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The Last Line of Defense: Addressing Section 512(g)'s Dwindling Capacity to Protect Educational Fair Users on the Internet

Gersham Johnson*

INTRODUCTION

The COVID-19 pandemic has rapidly transformed education from one of the least digitized sectors in the U.S. economy to a largely online phenomenon, with up to 93% of households with school-age children relying on distance learning.¹ The value of online educational opportunities has extended beyond traditional purveyors of education as well, with online service providers (OSPs)² like YouTube reporting an increase in average daily views for educational videos produced by subscribers (“users”).³

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1. See, e.g., Kevin Barefoot et al., *Research Spotlight Measuring the Digital Economy*, SURV. OF CURRENT BUS. 7 (May 2019), <https://perma.cc/HT5B-WKDZ> (surveying the digital economy—including the minuscule digital educational sector—prior to 2020); Kevin McElrath, *Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://perma.cc/M465-A7E6> (describing the widespread effect of distance learning on 93% of U.S. households); *Policy Brief: Education During COVID-19 and Beyond*, UNITED NATIONS 13 (2020), <https://perma.cc/B4NT-EBEA> (“[T]he move to distance learning has been an opportunity to expand flexible learning modalities, setting the stage for a sustained shift towards more online learning in this sub-sector in the future.”). This sea change will likely never be fully reversed, as some school districts have continued to offer remote learning opportunities as of fall 2021. See Natasha Singer, *Online Schools Are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 11, 2021), <https://perma.cc/V7HY-CNME>.

2. U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (2020), <https://perma.cc/9C9H-L2MW> [hereinafter COPYRIGHT OFFICE REPORT] (“[T]he Office uses ‘ISP’ . . . to refer solely to mere conduit service providers under section 512(a), and uses ‘OSP’ to refer to all online service providers covered by section 512, including mere conduits.”).

3. Ashley Wiers, *3 Ways People Are Using YouTube To Learn at Home During the Coronavirus Pandemic*, THINK WITH GOOGLE (May 2020), <https://perma.cc/3YHT-NBXC> (reporting 120% increase in average daily views of videos with “home school” in title). There has also been an explosion in enrollment in massive open online courses (MOOCs) in the wake of the pandemic, with 2020 enrollment in Coursera courses alone increasing 640% compared to the same period in 2019. See Chris Impey, *Massive Online*

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The rise of user-generated content in online education (“educational content”) is merely part of a larger sea change as more content is uploaded to OSPs than ever before.⁴ But educational content provides a curious case study. While educational content is a nebulous concept to describe, here it may be defined as materials—from video lectures to digital course packs—that are created wholly or in part by users, uploaded to OSPs, and designed to aid in online educational pursuits. Because copyrighted works play a central role in the explication of such topics as literature, art, and music, any increase in educational content will also inevitably bring with it an increase in the use of copyrighted materials.⁵ Even though educational uses of copyrighted works are often considered to be fair use,⁶ users who incorporate these works into their educational content remain vulnerable to infringement claims, which can cause their educational content to be removed.

This lack of protection for educational content applies to all users—“non-institutional”⁷ or “institutional”⁸—who create and upload teaching materials containing portions of copyrighted works. Educational content therefore provides a compelling case study illustrating the limited defenses afforded to all user-generated content, whether or not it is educational in nature: If fair use educational content is considered non-infringing but nevertheless subject to removal under the guise of copyright infringement,⁹ then *any* non-infringing user-generated content is potentially vulnerable to the same fate.¹⁰ Indeed, in response to the COVID-19

Open Courses See Exponential Growth During COVID-19 Pandemic, CONVERSATION (July 23, 2020), <https://perma.cc/M6PJ-ZLG4>.

4. L. Ceci, *Hours of Video Uploaded To YouTube Every Minute as of May 2019*, STATISTA (Sept. 14, 2021), <https://perma.cc/H3CF-456R>.

5. The existence of the TEACH Act, 17 U.S.C. § 110(2), itself speaks to the recognized necessity of using copyrighted works in an online classroom setting. The Act allows for online educators at accredited nonprofit educational institutions “to display all types of copyrighted works and to perform entire nondramatic literary and musical works and reasonable and limited portions of all other types of works.” Kristine H. Hutchinson, Note, *The TEACH Act: Copyright Law and Online Education*, 78 N.Y.U. L. REV. 2204, 2206 (2003); see also Matthew Bultman, *Online Teaching During Pandemic Raises Copyright Concerns*, BLOOMBERG L. (Apr. 3, 2020), <https://perma.cc/U5B6-4DJJ> (discussing the copyright issues that are often raised by online teaching).

6. Section 107 of the Copyright Act explicitly highlights educational uses of copyrighted content as (potentially) permissible under the fair use doctrine. See 17 U.S.C. § 107(1).

7. The “non-institutional” category posited by this Note includes both independent YouTubers and private nonprofit organizations like Khan Academy that provide free education to millions through their YouTube channels. See KHAN ACADEMY, <https://perma.cc/M3AL-C7JY> (last visited Oct. 29, 2021).

8. This “institutional category” is also posited by this Note and includes universities and other accredited institutions. An accredited institution is a university or other teaching body recognized by the U.S. Department of Education. See *Overview of Accreditation in the United States*, U.S. DEP’T OF EDUC., <https://perma.cc/2VH9-FVED> (last visited Nov. 17, 2021).

9. Prior to 2019, YouTube did not even require rightsholders to identify at which point in a video infringement occurred, which made it difficult for educator-YouTubers (who often incorporate film and music clips into their videos) to rebut potentially erroneous infringement claims. See Jacob Kastrenakes, *YouTube Is Making It Much Easier for Creators to Deal with Copyright Claims*, VERGE (July 9, 2019), <https://perma.cc/9JGT-WT4N> (discussing changes to the manual—as opposed to automated—copyright claim process).

10. Although institutional educational users have statutory protections for the use of copyrighted works in educational content, they are not protected by statute when they digitally disseminate educational

pandemic, YouTube increased the automation of its takedown practices, making it easier for rightsholders to have content that incorporates their copyrighted works removed—regardless of the purpose of the use.¹¹

While the situation may look bleak for producers of both educational and non-educational content, users possess a shield against erroneous takedown notices. Enacted as part of the Digital Millennium Copyright Act (DMCA), the § 512(g) counter-notification measure grants OSP users the ability to contest the takedown of their content.¹² However, studies have shown that this feature may generally be under-utilized, both in terms of overall volume and in relation to the amount of potentially invalid takedown notices that may warrant its use.¹³ Moreover, given additional evidence that submitted counter-notifications may be erroneous more often than not,¹⁴ this Note argues that the main issues plaguing the counter-notification system point to an overdeterrence of the wrong users—that is, users such as university professors¹⁵ and other educational content creators who are permissibly using copyrighted materials.

This Note provides a more thorough examination of the issues besetting the counter-notification process, particularly with respect to its use in education. In Part

content to individuals who are not enrolled in an official course. 17 U.S.C. § 110(2)(c)(i) (providing protection to accredited institutions for online transmission of educational materials to “officially enrolled” students). Moreover, the DMCA’s limitation on liability for nonprofit educational institutions that act as online service providers does not seem to translate to a limitation against takedown notices. *See id.* § 512(e); Robert H. Wright, *Escaping Davy Jones’ Locker: How the Motion Picture Industry Can Stop Digital Piracy Without Unnecessary Litigation*, 6 U. PITT. J. TECH. L. POL’Y 1 (2005) (describing limits on liability for nonprofit educational institutions when a member of the institution “uses Internet access provided by the institution” to commit infringement).

11. Matt Binder, *YouTube Tells Creators to Expect More Video Removals During Coronavirus Pandemic*, MASHABLE (Mar. 16, 2020), <https://perma.cc/NA2B-KD9X> (“With less human eyes reviewing the content, the automated system is likely to remove more videos from the platform regardless of whether the content violates YouTube policy.”).

12. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 202(g), 112 Stat. 2860, 2883 (1998) (codified as 17 U.S.C. § 512(g)). In this Note, I focus primarily on counter-notifications to § 512(c) takedown notices.

13. *See, e.g.*, Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 STAN. TECH. L. REV. 412, 425 (2019) (“[C]ounter-notices are very rare.”). *See generally* Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, U.C. BERKELEY PUB. L. & LEGAL THEORY RSCH. PAPER SERIES (2017), for a discussion of various studies involving OSPs, rightsholders, and their interactions with the counter-notification process. “While some rightsholders [in the study] expressed some faith in the counter notice process, OSPs mostly considered it a dead letter—impractical and rarely used. All OSPs and at least one rightsholder agreed that the counter notice procedure’s practical ability to protect targets is limited.” *Id.* at 44.

14. *See, e.g.*, COPYRIGHT OFFICE REPORT, *supra* note 2, at 33 n.150 (2020) (citing American Association of Independent Music (“A2IM”) et al., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 44 (Apr. 1, 2016)).

