YouTube Monetization

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I. Introduction

YouTube offers Content Identification technology (Content ID), an automated free service that allows copyright owners to receive revenue from user-uploaded videos that otherwise likely infringe the owners' copyrights because the videos utilize protected works without authorization. The system operates like this: a copyright owner, such as a record company, delivers reference files and metadata of content it owns to YouTube, which then compares every user-uploaded video to its library of reference files. When a match between a reference file and a newly uploaded file is found, e.g., a user-generated video that partially comprises a popular song, YouTube can either "monetize," block, or track viewing metrics of the video based on the copyright owner's pre-stated preference.

To copyright owners such as music and entertainment companies, the ability to not only police/block infringing material, but also to "monetize" on-line user uploaded videos comprising entirely or partially of the copyright owner's content, is attractive. The copyright owner may have a new revenue stream. However, utilizing the service may expose the copyright owner to litigation risks. This article discusses business considerations and litigation risks that content owners should evaluate in using the Content ID service.

II. Business Considerations

A content owner who chooses to become a YouTube Partner is enabled for Content ID, which allows content owners to upload the copyrighted material they own, whether compositions, master recordings or films, and then such material is scanned and each is given a unique "fingerprint." YouTube can then automatically identify user-uploaded or user-generated content (UGC) that is using the content owner's copyrighted material. Once such UGC is identified by Content ID, the Partner then has one of three options: (1) block the use; (2) track the use; or (3) monetize the use and receive revenue earned from advertisements placed before, after, during or alongside such UGC using the material.

Why would a copyright owner choose to enter into a revenue sharing deal with YouTube? The reason above all else is to maximize income generation. YouTube's Content ID has aided in the creation and expansion of revenue streams that stem from the (possibly illegal) use of a copyright owner's copyrighted material. Until very recently, Content ID only allowed the copyright owner to monitor illegal uses. Now, instead of relying solely on the Digital Millennium Copyright Act's (DMCA) governing takedown process to remove infringing material, copyright owners can also put Content ID to a much more productive and satisfying use, thus shifting Content ID's structure from one of penalizing YouTube users to fostering creativity and interest in the copyright owner's material while providing a method to monetize it.

The days of the "whack a mole" approach to infringing content continue to be frustrating and resource-wasting from the copyright owner's perspective. Content ID provides an opportunity to reduce the copyright owner's burdensome job of scouring YouTube for illegal uses of his or her material and aid in its removal. The power has now been shifted more in favor of the copyright owners, who can profit from the creative reuse of their material. This is a paradigm shift from a world of censorship to a world of collaboration, or at least reluctant bribed consent ex post facto.

One of the benefits of becoming a YouTube Partner as a copyright owner is YouTube's Copyright Management System (CMS). With CMS, the Partner uploads audio, visual or audiovisual content (the Asset) and metadata of the Asset through the CMS Uploader application and then sets the policy on the use of such Asset (block, track or monetize). The Partner has a "Claim" on the specific UGC that contains such Asset. The Partner can then review, alter or manage all Claims and Assets via the backend of his or her CMS account, making the incredibly vast material on YouTube much more manageable from the copyright owner's perspective, thereby having more control over protected material on the Internet.

While far from perfect, CMS creates an effective system for managing Assets, fixing incorrect ownership information and reviewing any Claims to either monetize or remove infringing material. If a YouTube user reaches out to a Partner and posits that the user's UGC was incorrectly removed or blocked, the Partner can quickly and easily reference the video and Claim at issue and pinpoint which Asset was being used without the proper permission. It will be interesting to see whether other uploader websites will adopt a system similar to CMS for reviewing and monetizing content on the Internet, and how any such sites may improve and expand on the CMS model and Content ID technology.

Aside from the monetary gains, YouTube Partners can increase exposure—not only for new songwriters and artists, but it also could mean a rebirth of popularity for catalog artists as well. All it takes is one insanely popular cat video using an obscure 1970's tune synched to its visuals to go viral, and another "Gangnam Style" or "Harlem Shake" sensation is created, which can, if properly monetized, create revenue for a work that has been tucked away for decades.

