harbor. First, courts should emphasize the applicability of the fair use doctrine to UGC posted on social media. Second, courts should intervene in social media platforms' overuse of ACR systems to proactively police copyright infringement.

Abolishing the DMCA is not the solution. Given the ubiquity of social media as a platform for arts, entertainment, and other copyrightable works, a

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323. *Id.*

324. *See id.* at 1282.

325. *Id.* at 1273, 1278–79.

326. *See id.* at 1287 (“Lynn Goldsmith’s original works, like those of other photographers, are entitled to copyright protection, even against famous artists.”).

327. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016).

328. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021).

complete lack of copyright protection within social media would contravene U.S. copyright law.<sup>329</sup> Copyright infringement still occurs en masse on social media when platforms ignore the DMCA's safe harbor requirements.<sup>330</sup> Moreover, U.S. copyright law has much to learn from European copyright doctrine.<sup>331</sup> Unlike those in the United States, European copyright laws recognize the author's work as the extension of their personhood, thus emphasizing the author's right to receive proper remuneration for their work and to restrict unauthorized copying.<sup>332</sup> Commendably, the text of Article 17 acknowledges this right.<sup>333</sup> Artists should receive compensation for the appearance of their art on social media, whether the art originates via an authorized production entity such as a record label or the artist releases the art independently.<sup>334</sup>

However, social media functions differently from traditional media.<sup>335</sup> Social media enables end-users to upload content,<sup>336</sup> so it lacks the gatekeeping institutions of traditional media.<sup>337</sup> Therefore, sharing new UGC genres like memes creates a democratized communication style.<sup>338</sup> Furthermore, not every end-user chooses to monetize their content uploaded on social media.<sup>339</sup> Although social media sites profit from a user base that uploads UGC, the average social media end-user typically does not see that money.<sup>340</sup> Private social media accounts also demonstrate that not all UGC has market value comparable to traditional media.<sup>341</sup> Whereas one end-user

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329. See U.S. CONST. art. I, § 8, cl. 8. (enshrining copyright protection for the promotion of new, original works); *supra* Part I.B.2 (charting the comparative success of social media versus traditional media).

330. See Hagey & Horwitz, *supra* note 186.

331. See Netanel, *supra* note 231, at 2.

332. See Davies, *supra* note 230, at 12–23.

333. See Council Directive 2019/790, *supra* note 224 (restricting “unauthori[z]ed acts of communicat[ing]” an author’s work online).

334. Compare Roxborough, *supra* note 241 (reporting that signed artists such as Paul McCartney supported Article 13), with Wang, *supra* note 76 (describing the prevalence of the internet as a tool for independent artists). See also Kim, *supra* note 70 (describing the problem that artists face when promoting their work on social media, putting it at risk of infringement).

335. Cf. Jones, *supra* note 76.

336. See Chik, *supra* note 18, at 242.

337. See *id.* at 245. (“The main feature of Web 2.0 is this focus on the decentralization of power, individual engagement, developing a ‘digital society,’ and ‘grassroots culture building’ in the internet environment.”).

338. See Adler & Fromer, *supra* note 15, at 485 (“[Memes] are the democratizing medium of our collective digital present.” (quoting Alice Bucknell, *What Memes Owe to Art History*, ARTSY (May 30, 2017), <https://www.artsy.net/article/artsy-editorial-memes-owe-art-history> [<https://perma.cc/Y827-L9AT>])); cf. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 937 (2009).

339. See Adler & Fromer, *supra* note 15, at 511 (“Most people who create and share memes do so not to earn money, but merely to engage with others on social media.”).

340. Compare Halbert, *supra* note 338, at 925 (using the term “user-generated content” in the context of websites profiting off end-users’ works), with Adler & Fromer, *supra* note 15, at 511 (describing a small group of meme creators who indirectly profit and an even smaller group of meme creators who directly profit through licensing).

341. See *Adjust Your Account Settings*, INSTAGRAM HELP CTR., <https://help.instagram.com/284802804971822/> [<https://perma.cc/CYQ9-SSAR>] (last visited Nov. 3, 2023); *Adjust Your*

may post to go viral, another may post to keep in touch with their family and friends.<sup>342</sup> These differences should influence courts' determinations of copyright infringement.