15. *See, e.g.*, *How Explaining Copyright Broke the YouTube Copyright System*, NYU LAW, <https://perma.cc/3CV3-2DGP> (last visited Nov. 17, 2021) (discussing the removal of a New York University School of Law academic discussion about copyright from YouTube despite a colorable fair use claim); Mike Masnick, *Sony Music Issues Takedown on Copyright Lecture About Music Copyrights by Harvard Law Professor*, TECHDIRT (Feb. 16, 2016), <https://perma.cc/P9U8-SMXX> (discussing a Content ID claim faced by a Harvard Law School professor for his use of music clips during an academic lecture on copyright).

I, I discuss the functionality of the counter-notification process within the greater legal and historical background of the DMCA, focusing on the unique challenges faced by educational content creators who seek to use counter-notifications on YouTube. In Part II, I discuss the tripartite problem facing counter-notification petitioners: (1) Counter-notifications are under-utilized overall; (2) counter-notifications are over-utilized by pirates for whom the educational fair use defense does not apply; and (3) the timeframe for “putting back” material is costly to users and rightsholders alike. Finally, in Part III, I propose a “First Shot” system whereby a preemptive “counter-notification” can be used to assert educational fair use and delay takedown of educational content before a rightsholder acts. The First Shot therefore substitutes for the regular counter-notification, a privilege only for educational “Fair Users.”

I. DMCA: COUNTER-NOTIFICATIONS, YOUTUBE, AND FAIR USE

A. NOTICE-TAKEDOWN: A USER’S PERSPECTIVE OF THE DMCA

In 2021, over 90% of U.S. adults—or over 310,000,000 people—used the Internet.¹⁶ This figure is striking and parallels an even more staggering global statistic: In 2017, more than 500 hours of content were uploaded to YouTube every minute.¹⁷ Online service providers like YouTube have become a hub for users to upload user-generated content. This content has proliferated every year since YouTube was founded in 2005,¹⁸ and it is an increasingly central part of the overall Internet landscape—a marked change from the circumstances in 1998, when Congress enacted the DMCA.¹⁹

1. The DMCA: For the Benefit of Rightsholders and Online Service Providers

Congress enacted the DMCA to “facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and *education* in the digital age.”²⁰ The Senate Report expressed the concern that copyright law must evolve with technology, not just to the benefit of rightsholders of copyrighted material but also to the benefit of those who seek to “exploit” copyrighted materials.²¹ Indeed, the Senate Report mentions protections for

16. Andrew Perrin and Sara Atske, *7% of Americans Don’t Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), <https://perma.cc/WV8W-MNH3>.

17. James Hale, *More Than 500 Hours of Content Are Now Being Uploaded To YouTube Every Minute*, TUBEFILTER (May 7, 2019), <https://perma.cc/K3WF-K5RL>.

18. Ceci, *supra* note 4.

19. In 1998, just 41% of U.S. adults were using the Internet. See Susannah Fox, *The Internet Circa 1998*, PEW RSCH. CTR. (June 21, 2007), <https://perma.cc/ZCB9-YVKU>. Moreover, YouTube did not yet exist. It is clear that “the landscape of the internet has dramatically changed.” Emily M. Asp, Note, *Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration*, 103 IOWA L. REV. 751, 764 (2018).

20. S. REP. NO. 105-190, at 1–2 (1998) (emphasis added).

21. *Id.* at 2.

educational institutions such as universities and libraries that use copyrighted materials for non-infringing purposes.²²

However, the DMCA may, in practice, primarily serve owners of copyrighted materials and OSPs rather than the multiplying number of users who use copyrighted works for noncommercial or educational purposes. As Alan Gocha argues, it seems that such users have little “commensurable protection” to defend against rightsholders’ ability to “extra-judicially censor” uploaded content.²³

Under its § 512 notice-and-takedown regime, the DMCA creates a “safe harbor” for OSPs to avoid liability for hosting copyright-infringing material uploaded by users.²⁴ In particular, an OSP is protected from lawsuits by rightsholders so long as the service provider does not have “actual knowledge” that the material it hosts infringes,²⁵ does not receive a “financial benefit” directly attributable to infringement it has the right and ability to control,²⁶ and “responds expeditiously” to requests to remove infringing material.²⁷ This third provision codifies the notice-and-takedown regime at the heart of this inquiry.

The safe harbor provisions impose the burden of finding and flagging infringing material on rightsholders who seek to challenge or “take down” user-generated content. Because “most [user-generated content] sites are designed to gain the section 512(c) safe harbor,”²⁸ the § 512(c) takedown is the rightsholder’s primary mechanism for achieving the removal of user-generated content.²⁹ If a rightsholder believes their copyrighted material is present on an OSP without their consent, they (or a person authorized to act on their behalf) may send the OSP’s designated agent

22. *See id.* at 20; *see also* 17 U.S.C. § 512(e) (creating protections against liability for educational institutions acting as OSPs).

23. Alan J. Gocha, *A Modern System for Resolving Online Copyright Infringement Disputes: Administrative Rulemaking and Adjudication, A One-Stop Fix to the Digital Millennium Copyright Act*, 58 IDEA 131, 154–55 (2018) (describing how the DMCA provides no prelitigation “impartial mechanisms” for users to resolve a rightsholder’s attempt to take down the user’s content). *See also* Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 758–59 (2011) (“Thus, while the incentive to comply with a copyright owner’s takedown notice is high, because doing so provides immunity from copyright infringement liability which can be significant, the incentive for reposting material when requested by a subscriber is significantly lower.”) (footnotes omitted); Rebecca Alderfer Rock, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 692 (2014) (“Section 512 of the Act was created as a compromise between ISPs [and OSPs] and the copyright industry.”).

24. 17 U.S.C. § 512(c). The DMCA also creates safe harbors for “transitory digital network communications,” § 512(a); “system caching,” § 512(b); and “information location tools,” § 512(d). Nonprofit educational institutions are also afforded some protections. § 512(e).

25. Section 512(c)(1)(A) also requires that the OSP is not, in the absence of actual knowledge, aware of “facts or circumstances” establishing infringing activity and that the OSP acts “expeditiously” to remove infringing material once knowledge is obtained.

26. 17 U.S.C. § 512(c)(1)(B).

27. 17 U.S.C. § 512(c)(1)(C). In addition, every OSP must satisfy two criteria for eligibility: adopting “repeat infringer” policies to remove users who consistently infringe copyrights and accommodating “standard technical measures.” § 512(i)(1).

28. Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 370 (2009).

29. *See* 17 U.S.C. § 512(c)(3).

a signed, written notification (“takedown notice”) identifying the copyrighted work and its location on the host’s site, and requesting its removal.³⁰

The data on the incidence of takedown notices suggest that processing takedown notices is a major task of OSPs.³¹ Moreover, because the safe harbor protects OSPs like YouTube from rightsholders more so than from users,³² there may be added incentive to act more expeditiously on rightsholders’ requests than users’,³³ thus lending credence to the observations by Gocha and others that the notice-and-takedown regime is skewed toward the benefit of rightsholders and OSPs.³⁴ Therefore, the § 512 mechanisms supporting users should be reasonably reliable and strong if they are to protect the content that users create and upload to OSPs.

2. The Counter-Notification: The User’s Defense

The counter-notification provides the only significant recourse for users to contest the removal of their uploaded content.³⁵ More specifically, the counter-notification allows users to challenge rightsholders’ claims of copyright infringement and thereby have their wrongfully removed content reinstated. That in 1998 it was already considered a necessity for § 512 to include such a protective measure for users—well before the rise of YouTube and the proliferation of user-generated content—is striking.³⁶ As user-generated content continues to proliferate, the counter-notification will likely become an increasingly important area of study.

30. This is a distillation of the six statutory elements that constitute a successful takedown notice. *See id.*

31. This burden is also borne in part by the rightsholders themselves, who must submit these notices. *See, e.g., Copyright Notices*, TWITTER, <https://perma.cc/R5B2-3Y2K> (last visited Nov. 17, 2021) (describing receipt of 150,000 takedown notices between July and December 2019); GOOGLE, *HOW GOOGLE FIGHTS PIRACY* 30 (Nov. 2018), <https://perma.cc/C9PA-53H8> [hereinafter *GOOGLE TRANSPARENCY REPORT*] (describing YouTube’s receipt of 2,500,000 takedown notices in 2017).

32. *But see* 17 U.S.C. § 512(g)(1) (protecting OSPs from liability for their “good faith disabling of access to” user content).

33. *See, e.g., Loren, supra* note 23, at 758 (explaining that, while OSPs may face legal liability from users for the mismanagement of user content, “the true risk of [a suit from a user] is often minimal due to limitations on liability that most service providers insist upon in their contracts with users”).

34. *See Gocha, supra* note 23, at 155 (discussing how users, unlike rightsholders, have recourse only to high-cost litigation to protect their content); Scott A. Tarbell, *Don’t Tread on Me: The Need for an Alternate Dispute Resolution Process for the Creators and Uploaders of User-Generated Content*, 14 PEPP. DISP. RESOL. L.J. 27, 43 (2014) (listing the factors favoring rightsholders over users, including: “(1) a copyright holder only has to ‘substantially’ include the requirements listed under the DMCA in issuing a takedown notice; (2) an OSP must act expeditiously to remove or disable access to the allegedly infringing material once served with the takedown notice; [and] (3) infringing material can be taken down, monetized with ads, or tracked (all possible before any notification is sent by the OSP to the user).”) (footnotes omitted).