Content ID and the monetization of UGC are also serving to ease some of the tension that has built up over past years between the content industry and the consumer/fan/music listener. It is a chance to repair this broken relationship that was once aggravated through lawsuits against grandmas and school children who were mostly just music lovers penalized for what was indeed the illegal use of copyrighted materials. Instead of immediately re-

moving infringing material, Content ID has created a mutually beneficial relationship where the YouTube user can show appreciation for the music he or she loves in a creative personal manner and the copyright owner, artist and songwriter can still earn and benefit from such (re)use.

While Content ID technology has created additional revenue for copyright owners, artists and songwriters, there is of course room for improvement...and complaints. The implementation of the monetization system on content means an inundation of advertisements. With more ads comes more frustration for YouTube viewers. While ads in the beginning of a YouTube video that allow the viewer to click "Skip This Ad" generate the most money because they are the most effective in capturing engaged consumers, they have the potential of losing viewers of the copyright owner's content. Time will tell how effective this advertising model remains.

With regard to the Content ID technology, there is certainly room for improvement when it comes to detecting cover songs of copyrighted compositions. If these uses go undetected, it cuts out music publishers from possible additional revenue they could be earning, thus shortchanging the songwriters. Content ID is not always able to detect melodies and a publisher would need substantial manpower to fully monitor the massive amounts of UGC that may contain a cover. It becomes a struggle for music publishers to stay ahead of the curve instead of only remaining reactionary to these uses.

Regarding the revenue created, earned and paid out with the implementation of Content ID and monetization of content, there is a lack of transparency in YouTube's revenue generation and, therefore, its sharing model. Publishers and record labels are left in the dark, as the revenue tracking and reporting provided by YouTube is limited. There is no clear formula to determine if one is in fact receiving one's "correct" share of revenue. To further exacerbate the matter, the revenue reported through YouTube's analytics and on a content owner's Google AdSense account (the account needed in order to actually receive money for the use of one's material on YouTube) does not necessarily match the checks copyright owners receive. This makes for difficult accounting practices and uneasy audit reviews when the copyright owner is unable to explain any such discrepancies to its writers or artists. Currently, YouTube has no answer or explanation for these discrepancies other than a shrug and a "be thankful you're getting anything" attitude.

Moving forward, YouTube and other similar models should be able to address such concerns. This in turn will lead to further growth of revenue and a continued use of the Content ID system, as well as make room for improvements in technology and a more transparent reporting system to break down the revenue sharing results. It is both YouTube's and copyright owners' joint responsibility to prevent potential confusion in the marketplace about copyright laws, rules and regulations amongst the users but still foster a sense of collaboration and creativity with the copyrighted material in a designated space, such as YouTube.

III. Litigation Risks

In the event there is copyright litigation concerning a work that a content owner has monetized using the Content ID program, the alleged infringer may point to Content ID to bolster an affirmative defense of "abandonment" or "license." "...abandonment of copyright requires: (1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent."[1] Put differently, "the plaintiff's acquiescence in the defendant's infringing acts may, if continued for a sufficient period of time and if manifested by overt acts, result in an abandonment of copyright."[2] In such cases, the abandonment is a defense for all acts occurring after the acquiescence.[3] However, copyright owners can abandon some rights without abandoning all.[4] Abandonment is also a defense to common law copyright claims.[5] Related to abandonment are the defenses of estoppel, waiver, or ratification.[6]

Examples of abandonment include:

- The copyright owner authorized or acquiesced in wide circulation of a large volume of the copyrighted material, a cartoon of a grinning boy.[7]
- The plaintiffs referred in writing to others as the owners and developers of computer software.[8]
- The author of a poem did not object to a psychiatrist's dissemination of thousands of copies of the poem to his patients, and the author affirmatively stated that he would not object.[9]
- Under the 1909 Copyright Act, general publication of the work without the prescribed copyright notice resulted in the forfeiture of any copyright.[10]