The existence of social media as an interactive forum with possible noncommercial uses highlights the importance of fair use on social media. The U.S. Court of Appeals for the Fifth Circuit's decision in *Bell v. Eagle Mountain Saginaw Independent School District*<sup>343</sup> exemplifies this importance.<sup>344</sup> The defendant school's tweet quoting a book passage—which the court determined could not cause market harm to the author, even in the aggregate—exemplifies how many posts incorporating portions of existing work constitute fair use.<sup>345</sup> Both the doctrine of fair use and social media technology facilitate criticism and commentary.<sup>346</sup> The lexicon of remix culture generated by the internet lends itself to artistic expression via transformative use.<sup>347</sup> Additionally, social media users' ability to defend their UGC as fair use enables criticism and commentary regarding political and other serious issues.<sup>348</sup>

In *Lenz*, the Ninth Circuit recognized fair use as an important defense for social media users and required its consideration before submitting takedown notices.<sup>349</sup> Nevertheless, social media platforms still use ACR technology that removes the human review process.<sup>350</sup> Numerous reports show that ACR cannot distinguish between copyright infringement and legal use of a copyrighted work because the technology is an audiovisual fingerprinting system incapable of determining the context of the use.<sup>351</sup> Furthermore, both takedown litigation and the extrajudicial appeals process for social media takedowns impose burdens on end-users.<sup>352</sup> Thus, social media platforms' use of ACR technology to remove potentially infringing UGC inherently violates *Lenz*.<sup>353</sup>

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*Account Settings*, FACEBOOK HELP CTR., <https://www.facebook.com/help/1221288724572426/> [<https://perma.cc/4Q5T-M8FC>] (last visited Nov. 3, 2023); *Manage Channel Settings*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2976814> [<https://perma.cc/P74E-GSXG>] (last visited Nov. 3, 2023); *How to Protect and Unprotect Your Tweets*, TWITTER HELP CTR., <https://help.twitter.com/en/safety-and-security/how-to-make-twitter-private-and-public> [<https://perma.cc/26MJ-5Z2Y>] (last visited Nov. 3, 2023).

342. See Kim, *supra* note 70, at 103. The term “viral” describes posts that receive extraordinary engagement in a short amount of time. See *id.* at 105.

343. See *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313 (5th Cir. 2022).

344. See *id.*

345. See *id.* at 324–25.

346. See, e.g., Complaint and Demand for Jury Trial, *supra* note 79, ¶ 23; Hosseinzadeh v. Klein, 276 F. Supp. 3d 34, 45 (S.D.N.Y. 2017).

347. See LESSIG, *supra* note 18; cf. Hosseinzadeh, 276 F. Supp. 3d at 40.

348. See *Raven v. Molyneux*, No. 14-CV-08288, 2015 WL 12827760, at \*1 (C.D. Cal. Jan. 27, 2015); Hosseinzadeh, 276 F. Supp. 3d at 46; *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 877–79 (N.D. Cal. 2020); *In re DMCA Section 512(h) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 514 (S.D.N.Y. 2022).

349. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016).

350. See Dayal, *supra* note 154.

351. See Lopez, *supra* note 33; Brodeur, *supra* note 169.

352. See *supra* Part II.A.1–2.

353. See *Lenz*, 815 F.3d at 1153.

Courts must rein in technology platforms' use of ACR on social media. Compliance should not extend beyond the law. Social media platforms should not violate *Lenz* to comply with the DMCA's safe harbor provision because the law should not prioritize the legal interests of platforms over their users. Courts must reinforce fair use as an "equitable rule of reason" in its twenty-first-century applications.<sup>354</sup> The Supreme Court noted in *Google* that courts may adopt fair use considerations according to the development of new technologies.<sup>355</sup> The Court further emphasized the importance of a context-dependent analysis of fair use concerning software.<sup>356</sup> Given this flexibility, the judiciary is therefore the optimal institution to distinguish fair use on social media from fair use in traditional media.

For now, judicial reform of fair use presents more feasibility than legislative reform of the DMCA. Ideally, Congress could address the ACR legal issues by creating a statutory limit on which monitoring mechanisms OSPs can use.<sup>357</sup> However, Congress has never amended the DMCA,<sup>358</sup> and all amendment proposals since 1998 have failed.<sup>359</sup> Furthermore, the controversy surrounding Article 17 of the EU DSM Directive demonstrated the risk posed to fair use at the hands of legislators influenced by lobbyists.<sup>360</sup> The most recent proposed amendment to the DMCA even included the "notice and stay-down" provision akin to the one from Article 13, which internet activists condemned.<sup>361</sup> In contrast, courts have heard at least some takedown litigation.<sup>362</sup> The Supreme Court has strengthened fair use in *Campbell* and *Google*.<sup>363</sup> Likewise, the district and circuit court cases following *Campbell* have expanded on its holding in ways that would expand what constitutes fair use on social media.<sup>364</sup> Ultimately, the ability of courts to grant fair use expansions to social media users and curtail the demands of industry rights holders may depend on how they apply *Andy Warhol Foundation*.<sup>365</sup> Granted, *Andy Warhol Foundation* generally articulated a facts-dependent analysis, much like past fair use cases.<sup>366</sup> Nonetheless,

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354. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

355. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021).