35. 17 U.S.C. § 512(g).

36. 105 CONG. REC. 9193, 9238 (1998) (statement of Sen. John Ashcroft) (noting that the takedown procedure on its own prioritized rightsholders while providing “little or no protection” for users).

Section 512(g): Requirements and Process

The counter-notification process is defined by two distinct considerations: First, the user must have been notified by the host OSP that their content was removed or disabled in response to a valid takedown notice.³⁷ Second, the user must then submit a written request, to the OSP’s designated agent, that the removed material be reinstated.³⁸ This communication will then be forwarded to the rightsholder. If the rightsholder does not respond with a lawsuit, the material must be reinstated no more than fourteen days after receipt of the counter-notification.³⁹

Analogously to the § 512(c) takedown notice, a counter-notification must fulfill several statutory requirements in order for a user’s submission to be considered successful:

- (A) A physical or electronic signature of the subscriber.
- (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.
- (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.
- (D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located⁴⁰

While the counter-notification appears to be the mirror image of the rightsholder’s takedown notice, these four elements actually distinguish it from the takedown notices to which they respond. The first three required elements may be fairly straightforward⁴¹ and similar to the requirements of takedown notices,⁴² but the fourth element may produce unique consequences for the user. Indeed, because users

37. 17 U.S.C. § 512(g)(2)(A).

38. 17 U.S.C. § 512(g)(3).

39. 17 U.S.C. § 512(g)(2)(B); *see also* COPYRIGHT OFFICE REPORT, *supra* note 2, at 27.

40. 17 U.S.C. § 512(g)(3). The statutory term “subscriber” is synonymous with the term “user” employed throughout this Note.

41. There is little caselaw explicitly discussing the first and second required elements of the counter-notification, either pointing to the lack of confusion around the meaning of those elements or to the overall under-utilization of the counter-notification process. The “good faith belief” standard has received more attention, although more often for takedown notices. *See, e.g.,* Rossi v. Motion Picture Ass’n of Am. Inc., 391 F.3d 1000, 1004 (9th Cir. 2004) (discussing whether an issuer of a takedown notice must have a subjective or an objective good faith belief that their work was being infringed); *cf.* Love v. Nuclear Blast Am., No. EDCV 20-124 PSG, 2020 WL 5834289, at *5 (C.D. Cal. Aug. 19, 2020) (“Plaintiff has plausibly alleged that Nuclear Blast submitted the counter-notice knowing that it was misrepresenting that it had a good faith belief that its video was misidentified or mistakenly flagged.”).

42. The first three elements of a successful counter-notification correspond to elements (i), (iii), and (v) for takedown notices. *See* 17 U.S.C. § 512(c)(3).

must consent to a federal jurisdiction and identify themselves⁴³—and because the issue of a rightsholder’s “good faith” is rarely litigated⁴⁴—the counter-notification places the threat of DMCA litigation primarily at the feet of users, despite the actions of rightsholders.⁴⁵

It is worth reiterating that because a counter-notification is a defensive measure, a user may issue one only *after* the content has actually been removed in response to a takedown notice—regardless of whether the user anticipates that their work may be targeted for removal by a rightsholder.⁴⁶ Moreover, a user’s content cannot be put back immediately upon issuance of a counter-notification; an OSP has ten to fourteen business days from receipt of a counter-notification to replace the removed material.⁴⁷ Rightsholders, on the other hand, may issue a takedown notice at any time.⁴⁸ The current statutory requirements for a counter-notification are therefore completely dependent upon the actions of the rightsholder.

Section 512(f): The Necessary Consideration of Fair Use

The third required element for a § 512(g) counter-notification produces unique results as applied to the kinds of users who create educational and other “transformative” content. This element codifies the requirement—also expressed more consequentially under § 512(f)—that the user affirm, under penalty of perjury, that they have a “good faith belief” that their content was wrongfully targeted by the takedown notice before they may submit a counter-notification. In the wake of the Ninth Circuit’s 2004 decision in *Lenz v. Universal Music Corp.*, the broader § 512(f) good faith requirement is sometimes taken to mean that rightsholders and users alike must consider fair use before issuing a DMCA notice, lest they be faced with misrepresentation claims.⁴⁹ This means that users who create educational content—

43. See 17 U.S.C. § 512(g)(3). For users who are outside the United States, the federal jurisdiction will typically correspond to “any judicial district in which the service provider may be found.”

44. Asha Velay, *Using the First Fair Use Factor To Screen DMCA Takedowns*, 17 VA. SPORTS & ENT. L.J. 54, 59 (2017) (noting that litigation under § 512(f), which defines the standard of good faith, is sparse).

45. See Zoe Carpou, Note, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA To Fight Piracy and Protect End-Users*, 39 COLUM. J.L. & ARTS 551, 566–67 (2016) (“Indeed, § 512(g)’s requirement that users submit to the jurisdiction of the courts before they can counter-notify has resulted in at least some instances in which users provide false information in their counter-notification.”); cf. *BMaddox Enterprises LLC v. Oskouie*, 17 Civ. 1889 (RA)(HBP), 2017 WL 9534738, at *3 n.4 (S.D.N.Y. Sept. 8, 2017) (briefly noting the plaintiff’s claim that the defendants’ counter-notifications contained “false identifying information”). But see 17 U.S.C. § 512(f) (allowing for users to bring misrepresentation claims against rightsholders who abuse the takedown notice procedure).

46. See 17 U.S.C. § 512(g)(3)(B) (requiring the user to identify the content that “*has been removed* or to which access *has been disabled*”) (emphasis added).

47. 17 U.S.C. § 512(g)(2)(C).

48. See 17 U.S.C. § 512(c).

49. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016) (holding that § 512(f) requires rightsholders to “consider fair use before sending a takedown notification”); see also *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004) (“[T]he ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.”). Though

and who in theory are already considering fair use—should be prime candidates for issuing successful counter-notifications.⁵⁰

However, because takedown notices issue in response to a user’s apparent infringement of a rightsholder’s copyrighted work, rebutting such notices often requires the user to assert “fair use” by default.⁵¹ The fair use defense asserts that the user’s incorporation of portions of a copyrighted work was in fact “reasonable,” and that a reasonable rightsholder would therefore consent to such use.⁵² Such an argument can be made upon the examination of four nonexhaustive factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the work used; and (4) the effect of the use upon the potential market for or the value of the copyrighted work.⁵³ Although all four factors are taken into consideration, factors one and four dominate the analysis.⁵⁴

Fair use is frequently invoked as a user’s defense in DMCA-related litigation.⁵⁵ And between the two dominant fair use factors, it is the first factor that most often favors the defendant, particularly if the defendant’s use fits the “description of uses” described in § 107.⁵⁶ Because one such use is for “nonprofit educational purposes,” users who incorporate a copyrighted work into their uploaded content would likely have a strong fair use defense if the purpose of their use of the work was in fact

these holdings on § 512(f) pertain explicitly to rightsholders (and takedown notices), users are also implicated. *See* 17 U.S.C. § 512(f)(2) (considering the counter-notification). Moreover, the consequences of misrepresentation are damages, including attorneys’ fees. 17 U.S.C. § 512(f).

50. This assumes that the other requirements for issuing a successful counter-notification, which are primarily procedural, have also been satisfied.

51. Laura Zapata-Kim, *Should Youtube’s Content ID Be Liable for Misrepresentation Under the Digital Millennium Copyright Act?*, 57 B.C. L. REV. 1847, 1855 (2016) (“Content creators that choose to file counter notices generally claim that their material is not infringing any copyright because it is fair use.”).

52. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549–50 (1985).

53. 17 U.S.C. § 107.

54. *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (analyzing the fair use factors in a music parody context, with factor two receiving limited attention and factor three’s analysis “harken[ing] back” to factor one); *see also* Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 572 (2008) (proposing a new fair use test focusing only on factors one and four because “the second and third factors rarely drive fair use outcomes”).

55. As of this writing, there are only between 100 and 200 cases discussing or referencing a user’s counter-notification in the DMCA context. Of these cases, many are not decided on the merits of a rightsholder’s copyright infringement claim but rather on other grounds, such as lack of jurisdiction or § 512(f) misrepresentation. *See, e.g.*, Johnson v. New Destiny Christian Ctr. Church, Inc., No. 6:17-cv-710-Orl-37DCI, 2019 WL 1014245, at *2 (M.D. Fla. Mar. 4, 2019), *aff’d*, 826 F. App’x 766 (11th Cir. 2020) (involving a user-initiated suit under § 512(f) in response to a rightsholder’s “malicious prosecution” via takedown notices). Notwithstanding, there are several cases in which users invoke fair use as a defense. *See, e.g.*, Lenz v. Universal Music Corp., 815 F.3d 1145, 1151 (9th Cir. 2016); Hughes v. Benjamin, 437 F. Supp. 3d 382, 395 (S.D.N.Y. 2020) (misrepresentation claim dismissed due to user’s “implied statement” of fair use in the parody context); Shropshire v. Canning, No. 10-CV-01941-LHK, 2011 WL 90136, at *1 (N.D. Cal. Jan. 11, 2011) (“In [the] counter-notice, Defendant stated that he believed the video constituted ‘fair use’ . . .”).