In sum, copyright owners may be found to have abandoned their copyrights when they permitted the circulation of their works into the public without any restrictions and/or notice that the works were copyrighted.[11]

Does use of Content ID result in abandonment? Copyright defenders may try to draw a parallel to the Content ID program: the copyright owner of a sound recording permits the circulation of its work in the public (on YouTube) without restrictions, without notice that the work is protected by copyright, and rather than take affirmative steps to enforce, instead permit the unauthorized use while deriving revenue. Of course, copyright owners will be quick to point out that passive acts, such as silence or inaction, are rarely found to constitute abandonment.[12] "[F]ailure to pursue third-party infringers has regularly been rejected as a defense to copyright infringement or as an indication of abandonment."[13] Assertions of proprietorship, even if in a "less than aggressive manner" (e.g., if unwarranted by the monetary value of the works), have defeated an abandonment defense.[14] Expending resources to enforce the copyright, even if in the context of another unauthorized use, may defeat an abandonment defense.[15]

A defendant may also raise the defense of "implied license." A license "immunizes the licensee from a charge of copyright infringement, provided that the licensee uses the copyright as agreed with the licensor."[16] Where the dispute turns on whether there is a license at all, the burden is on the alleged infringer to prove the existence of the license.[17] Additionally, "a license for one use does not equate to a license for all uses."[18] A nonexclusive license may be granted orally, or may be implied from conduct.[19] "The grant of a license may be implied by 'objective conduct that would permit a reasonable person to conclude that an agreement to use a copyrighted work had been reached.'"[20] "A nonexclusive license may be implied from a 'lack of objection' where the copyright owner knows about the use of the work."[21]

Does use of Content ID result in an implied license? The alleged infringer may draw a parallel: the owners of copyright in sound recordings know about the unauthorized uses, do not object, and instead permit the unauthorized uses while deriving revenue (which is analogous to royalties). However, there is also authority that in order for an implied license to be found, there must be a "meeting of the minds as determined by contract law."[22] For example, "...courts have found implied licenses in 'narrow' circumstances where one party created a work [at the] other's request and handed it over, intending that [the other] copy and distribute it."[23] Accordingly, a content owner may assert that it has no "meeting of the minds" with the unauthorized user; the only "meeting of the minds" is the owner's agreement with YouTube to monetize the use. Additionally, even if there was a "meeting of the minds," the owner may prevail by showing that any implied license was terminated, such as by sending a cease and desist letter.[24]

IV. Conclusion

Monetizing otherwise likely infringing material online is attractive to copyright owners and the artists, songwriters and creators they represent. Copyright owners who utilize monetization services like Content ID should be aware of the pros and cons of the service, and also potential litigation risks.