356. See *id.*

357. See Council Directive 2019/790, *supra* note 224 (eliminating the advocacy of content monitoring technology proposed in Article 13).

358. See 17 U.S.C. § 512.

359. See H.R. 1201, 109th Cong. (2005); Tillis, *supra* note 224.

360. See Bridy, *supra* note 34, at 328.

361. See Tillis, *supra* note 224; Open Letter to Antonio Tajani MEP, *supra* note 253.

362. See *supra* Parts I.B, II.C.

363. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

364. See, e.g., *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013); *Graham v. Prince*, 265 F. Supp. 3d 366, 384 (S.D.N.Y. 2017); Seibel, *supra* note 271.

365. See Seibel, *supra* note 271.

366. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1278–87 (2023); cf. *Campbell*, 510 U.S. at 569; *Cariou*, 714 F.3d at 694.

commercial users should be mindful of the Court's emphasis on the transformative nature of the work.<sup>367</sup>

*B. Proposed Judicial Considerations for Fair Use in a Social Media Context*

Adapting judicial fair use analysis to social media does not necessitate an entirely new factor test apart from the four factors in § 107.<sup>368</sup> This section incorporates prior cases about DMCA takedowns and fair use to propose items that courts should consider within the existing four factors when evaluating whether UGC on social media constitutes fair use. Judicial emphasis on the prevalence of fair use among UGC creators could limit social media platforms' ability to legally use ACR without an additional human review process for fair use before content removal.<sup>369</sup>

Courts should consider a post's potential for direct or indirect monetization when analyzing fair use for UGC. Section 107 directs courts to consider "the purpose and character of the use, including whether such use is of a commercial nature."<sup>370</sup> It also requires consideration of "the effect of the use upon the potential market for or value of the copyrighted work."<sup>371</sup> Considering a post's potential for monetization would address these statutory provisions. Currently, automated detection systems remove noncommercial content that is not a market substitute for the original.<sup>372</sup> In 2021, the hundreds of thousands of takedown notices sent to Twitter users did not all relate to commercial posts.<sup>373</sup> Not every post has monetization potential, nor does every post center around copyrighted material. As Professor Lessig notes, "[t]here is no market in licensing music to amateur video."<sup>374</sup> Just as people do not need to license music every time they play it at an in-person gathering,<sup>375</sup> social media platforms should not remove a personal video shared among friends and family just because it has unlicensed music playing in the background. Instead, courts should use monetization potential to distinguish posts on a case-by-case basis, *ex post*, based on their actual commercial value.

To determine "monetization potential," courts should consider: (1) whether the account belonging to the user of the copyrighted work is "public" or "private";<sup>376</sup> (2) the number of followers on the account belonging to the user of the copyrighted work versus the number of followers on the account belonging to the rights holder; (3) whether the post from the user of the

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367. *See Andy Warhol Found.*, 143 S. Ct. at 1273–74.

368. *See* 17 U.S.C. § 107; *cf.* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021) (applying § 107 analysis to software code).

369. *Cf.* *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

370. *See* 17 U.S.C. § 107.

371. *See id.*

372. *See* Sharma, *supra* note 173.

373. *See id.*

374. *See* LESSIG, *supra* note 18, at 3 (addressing Stephanie Lenz's home video).

375. *See* 17 U.S.C. § 110.

376. *Cf. id.*



copyrighted work went “viral”; and (4) the amateur or professional status of the copyright user versus the copyright holder, including the “production value” of both parties’ works.<sup>377</sup> Comparing the monetization potential of two parties’ works helps to ensure that courts do not inadvertently expand fair use so far that it becomes a tool only for the “rich and fabulous.”<sup>378</sup> To provide an analogy: if a relatively unknown photographer similar to Lynn Goldsmith posts their work on social media and a Warhol-esque social media account reposts that work with no compensation or attribution, that may not match the conceptualization of fair use as an “equitable rule of reason.”<sup>379</sup>

Rights holders may oppose this tailoring of the fair use doctrine to social media, deeming it too lenient and claiming it minimizes the market harm caused by even noncommercial UGC. For example, in its suit against Meta, Epidemic Sound characterized users’ recording of its songs in the background of their Instagram Reels as “steal[ing] Epidemic’s music.”<sup>380</sup> The European music industry lobbied for Article 17 due to the alleged “value gap” between earnings from Spotify and YouTube.<sup>381</sup> Although these actions address rights holders’ legitimate concerns about infringement on social media, they understate ACR technology’s capacity to wipe out fair use.<sup>382</sup> Additionally, the court has already recognized the need to tailor the “market harm” prong of fair use to the nature of the social media platform.<sup>383</sup> Given the imbalance between copyright and fair use recognition caused by ACR technology, leniency toward fair use on social media is desirable.