56. *See* Wright v. Warner Books, Inc., 953 F.2d 731, 736 (2d Cir. 1991) (“[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107.”).

educational and noncommercial.⁵⁷ But more broadly, users will often seek to establish that the purpose of their use is substantially “transformative” of the copyrighted work, as such a purpose is more likely to satisfy fair use.⁵⁸

Although a transformative purpose alone may not be enough to satisfy fair use,⁵⁹ at the counter-notification stage the apparent satisfaction of factor one may be enough to presume that a user had a good faith belief that their counter-notification was validly sent.⁶⁰ One commentator has even proposed a first factor screening test for rightsholders issuing takedown notices in order to prevent wrongful takedowns in the first place.⁶¹ Therefore, a user whose content satisfies a nonprofit educational purpose should in theory have no problem issuing facially valid counter-notifications that do not run afoul of § 512(f) misrepresentation penalties.⁶²

Users who produce and upload educational content to OSPs are thus prime candidates for examining the flaws of the counter-notification process. Thus, data that establish either that there is a general failure of counter-notifications in this situation or that counter-notifications are not being issued at all will imply that many presumptive instances of fair use are not being protected by counter-notifications. Accordingly, this Note invokes users who produce educational content as a litmus test for the efficacy of the counter-notification.

57. In addition, the nonexhaustive description of uses includes “criticism, comment . . . [and] teaching.” 17 U.S.C. § 107 (emphasis added).

58. While the word “transformative” does not appear in the § 107 description of the first fair use factor, the Supreme Court has found that a sufficiently “transformative” purpose can support a finding of fair use. *See generally Campbell*, 510 U.S. 569. The Court has defined a transformative use as one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 579. Indeed, in DMCA litigation, defendants who have issued counter-notifications have sought to establish a “transformative” use in several forms, including criticism and commentary. *See, e.g., Hughes*, 437 F. Supp. 3d at 391 (finding that the defendant’s use of the plaintiff’s work for comment and criticism was a transformative use which favored the defendant under factor one); *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 45 (S.D.N.Y. 2017) (holding that factor one favors the defendants because “the [defendants’] video is quintessential criticism and comment”).

59. While a transformative purpose may not even be strictly necessary—at least in the case of a nonprofit educational institution’s use of copyrighted materials, *see Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014) (“Thus, we are persuaded that, despite the recent focus on transformativeness under the first factor, use for teaching purposes by a nonprofit, educational institution such as Defendants’ favors a finding of fair use under the first factor, despite the nontransformative nature of the use.”)—the Supreme Court has established that satisfying factor one is not enough on its own to find fair use. *Campbell*, 510 U.S. at 578 (“Nor may the four statutory factors be treated in isolation, one from another.”). At minimum, a defendant will also have to show that there has been no market harm to the plaintiff’s work, under factor four. *See, e.g., Cariou v. Prince*, 714 F.3d 694, 708–09 (2d Cir. 2013) (analyzing the fourth factor immediately following an extensive factor one discussion).

60. *See Velay*, *supra* note 44, at 68 (“Because the most determinative factor courts look at to assess fair use is the first factor . . . changing the dialogue to a focus on the first factor is a step in the right direction to achieving a practical implementation of the Ninth Circuit’s [*Lenz*] decision [requiring subjective good faith in issuing DMCA notices].”).

61. *Id.* at 75.

62. It is worth noting that a user’s good faith belief that a takedown notice was received in error is not synonymous with a fair use defense; a presumptively successful fair use defense instead suggests that the user would have held the good faith belief at the time their counter-notification was issued.

Defining the Subset: Non-Institutional and Institutional User-Educators

It is worth briefly defining the sub-universe of users who create online educational content. For the purposes of this Note, the default educational content creator is the YouTuber, of which there are two primary categories: freelance YouTubers unaffiliated with an accredited educational institution (“noninstitutional users”)⁶³ and universities or other accredited institutions (“institutional users”).⁶⁴ The latter category does not incorporate educators who merely use digital resources to teach their students. Educators who perform or display copyrighted works solely for their class’s registered students cannot be said to be purveyors of online educational content, as this content would not be widely available online.⁶⁵ Regardless, users who create any content must contend not only with the realities of the DMCA, but also with the policies of the OSPs that they frequent.

B. YOUTUBE AND CONTENT ID: AN ILLUSORY ESCAPE FROM THE DMCA**1. Why YouTube: The Importance of YouTube in Online Education**

YouTube has become an invaluable tool for understanding the current position of users of OSPs—and, by extension, the efficacy of the counter-notification process itself—for two reasons: (1) its increasingly substantial role in fair use practices such as education, and (2) its employment of Content ID, a system that often displaces the DMCA regime.

First, “learning-related content” is massively popular on YouTube, garnering 500 million views daily.⁶⁶ While this category is admittedly vague, the growing importance of YouTube in online education—particularly since the start of the COVID-19 pandemic⁶⁷—is hardly in dispute. Indeed, the platform has an entire playlist dedicated to education, featuring videos on everything from history to computer programming,⁶⁸ and YouTube has even partnered with hundreds of universities and other providers to offer free video lectures.⁶⁹ While it is unclear

63. Because an accredited institution must be recognized by an approved accrediting agency, *see The Basics of School Accreditation*, HOMELAND SECURITY: STUDY IN THE STATES, <https://perma.cc/DL7X-5FBS> (last visited Jan. 2, 2022) (defining accreditation as “the recognition from a [U.S. Department of Education-approved] accrediting agency that an institution maintains a certain level of educational standards”), a “noninstitutional user” would include a formally registered nonprofit organization such as Khan Academy, as it is otherwise unaffiliated with any academic institutions.

64. Institutional users can be either for-profit or nonprofit. A university that uploads lectures to its YouTube page for public viewing will likely not be exempt from a fair use defense merely because the university is for-profit.

65. These educators are nevertheless covered by Section 110 of the Copyright Act. 17 U.S.C. § 110(2).

66. Malik Ducard, *What Brands Can Learn from Educational Content on YouTube*, THINK WITH GOOGLE (May 2017), <https://perma.cc/YJ59-VQR3>.

67. Since the start of the COVID-19 pandemic, YouTube has seen a 120% global increase in average daily views of “homeschooling” videos. Wiers, *supra* note 3.

68. *Learning*, YOUTUBE, <https://perma.cc/A79A-RV93> (last visited Nov. 8, 2021).

69. Amy Antonio & David Tuffley, *YouTube a Valuable Educational Tool, Not Just Cat Videos*, CONVERSATION (Jan. 15, 2015), <https://perma.cc/HFQ6-9KWE>.

what percentage of the total content on YouTube is truly “educational” in nature,⁷⁰ it is apparent that YouTube is a valuable case study for educational user content and, by extension, the efficacy of ostensibly valid potential counter-notifications.

Secondly, YouTube is also an important case study in the rise of automation in the takedown of copyrighted material. Due to the large numbers of DMCA requests that must be processed under the current internet landscape, OSPs have started turning to automated processes to ease the administrative burden.⁷¹ While these processes generally are more efficient at fulfilling the DMCA’s notice-and-takedown requirements than nonautomated methods,⁷² YouTube’s Content ID algorithm actually exists outside of and intervenes prior to the DMCA’s control, leaving users to contend with two separate regimes: a takedown regime and an ex ante blocking regime.⁷³ Importantly, the potential for “false positives”⁷⁴ and fraud⁷⁵ stemming from Content ID reveals the necessity of having strong counter-notification and dispute resolution systems to rebut these claims, particularly for educational “fair

70. As used in this Note, “online educational content” refers to content created and uploaded by a user of an OSP which, for purposes of the argument presented, must feature some portion of a copyrighted work, and the copyrighted work must be incorporated into a larger explication that a teacher might themselves present to their students in a classroom setting. Such an explication must include verbal explanations, demonstrations, or diagrams beyond the copyrighted work that help to contextualize or explain the work. Under these criteria, a YouTube video explaining the music theory of a hit song while featuring clips of the song in question would qualify as educational content. However, a YouTube video featuring an individual performing a cover of the same song would not qualify. While a cover of a song could be used educationally, the question is not whether content *could* be used in an educational manner. Instead, the question is whether it is objectively reasonable to conclude that the subjective intent of the user in creating the online content was to educate.

71. See Adam Eakman, *The Future of the Digital Millennium Copyright Act: How Automation and Crowdsourcing Can Protect Fair Use*, 48 IND. L. REV. 631, 638–39 (2015) (discussing the automation of corporations’ takedown processes in response to large volumes of DMCA notices).

72. Penney, *supra* note 13, at 471 (“Content targeted by automation was much more likely to be taken offline or made otherwise inaccessible: Only 7% of [Google] Blogger content targeted by automation remained online, while 13% non-automated/individual-sent notices remained online.”).