Endnotes

1. Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471, 483-4 (2d Cir. 2004), *certified question accepted*, 3 N.Y.3d 666, 817 N.E.2d 820 (2004) *and certified question answered*, 4 N.Y.3d 540, 830 N.E.2d 250 (2005).
2. Coach, Inc. v. Kmart Corporations, 756 F. Supp. 2d 421, 427 (S.D.N.Y. 2010) (citing Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1540 (S.D.N.Y. 1991)). *See also*, Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F. Supp. 1392, 1398-99 (C.D. Cal. 1990) (stating standard for copyright abandonment).
3. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.07, at 13–135 (2013).
4. Melchizedek v. Holt, 792 F. Supp. 2d 1042, 1051 (D. Ariz. 2011) (citing Micro Star v. FormGen Inc., 154 F.3d 1107, 1114 (9th Cir. 1998)).
5. *Capitol*, 372 F.3d at 483-84.
6. Cafferty v. Scotti Bros. Records, Inc., 969 F. Supp. 193, 199 (S.D.N.Y. 1997); Hayden v. Chalfant Press, Inc., 177 F. Supp. 303, 307-08 (S.D. Cal. 1959).
7. Stuff v. E.C. Publ'ns, Inc., 342 F.2d 143 (2d Cir. 1965) (at pp. 144-45 "...a great volume of nearly identical prints had appeared over a long period and that plaintiff's husband had been most derelict in preventing others from infringing his copyright"), *cert. denied*, 382 U.S. 822, 86 S.Ct. 50, 15 L.Ed.2d 68 (1965).
8. Rouse v. Walter & Associates, L.L.C., 513 F. Supp. 2d 1041, 1069-70 (S.D. Iowa 2007).
9. Bell v. Combined Registry Co., 397 F. Supp. 1241, 1249 (N.D.Ill. 1975), *aff'd*, 536 F.2d 164 (7th Cir. 1976).
10. Warner Bros. Entm't v. X One X Prods., 644 F.3d 584, 592-95 (8th Cir. 2011); Lopez v. Elec. Rebuilders, Inc., 416 F. Supp. 1133, 1135 (C.D. Cal. 1976).
11. Clark Equip. Co. v. Harlan Corp., 539 F. Supp. 561, 569 (D. Kan. 1982).
12. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.07, at 13–134 (2013); *see also* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1540 (S.D.N.Y. 1991).
13. Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471 (2d Cir. 2004) (citing Paramount Pictures Corp. v. Carol Publ'g Grp., 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998)).
14. Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 456 F. Supp. 531, 535 (S.D.N.Y. 1977), *aff'd*, 592 F.2d 651 (2d Cir. 1978). *See also* Nat'l Comics Publ'ns Inc. v. Fawcett Publ'ns Inc., 191 F.2d 594, 597-98 (2d Cir. 1951), *supplemented sub nom.*, Nat'l Comics Publ'ns Inc. v. Fawcett Publ'ns Inc., 198 F.2d 927 (2d Cir. 1952).
15. Paramount Pictures Corp. v. Carol Pubi'g Grp., 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998), *aff'd sub nom.*, Paramount Pictures Corp. v. Carol Publ'g Grp., Inc., 181 F.3d 83 (2d Cir. 1999).
16. Davis v. Blige, 505 F.3d 90, 100 (2d Cir. 2007).
17. Tasini v. New York Times Co., 206 F.3d 161, 171 (2d Cir. 2000).
18. Agence France Presse v. Morel, 2013 WL 146035, *12 (S.D.N.Y. Jan. 14, 2013) (citing Gilliam v. Am. Broadcasting Cos., 538 F.2d 14, 20 (2d Cir. 1976)).
19. Graham v. James, 144 F.3d 229, 235 (2d Cir. 1998) (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 10.03(a)(7)).
20. SimplexGrinnell LP v. Integrated Systems & Power, Inc., 642 F. Supp. 2d 167, 191-92 (S.D.N.Y. 2009) (quoting SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp.2d 301, 317 (S.D.N.Y. 2000) (internal quotations omitted)).
21. *Id.* at 193 (citing Keane Dealer Services, Inc. v. Harts, 968 F. Supp. 944, 947 (S.D.N.Y. 1997). *See also*, EMI Latin v. Bautista, 2003 WL 470333, *13 (S.D.N.Y. Feb. 24, 2003) (citing *Keane Dealer* and Viacom Int'l, Inc. v. Fanzine Int'l, Inc., 2000 WL 1854903, at *3-5 (S.D.N.Y. July 12, 2000) ("In certain circumstances, failure by the copyright owner to object to reproduction of copyrighted works may provide the basis for implying a nonexclusive license, but this basis for an implied license is available only when the owner's silence is coupled with knowledge of the copying.").
22. Zappa v. Rykodisc, Inc., 819 F. Supp. 2d 307, 319 (S.D.N.Y. 2011).
23. *Id.* at 319 (quoting SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc., 211 F.3d 21 (2d Cir. 2000)).
24. Ulloa v. Universal Music and Video Distribution Corp., 303 F. Supp. 2d 409, 416-17 (S.D.N.Y. 2004).

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