In sum, evaluating fair use on social media requires considering the differences between social media and traditional media. Accounting for such differences would lighten the burden on defendants claiming fair use and social media users appealing ACR takedowns in the shadow of the law.

### *C. Proposed Expansion of Judicial Interpretation of § 512(f)*

In addition to expanding fair use considerations for social media infringement disputes, courts should also allow more actions against misrepresentative claims of infringement that occur through social media platforms’ notice-and-takedown systems. Currently, a plaintiff’s ability to state a misrepresentation claim often depends on whether the plaintiff can sufficiently identify the misrepresenting person or group.<sup>384</sup> This may present a challenge on the internet, especially when a group colludes to

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377. Here, production value refers to the amount of financial capital invested into the production of the work.

378. See *Gilden & Greene*, *supra* note 288, at 89.

379. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); see also *Boyden*, *supra* note 288.

380. See *Complaint and Demand for Jury Trial*, *supra* note 186, ¶ 7.

381. See *Bridy*, *supra* note 34, at 327–28.

382. See *Dayal*, *supra* note 154.

383. See *Bell v. Eagle Mountain Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 325–26 (5th Cir. 2022).

384. See *Raven v. Molyneux*, No. 14-CV-08288, 2015 WL 12827760, at \*2 (C.D. Cal. Jan. 27, 2015).

misrepresent infringement.<sup>385</sup> Ultimately, whether future misrepresentation claims of this kind will be successful remains to be seen.<sup>386</sup>

Courts should interpret the DMCA to prohibit ACR systems from taking down UGC on social media.<sup>387</sup> Currently, § 512(f) of the DMCA provides that “[a]ny *person* who *knowingly* materially misrepresents” material online is infringing.<sup>388</sup> This statutory language would seemingly exclude the artificial intelligence-based ACR algorithms, which are not (yet) legal persons and thus cannot remove content knowingly. However, humans at social media platforms implement the ACR software, and rights holders add their audiovisual content to the digital fingerprinting systems for ACR.<sup>389</sup> Social media platforms know that not all UGC removed by their ACR systems is infringing because some UGC constitutes fair use.<sup>390</sup> Likewise, rights holders know that they have a duty to consider fair use before sending a takedown notice.<sup>391</sup> Yet, by using ACR systems as a more expedient method of UGC removal, social media platforms knowingly participate in the removal of at least some material that is not infringing.<sup>392</sup> Thus, courts should interpret both the people operating platforms’ ACR systems and the rights holders who use ACR systems as within the scope of “persons” per § 512(f).

Currently, OSPs are not liable for removing material for infringement, even if it is ultimately not infringing, as long as they acted in good faith.<sup>393</sup> This provision of the DMCA, § 512(g), complicates courts’ potential ability to hold the social media platforms liable for not scrutinizing takedown requests more heavily for misrepresentative reports or errors in reporting by their ACR systems.<sup>394</sup> However, ACR technology, which skirts the human review for fair use required by *Lenz*,<sup>395</sup> should not constitute good faith removal by an OSP. Again, social media platforms’ attempts to comply with the DMCA should not extend beyond the DMCA.

#### CONCLUSION

The path toward solving the inequities sprouting from enforcement of the DMCA on social media is twofold. First, courts should consider how social media differs from traditional media when evaluating fair use. Second, courts should treat social media operators and rights-holding users as “persons” under the DMCA. Although courts and legal practitioners may be

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385. *See id.*; First Amended Complaint, *supra* note 64.

386. *See* Good, *supra* note 64.

387. *See* 17 U.S.C. § 512.

388. *See id.* (emphasis added).

389. *See supra* Part I.C.

390. *See* Stern, *supra* note 174.

391. *See* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151–52 (9th Cir. 2016).

392. *See* Brodeur, *supra* note 169 (providing an example of non-infringing UGC removed by Facebook’s ACR system).

393. *See* 17 U.S.C. § 512(g).

394. *See id.*

395. *See* *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016).

tempted to disregard fair use on social media as trivial or niche, social media has evolved into one of the primary fora for social interaction in the more than two decades since the DMCA's enactment. The remix culture borne out of social media has morphed into popular culture itself and is the next iteration in a long legacy of public expression. For this reason, courts must ensure that this user-generated popular culture remains in the hands of the people.