73. Compare 17 U.S.C. § 512(c)(3) (requiring rightsholders to affirmatively request, via takedown notice, that an OSP remove infringing content published on its website), with *What Is a Content ID Claim?*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/S7YW-L6UL> (last visited Nov. 17, 2021) (describing algorithm that *automatically* issues Content ID claims on any videos identified as being potentially infringing).

74. “False positives” are erroneous matches that inaccurately flag users’ material as being infringing. See Toni Lester & Dessislava Pachamano, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51, 69 (2017) (“False positives are a natural consequence of the use of non-human methods for detection.”).

75. See, e.g., Tom Gerken, *YouTube’s Copyright Claim System Abused by Extorters*, BBC (Feb. 14, 2019), <https://perma.cc/WQS8-9YGD>; David Kravets, *Rogues Falsely Claim Copyright on YouTube Videos To Hijack Ad Dollars*, WIRED (Nov. 21, 2011), <https://perma.cc/JJ3P-FPCY> (“[I]f . . . a rogue manages to feed the filter content it doesn’t own, a YouTube user could see her video hijacked through a false copyright claim.”); cf. Josh Katzowitz, *YouTube Stars Say Unfair Copyright Claims Are Making Their Lives Hell*, DAILY DOT (Jan. 27, 2021), <https://perma.cc/K2FR-EX9U> (citing examples of users whose videos were erroneously targeted by Content ID claims).

users”—non-institutional and institutional alike—who frequently utilize copyrighted works in the content that they create and upload.⁷⁶

2. Content ID: YouTube’s Limitation To the Counter-Notification

Under the DMCA’s § 512(c), YouTube is saved from liability for hosting users’ infringing material if it expeditiously removes it. YouTube’s “copyright strike” system is its primary mechanism for satisfying the DMCA’s requirements for establishing a “safe harbor.”⁷⁷ “Copyright strikes” are issued to users after valid takedown requests are sent by rightsholders, but they may be rebutted by counter-notifications.⁷⁸ Where YouTube differs is in the consequences a user may accrue in response to multiple takedown notices. If a user receives three takedown notices—and therefore three copyright strikes—they become a “repeat infringer” whose account is subject to termination if they fail to successfully issue counter-notifications to rebut the strikes (or if the strikes are not retracted).⁷⁹

However, YouTube users’ uploaded content may also be blocked by rightsholders independent of the statutory notice-takedown process—and therefore, independent of the users’ ability to issue counter-notifications. Under its Content ID filter, YouTube has an online database that stores “fingerprints,” which are copies of reference files of copyrighted works.⁸⁰ Content ID monitors videos that have been uploaded but not yet published, looking for any content that matches a fingerprint. If a match is found, Content ID will, at the preference of the rightsholder, either block the video from viewership, monetize the video with advertisements, or track the video’s viewership data.⁸¹ If the uploaded video does not correspond to any of the fingerprints, it will be published.

These three options complicate the counter-notification process by replacing much of the DMCA’s notice-and-takedown regime altogether;⁸² rightsholders need not even issue a takedown notice to have a user’s allegedly infringing content blocked from viewers, as they may rely on Content ID instead.⁸³ If a user receives

76. See Kastrenakes, *supra* note 9 (“YouTube is incentivized by law to work with copyright owners once it’s received a claim, which puts video creators at a disadvantage when they try to prove fair use. That can make it hard for YouTubers to make educational content that involves breaking down songs or movies, since they risk the videos being taken down . . .”).

77. 17 U.S.C. § 512(c)(1) (describing how OSPs may establish a safe harbor from liability).

78. *Copyright Strike Basics*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/XT5R-BTG9> (last visited Nov. 8, 2021).

79. *Id.* The “repeat infringer” language originates in § 512, which requires OSPs to develop policies to remove users who repeatedly commit copyright infringement. 17 U.S.C. § 512(i)(1)(A).

80. The reference files are submitted by qualifying rightsholders. *How Content ID Works*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/FX8K-AVPD> (last visited Nov. 8, 2021).

81. *Id.*

82. Content ID was implemented to go the extra mile to placate disgruntled rightsholders who prefer monetization of videos containing their content to outright takedown, and operates largely separately from the DMCA. Nicholas Thomas DeLisa, Note, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 BROOK. L. REV. 1275, 1284–85 (2016).

83. Robert Andrea, *No Safe Harbor: YouTube’s Content ID and Fair Use*, B.C. INTEL. PROP. & TECH. F. 1, 7 (2020).

an email from YouTube informing the user that they have received a Content ID claim,⁸⁴ they must dispute the claim directly to the rightsholder, who has thirty days to respond.⁸⁵ If the rightsholder either does not respond or affirmatively releases the claim, the user need not take any further action.⁸⁶ However, if the rightsholder chooses to “reinstate” the claim, a user may “appeal” the decision to keep their content posted.⁸⁷ In the alternative, a rightsholder may choose to issue a DMCA takedown notice; only then may a user issue a counter-notification in response.⁸⁸

To reiterate: Content ID is purely an internal policy of YouTube.⁸⁹ Content ID therefore diminishes the role of the DMCA—and by extension, the role of the counter-notification. Moreover, the ability of rightsholders to block users’ content via Content ID also allows rightsholders to bypass the other safeguards that accompany the DMCA: The necessary consideration of fair use in takedown notices is a statutory obligation under § 512(f), but not required under YouTube’s internal Content ID policy.⁹⁰ Therefore, with potentially 98% of YouTube’s copyright claims going through Content ID as of 2018,⁹¹ Content ID renders the counter-notification a less viable option for users seeking to protect their content.⁹²

84. Unlike the DMCA system, which employs ex post blocking of content, the Content ID system employs ex ante blocking before upload. Moreover, the system is automated: If the problematic (“claimed”) segment of a blocked video is trimmed and removed by the user, the associated claim will be released. See *What Is a Content ID Claim?*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/S7YW-L6UL> (last visited Nov. 17, 2021).

85. *Dispute a Content ID Claim*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/9KWB-785H> (last visited Nov. 17, 2021). Finally, because Content ID is distinct from the DMCA, users do *not* accrue copyright strikes upon receiving Content ID claims. See *id.*

86. *Id.*

87. A user does have the option to simply appeal a rightsholder’s upheld claim without doing anything more. See *id.* It is also unclear if a video that has been “blocked” from upload is still “on” YouTube, ready to be formally removed by a takedown notice.

88. See *id.* It is unclear from the instructions whether a user may also submit a counter-notification after a rightsholder merely upholds the claim. Because a rightsholder may submit a takedown notice *either* in lieu of upholding the claim or *after* the user appeals, see *id.*, a user may be required to submit a counter-notification either following their dispute of a claim or following their appeal of an upheld claim. However, a takedown notice is still likely required in order to trigger a counter-notification.

89. Indeed, the system was developed in part to placate media and technology giants, like Viacom, who found the DMCA inadequate to stem the tide of alleged copyright infringement occurring on YouTube. See Kenneth Li & Eric Auchard, *YouTube To Test Video ID with Time Warner, Disney*, REUTERS (June 11, 2007), <https://perma.cc/9HL4-3354>. Content ID has, of course, also helped rightsholders collect revenue from postings containing their copyrighted works. Saba Hamedy, *YouTube Has Paid \$2 Billion To Rights Holders Through Content ID*, MASHABLE (July 13, 2016), <https://perma.cc/PU5Y-29TG>.

90. See Andrea, *supra* note 83, at 1, 8; Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. 26, (Dec. 2020), <https://perma.cc/6MGL-4TQ8> (“While the law does not make fair use of music more difficult to prove than fair use of any other kind of work, Content ID does.”).

91. GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 24.

92. A minor consolation for users is that Content ID claims will not result in the termination of the user’s account. See *What Is a Content ID Claim?*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/S7YW-L6UL> (last visited Nov. 17, 2021).

While it appears that in 90% of cases rightsholders choose to forego outright blocking and leave user content uploaded,⁹³ it is less clear what *kinds* of content are being blocked. In the case of educational fair use, it is unclear how much educational content is even being processed by Content ID, let alone how much of that educational content is being blocked by the algorithm.⁹⁴ Therefore, even in its diminished capacity, the counter-notification process still looms as a consideration for users of Content ID, particularly for those involved in education.

A final notable alteration on the counter-notification process comes not from Content ID but from YouTube's Terms of Service.⁹⁵ While OSPs are incentivized under § 512 to "promptly notify" users that their material has been removed,⁹⁶ the actual terms of service of YouTube and other providers proclaim these OSPs' ability to remove content at any time.⁹⁷ There is even evidence that YouTube may be disregarding some counter-notifications altogether as a result of its Terms of Service and its arrangements with rightsholders.⁹⁸ One YouTuber who makes educational nature videos did not even make it to the counter-notification stage in their copyright infringement dispute, claiming that their attempts to appeal a Content ID claim went completely ignored.⁹⁹ It seems that at both the Content ID or DMCA stages,

93. Most claimed content is likely being monetized. See Robert Kyncl, *Why Creators Should Care About European Copyright Rules*, YOUTUBE OFFICIAL BLOG (Sept. 4, 2018), <https://perma.cc/V5P6-ND4W>.

94. There is currently little direct data on how much educational user content contains copyrighted works that have been processed through Content ID. In theory, a good proxy for this data could be found by determining what percentage of educational content relies on the copyrighted works of large rightsholders; that is, large rightsholders appear more likely to qualify for and rely on Content ID. However, it is not clear what percentage of Content ID's qualified rightsholders are actually large rightsholders—especially because the criteria for qualification are so vaguely defined. See *Qualify for Content ID*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/QDZ7-4Q7Z> (last visited Nov. 17, 2021) (describing the criteria for eligibility, including "whether the copyright owner's content can be claimed through Content ID and their demonstrated need"); cf. *Decoding Content ID: How Artists Make Money on YouTube*, AWAL (Aug. 7, 2018), <https://perma.cc/26UL-MTSY> ("[M]any indie creators choose to go through an official YouTube Partner. AWAL, a YouTube Certified company, handles the legal and technical necessities for our members."). Therefore, even determining the source of copyrighted works within educational content may not reveal the extent to which educational content is processed through Content ID.

95. YouTube provides other tools for rightsholders to target and remove content beyond Content ID and its Terms of Service, but they appear more limited in scope. See *Copyright Match Tool*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/PTR4-HEQF> (last visited Nov. 17, 2021) ("The Copyright Match Tool finds full reuploads of your original videos on other YouTube channels.").

96. 17 U.S.C. § 512(g)(2)(A).

97. *Terms of Service*, YOUTUBE (Nov. 18, 2020), <https://perma.cc/V4SV-PLWG> (last visited Nov. 17, 2021) ("If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion.").

98. See *Videos Removed or Blocked Due to YouTube's Contractual Obligations*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/Y357-97S2> (last visited Nov. 17, 2021) ("YouTube enters into agreements with certain music copyright owners to allow use of their sound recordings and musical compositions . . . Sometimes, this may mean the Content ID appeals and counter notification processes won't be available."); Michael Weinberg, *Universal Music Group and YouTube Agree to Forget About Fair Use*, PUB. KNOWLEDGE (June 27, 2014), <https://perma.cc/725S-GBHJ> (discussing how YouTube initially opted to ignore a counter-notification from a user in response to a takedown notice from UMG).

99. u/elle___, Comment to *YouTube's Content Claim System Is Out of Control*, REDDIT, <https://perma.cc/GQ53-MWC2> (last visited Nov. 17, 2021).

analyzing the potential pitfalls of YouTube’s user defense mechanisms provides an invaluable opportunity to better understanding how users navigate the current internet ecosystem.

C. “TRUSTED USERS” AND THE IMPORTANCE OF ACCREDITATION

Facing both Content ID and the DMCA proper, the counter-notification will not remedy many instances of content-blocking. Both non-institutional and institutional users who create educational content typically only have recourse to a thin shield to protect the material that they upload to OSPs. Nonetheless, it is worth noting that formally recognized (“accredited”) educational institutions are often granted more statutory protections when incorporating copyrighted works into their educational content. But these protections exist only under extremely limited circumstances, such as when a nonprofit institution is itself acting as an OSP,¹⁰⁰ or when traditional classroom educators affiliated with a nonprofit institution are communicating copyrighted work directly to their students.¹⁰¹ Although statutory accreditation typically protects only universities and other educators, one notable quasi-accreditation system, proposed for the European Union copyright system, would grant some of the protections afforded accredited institutions to ordinary users of OSPs as well.

Online content sharing service providers (OCSSPs) in the European Union are governed by Article 17 of the Digital Single Market Directive, a statutory scheme that diverges substantially from § 512.¹⁰² Most notably, unlike OSPs under § 512, host service providers under Article 17 must actually obtain authorization from rightsholders for the use of copyrighted works up front;¹⁰³ this means that OCSSPs must take efforts to preemptively block copyrighted works that have not been

100. Section 512(e) provides limitations on liability for “nonprofit educational institutions”—but only in their capacity as online service providers, and only to the extent that their agents (students or other “employees” of the institution) are engaging in potentially infringing activities while performing teaching or research functions. 17 U.S.C. § 512(e). Because of this, a university’s YouTube channel would therefore not qualify for protection; while “nonprofit educational institutions” are not defined, the definition of “online service provider” that is most pertinent is “a provider of online services or network access, or the operator of facilities therefor.” 17 U.S.C. § 512(k)(1)(B).

101. See Hutchinson, *supra* note 5, at 2219–21, for a discussion on how, under the TEACH Act, online educators are allowed to “perform or display copyrighted works in the course of their teaching activities without having to fulfill any substantial procedural requirements.” But when classroom educators are distributing content to an even wider audience than the immediate classroom, even the TEACH Act provides no shield. See 17 U.S.C. § 110(2)(A).

102. Article 17 covers a narrower subset of the DMCA’s online service providers, primarily major platforms such as YouTube. See Jane C. Ginsburg, *A United States Perspective on Digital Single Market Directive Article 17*, in *EU COPYRIGHT LAW: A COMMENTARY 17* (Irina Stamatoudi & Paul Torremans, eds.) (forthcoming 2021), https://scholarship.law.columbia.edu/faculty_scholarship/2678/. Some states, such as Poland, have challenged the implementation of Article 17 altogether. See Paul Keller, *CJEU Gearing in the Polish Challenge to Article 17: Not Even the Supporters of the Provision Agree on how It Should Work*, KLUWER COPYRIGHT BLOG (Nov. 11, 2020), <http://perma.cc/M7P8-NC2C>.

103. See DSM-Directive, Art. 17(2). Unlike § 512, once host service providers have been granted a license by a rightsholder, users are granted permission to post content—so long as they are not acting as commercial entities. See Ginsburg, *supra* note 102, at 16.

licensed before they appear online, thus aligning this system more with the pre-upload blocking of Content ID than the DMCA.¹⁰⁴

But despite differences in overall architecture, the user redress mechanism of Article 17 invites several parallels to the § 512 notice-and-takedown regime. Users of OCSSPs may challenge the blocking of their postings via an “effective and expeditious complaint and review mechanism” not entirely dissimilar from the counter-notification scheme of § 512,¹⁰⁵ and uses of copyrighted works resembling those covered under the U.S. fair use doctrine are also permitted.¹⁰⁶ While both Article 17 and § 512 are considered to be rather poor protectors of users’ interests,¹⁰⁷ observing any approaches taken to improve the former’s handling of online copyright infringement may prove useful in improving §512.¹⁰⁸

One suggestion to improve Article 17 was proposed by Professor Matthias Leistner. He proposes a “trusted user” system, whereby users can preemptively flag their content, during the uploading process, as a justified use of copyrighted material.¹⁰⁹ After a series of successful “flaggings” of justified use (i.e., after a user has successfully asserted fair use multiple times), the standard user can become the “trusted user.” This status would confer the benefit of “delayed takedown,” allowing the content of the trusted user to stay online following a removal request, avoiding takedown while any disputes are resolved with the rightsholder.¹¹⁰ Leistner also proposes an analogous “trusted rightsholder” designation, and conceives of an overall system in which trusted and standard users face off against trusted and standard rightsholders, with the outcome of each infringement dispute favoring the higher-ranked participant.¹¹¹ This solution, designed to improve the user redress process and provide better protections for users’ content, parallels the solution this Note proposes to resolve the issues plaguing the counter-notification.¹¹²

104. See Ginsburg, *supra* note 102, at 17.

105. DSM Directive, Art. 17(9).

106. See DSM Directive, Art. 17(7); see also Ginsburg, *supra* note 102, at 18 (noting that uses including “quotation, criticism, review, caricature, parody or pastiche” are covered under Art. 17(7)).

107. Matthias Leistner, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S.—Can We Make the New European System a Global Opportunity Instead of a Local Challenge?*, 2 ZEITSCHRIFT FÜR GEISTIGES EIGENTUM/INTELL. PROP. J. (ZGE/IPJ) 1, 60 (2020). (“Empirical data as well as a structural analysis of the fundamental incentive structure, established by both the DMCA as well as the Art. 17 system, show that the user complaint and redress mechanism alone will not be sufficient to effectively protect (‘ensure’) users’ rights and interests.”).

108. There also exists a takedown regime, although it departs from the DMCA in that it applies only to the infringing user content that failed to be preemptively blocked before upload, and once the content is taken down, it stays down. See DSM Directive, Art. 17(4); see also Leistner, *supra* note 107, at 66.

109. Leistner, *supra* note 107, at 68.

110. *Id.*

111. *Id.* at 70–71. As an illustration, if a rightsholder sent a notice to a trusted user, and if the user had flagged their content as being justified, both the notice and the flag would have to be deemed plausible (algorithmically). Then, the notice of the rightsholder would be communicated to the user, who would have a certain amount of time to respond. In this scenario, the trusted user’s material would *stay online* for the whole dispute, whether the rightsholder rejects the user’s response or not.

112. See *infra* Part III.

II. COUNTER-NOTIFICATIONS POSE A TRIPARTITE PROBLEM FOR USERS

All of the various issues identified under the counter-notification process can be categorized as a tripartite set of factors. The first two factors are user-centric: (1) The counter-notification appears to be underutilized overall, but particularly by those users with presumptively valid “fair use” defenses, and (2) it is more likely to be overutilized by pirates without a valid fair use defense. The final factor is of broader, structural applicability: (3) The timeframe of takedown poses its own issues for both users and rightsholders, who are burdened by the ten-to-fourteen day window during which contested copyright infringement claims are resolved.¹¹³ Examples featuring educational user content particularly emphasize the scope of this tripartite problem, revealing that current solutions are inadequate and that the “First Shot” resolution that this Note proposes in Part III will provide a novel contribution. Together, the three factors—applicable to both the DMCA and Content ID—help make sense of the overarching problems plaguing the counter-notification.

A. A SYNTHESIS OF THE THREE SUB-PROBLEMS OF COUNTER-NOTIFICATIONS

In May 2020, the Copyright Office published a report on § 512 (the “Copyright Office Report”). This study, which is the first comprehensive government study on the functioning of § 512,¹¹⁴ was commissioned to assess whether the primary goal of the DMCA—to accomplish, in the words of the Copyright Office Report, the balance of the success of OSPs and the greater “internet ecosystem” with protections for rightsholders—had been satisfied.¹¹⁵ The basic answer provided by the Copyright Office was in the negative: The balance has been “titled askew” for most parties involved.¹¹⁶

Despite identifying its focus as the entire internet ecosystem (that is, rightsholders, OSPs, *and* users), the Copyright Office Report’s emphasis is, in actuality, primarily on rightsholders and OSPs. The rights of users, and by extension the functionality of counter-notifications, are given less attention. Indeed, in a telling omission, none of the guiding principles of the Copyright Office Report explicitly mentions users or the counter-notification process.¹¹⁷ Notwithstanding this omission, the Copyright

113. Urban, Karaganis, and Schofield briefly identify several issues with the counter-notification process, including the timing and under-utilization issues. *See* Urban, Karaganis & Schofield, *supra* note 13, at 44–46. However, their focus does not attempt to account for the differences between (educational) fair users and pirates, and they also attempt to distinguish several other issues, such as lack of delayed takedown, that this Note addresses as part of the tripartite problem.

114. *See generally* COPYRIGHT OFFICE REPORT, *supra* note 2, at 1 (“This Report is the first full analysis of whether section 512 is working effectively in achieving its aim of balancing the needs of online service providers (‘OSPs’) with those of creators.”).

115. *Id.*

116. *Id.* For example, § 512’s requirement that OSPs adopt and reasonably implement policies to remove “repeat infringers,” 17 U.S.C. 512(i)(1)(A), has been interpreted more loosely than perhaps Congress initially intended, tilting the balance in favor of OSPs by giving them greater leeway to adopt unwritten policies. *See* COPYRIGHT OFFICE REPORT, *supra* note 2, at 3.

117. COPYRIGHT OFFICE REPORT, *supra* note 2, at 2.

Office Report incidentally highlights various data on the counter-notification process. The data on counter-notifications are derived primarily from the perspectives of rightsholders and OSPs, but from this data three distinct trends can be extrapolated, each supported in the literature, that define the distinct limitations of the counter-notification process.

First, counter-notifications appear to be under-utilized by “fair users,” those users who can assert appropriate use of rightsholders’ copyrighted materials.¹¹⁸ This underutilization seems to define the practices of both institutional and non-institutional educational content creators in particular. Secondly, counter-notifications are relatively overutilized by “pirate users,” those users who fail to validly assert fair use or other defenses.¹¹⁹ Finally, the time frame for “put back” of removed material after a counter-notification is itself a major structural flaw affecting users and rightsholders alike.¹²⁰

This Note argues that educational content creators, as quintessential fair users, face a burden that is representative of the challenges faced by the more vulnerable users under the notice-and-takedown regime. This is because these users—whether institutional or non-institutional—are more likely to be discouraged from utilizing the counter-notification procedure and because the delay in put back may frustrate their educational objectives. In the wake of the COVID-19 pandemic, few examples of fair use are more representative than education; educational content consumption has only continued to skyrocket since March 2020.¹²¹

118. Despite the existence of notable studies on the under-utilization of counter-notifications that seem to support this point, it is not directly stated anywhere in the Copyright Office Report. Indeed, none of the Report’s twelve “conclusions and recommendations” seem to directly address users who upload content to OSPs—and instead focus exclusively on OSPs and rightsholders. *See id.* at 147 (“[S]everal OSPs cite, in their comments and at the roundtables, evidence they believe highlights the significant number of inappropriate notices under the current system.”) (emphasis added). However, the Report both acknowledges that the number of counter-notifications sent may be insignificant, *see id.* at 80 n.426, and that users may generally not have enough education to properly utilize the system, *see id.* at 172 (“Several commenters emphasize the need for more materials to educate users about the section 512 notice- and-takedown process.”). While the Report implies that the lack of education has resulted in erroneous counter-notifications, the diminishing number of counter-notifications overall suggests that users—particularly the ones that would actually be concerned about protocol—are not well-versed enough to truly abuse the system.

119. The Copyright Office Report highlights, in one of its twelve conclusions, the issue of abusive counter-notifications *and* takedown notices. *See id.* at 5. The Report explicitly notes that identification issues may be encouraging the erroneous notifications—suggesting that pirates who lack a colorable fair use defense may be playing an outsize role in the abusive notices. *Id.* at 34 (“[R]ightsholders say that other developments that obscure the identity of internet users have further complicated the notice-and-takedown process and, more generally, copyright enforcement online.”). Note that the Report cites rightsholders for comment, but not users.

120. Another of the Copyright Office Report’s recommendations is to address the “both too long . . . and too short” ten-to-fourteen-day timeframe for putting back user-generated content. *Id.* at 6.

121. Indeed, because “half of YouTube viewers are there for education,” educational content is among the most relevant examples of fair use. Sean Berry, *Study Shows Half of YouTube Viewers Are There for Education*, VIDEOMAKER (Nov. 8, 2018), <https://perma.cc/RF8Y-QU63>; *see also* *New Udemy Report Shows Surge in Global Online Education in Response to COVID-19*, BUSINESS WIRE, Apr. 30, 2020, <https://perma.cc/T8PF-JU5P>.

1. Under-Utilization of Counter-Notifications by Educational Fair Users

That the counter-notification is underutilized has been widely speculated,¹²² but no scholars are truly certain whether or why this is the case.¹²³ The Copyright Office Report and the legislative history of the DMCA highlight a number of issues with the counter-notification procedure that all seem to point to the underutilization issue, including: the lack of user education on the counter-notification process,¹²⁴ intimidation due to the byzantine and confusing nature of the process,¹²⁵ and fear of the potential legal proceedings.¹²⁶

Academic studies further support the notion that counter-notifications are underutilized, in particular by those who actually have a higher chance at asserting fair use. Several of the other hypothesized reasons for underuse that have been noted—users’ lack of knowledge of copyright law,¹²⁷ the lack of user awareness that their content has been removed (due to the failure of OSPs to adequately provide notice),¹²⁸ the threat to user privacy,¹²⁹ and even potential costs associated with

122. See, e.g., COPYRIGHT OFFICE REPORT, *supra* note 2, at 33 n.150 (citing American Association of Independent Music (“A2IM”) et al., Comments Submitted in Response To U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 44 (Apr. 1, 2016)); Urban, Karaganis, & Schofield, *supra* note 13, at 118 (“Yet all available evidence suggests that counter notices are simply not used.”); Penney, *supra* note 3, at 458 (“[C]ounter-notices have been found to be very rare under the DMCA.”); Carpou, *supra* note 45, at 575 (“The data reveals that, overall, the rate of [litigation] claims stemming from takedown requests involving counter-notifications or potential § 512(f) violations has been fairly low since *Diebold*.”). But see COPYRIGHT OFFICE REPORT, *supra* note 2, at 147 n.788 (questioning the methodology of the Urban, Karaganis, and Schofield study establishing the low incidence of counter-notifications).

123. See, e.g., Carpou, *supra* note 45, at 566 (“[T]he reason for the low pushback remains unclear.”); Zapata-Kim, *supra* note 51, at 1851–52 (speculating on various reasons as to why counter-notifications are under-utilized). It is also important to note that much of the data around § 512 is simply difficult to access. See COPYRIGHT OFFICE REPORT, *supra* note 2, at 2.

124. COPYRIGHT OFFICE REPORT, *supra* note 2, at 172.

125. See 81 Fed. Reg. 78636, 78641 (Nov. 8, 2016); see also Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 254 (2015) (“Although Lenz successfully used the counter-notification process and actually pursued a suit against Universal Music Corp., this is not typically the case because most users do not know about the system, do not know about their rights under copyright law, or are too scared to pursue a lawsuit against a mass media corporation.”) (footnotes omitted).

126. See 81 Fed. Reg. 78636, 78641 (Nov. 8, 2016); Loren, *supra* note 23, at 760 (“[Required information] contents for the counter-notice will cause many individuals to pause before sending one. Even if the material is clearly not infringing, many individual users would rather forego having their material reposted than face a lawsuit.”).

127. Urban, Karaganis & Schofield, *supra* note 13, at 44; Charles W. Hazelwood, Jr., *Fair Use and the Takedown/Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 330 (2010) (“In order to exercise their rights under the put back provisions, the average Internet user must be aware of both the right to put back and their fair use rights.”).

128. Loren, *supra* note 23, at 759 (“One consequence of the largely insignificant incentive for OSPs to follow through with the counter-notice aspect of the takedown regime is that users often are unaware of the ability to send a counter-notice and may even be unaware that material they posted has been removed.”).

129. See Urban, Karaganis, & Schofield, *supra* note 13, at 45; Carpou, *supra* note 45, at 566–67 (“Indeed, § 512(g)’s requirement that users submit to the jurisdiction of the courts before they can counter-notify has resulted in at least some instances in which users provide false information in their counter-notification.”).

seeking legal advice¹³⁰—are all concerns that would likely be more heavily borne by a law-abiding educational fair user than by a pirate who likely would never seek to follow the law to begin with.¹³¹ Although there is not a wealth of data on the actual incidence of counter-notifications, various examples illustrate that both non-institutional and institutional users face hurdles that likely depress their desire to issue counter-notifications.

For the non-institutional educator,¹³² YouTube’s instructions for submitting a counter-notification are remarkably lacking in detail; one of the requirements is listed simply as “meet all legal requirements,” without specifying what those requirements might be or where to ascertain that information.¹³³ YouTube does define “fair use” after listing it as a valid reason for submitting a counter-notification, but a user has to exit the “Submit a Copyright Counter Notification” page and click through two additional links before finding a perfunctory definition of the four factors of fair use.¹³⁴ Indeed, even this perfunctory definition is completely lacking in examples of educational fair use, thus requiring users to do their own homework. Unfortunately, for non-institutional users who decide to put off figuring out the process until they are actually faced with an infringement claim, it appears that takedown notices themselves often contain little information that would help users in proceeding to rebut them.¹³⁵

Even though users may be more likely to face Content ID claims than takedown notices,¹³⁶ the possibility of erroneous claims—which must be resolved by DMCA-adjacent channels¹³⁷—can also add to user confusion. One non-institutional educator

130. See Michael Bradford Patterson, *To Speak, Perchance to Have a Dream: The Malicious Author and Orator Estate as a Critique of the Digital Millennium Copyright Act’s Subversion of the First Amendment in the Era of Notice and Takedown*, 22 J. INTEL. PROP. L. 177, 197 (2014) (“Those that wish to file a counter-notice often need to consult a lawyer to be able to do so correctly.”); Penney, *supra* note 13, at 465 (“[Eighty-one percent of] Respondents stated they would not challenge the notice because they were concerned about legal costs.”).

131. One notable reason posited by Urban and Quilter is that potential infringers may just simply move to different hosting service websites rather than waiting the ten-to-fourteen-day period for put back. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMP. & HIGH TECH. L.J. 621, 679–80 (2006). But this solution notably fails when applied to established YouTubers who run educational channels. Such users would have no incentive to abandon their channels—and would have every incentive to fight to preserve their content—if the counter-notification process were less onerous. Pirates, on the other hand, would likely have no qualms about switching OSPs.

132. The discussion that follows is also of import to lay users generally.

133. *Submit a Copyright Counter Notification*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/CK9T-JMFN> (last visited Nov. 17, 2021).

134. *Fair Use on YouTube*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/EX85-4L3L> (last visited Nov. 17, 2021).

135. Hazelwood, *supra* note 127, at 330 (discussing an example YouTube takedown notice that does not alert its recipient of their rights to pursue put back of the removed material).

136. Unfortunately, it is not really clear how much more likely it is for educational users to face Content ID claims, as it is unclear just how frequently users are incorporating the works of rightsholders who have qualified for Content ID.

137. In its description of the claim dispute process, YouTube states that you can “appeal [a rightsholder’s] decision” to uphold a claim, but this appeal is confusingly linked to a page that also

actually received a Content ID claim asserting that he had infringed an instrumental backing track that he himself had created and uploaded for teaching purposes.¹³⁸ For non-institutional educators seeking to protect their lawful content from Content ID claims and DMCA takedown notices, this labyrinth of requirements may very well discourage deployment of counter-notifications when the need arises.

Confusion over the overall counter-notification submission process does not just impact the layperson, but also hinders institutional creators of educational content as well. When New York University School of Law posted a video to the school's YouTube page—which incidentally featured intellectual property professors discussing copyright infringement disputes in music—the video was flagged by YouTube's Content ID for featuring short snippets of the songs discussed.¹³⁹ The professors initially disputed the Content ID claim, but the rightsholders rejected this dispute. The professors were fearful of responding with a counter-notification due to their uncertainty over how many violations the video had really incurred, and whether they would be faced with enough copyright strikes to disable the whole account.¹⁴⁰ Despite the fact that such an educational discussion—featuring minimal usage of copyrighted works—was presumptively fair use, the counter-notification process so baffled these seasoned lawyers that they sought to resolve the dispute through private channels.¹⁴¹

The following example is even more illustrative of the shortcomings of statutory protections for users—whether “ordinary” or institutional. Harvard Law Professor William Fisher's lecture on copyright was the victim of a Content ID claim due to the presence of a few sound recordings during an academic discussion focusing on cover versions of Jimi Hendrix's song “Little Wing.”¹⁴² What is so striking about this claim is that it was issued against an actual course lecture from CopyrightX,

discusses DMCA counter-notifications. See *Dispute a Content ID Claim*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/J5AY-D5DC> (last visited Nov. 17, 2021).

138. Another user had downloaded the educator's track, recorded their own vocals on top of it, and reuploaded it as a new version—thus leading Content ID to erroneously target the original as being the infringing version. See Paul Davids, *Craziest Copyright Strike from YouTube Ever?!*, YOUTUBE (July 3, 2018), <https://perma.cc/CF6D-KQHW>. Fortunately, this dispute was quickly resolved by the parties, though is unclear what would have happened if the dispute resolution had failed and the faux-rightsholder had actually desired to send a takedown notice.

139. *How Explaining Copyright Broke the YouTube Copyright System*, NYU LAW, <https://perma.cc/S9UN-DVBX> (last visited Nov. 17, 2021).

140. *Id.* As it turns out, a video can only have one copyright strike at a time, but apparently this was not clear at the time of the dispute.

141. *Id.* Although not an accredited institution, the Hudson Valley Bluegrass Association (HVBA) faced a very similar Content ID dispute after uploading educational lectures on the history of bluegrass to its YouTube channel. See Mitch Stoltz, *YouTube's Copyright Robots Help Sony Shake Down Educators*, ELEC. FRONTIER FOUND. (May 11, 2016), <https://perma.cc/LSS6-PN3H>. Despite featuring 30-second clips of music, Content ID flagged the videos due to the policies of Sony Music. *Id.* Like the NYU law professors, the HVBA sought to use private channels to resolve the dispute, and emailed Sony's representative directly to explain their fair use of the music. But instead of resolving the issue, Sony sought a \$500 license fee from the HVBA. *Id.* While this dispute existed completely within YouTube's private Content ID framework—and thus did not involve counter-notifications or other provisions of § 512—it speaks to the futility of the counter-notification measure in allowing educational fair users the opportunity to assert fair use after their work is taken down or blocked by rightsholders.

142. Masnick, *supra* note 15.

Harvard Law School’s massive open online course (MOOC) on copyright law.¹⁴³ That this seemingly obvious example of fair use could be the victim of a Content ID claim,¹⁴⁴ even if only temporarily, means that even accredited institutions and MOOCs are in danger when they host content on certain OSPs. Such a reality likely provides users with little incentive to engage with § 512(g).

These incidents, while anecdotal, are indicative of structural trends. Music education in particular has been a notable victim of Content ID claims and takedown requests.¹⁴⁵ Multiple YouTubers have experienced having their content blocked by rightsholders such as Universal Music Group—often regardless of the amount of the music excerpted.¹⁴⁶ A two-second guitar riff would seem to satisfy a fair use analysis, but many educational YouTubers try to avoid using material that requires interacting with the DMCA regime, for fear of facing lawsuits.¹⁴⁷

Importantly, the above examples may point to the issue being one of true *underutilization*, not merely infrequent utilization.¹⁴⁸ It is not that there are few instances

143. *Lectures*, CopyrightX, <https://perma.cc/2J63-QGE6> (last visited Nov. 17, 2021). The video lecture in question was “The Subject Matter of Copyright,” and was prepared for both CopyrightX and the law school’s general course on copyright law.

144. Professor Fisher does use over forty seconds of a few of the recordings. While this is arguably a substantial fraction of a standard-length rock song, the clips were intended to illustrate to the listener, for the purposes of a moral rights discussion, the ways in which subsequent musicians have approached the iconic intro to Jimi Hendrix’s song. See The Berkman Klein Center for Internet & Society, *William Fisher, CopyrightX: Lecture 3.3., The Subject Matter of Copyright: Music*, YOUTUBE, <https://perma.cc/GRC3-4BDC> (last visited Nov. 17, 2021). While there is no bright-line rule for the amount of a copyrighted work that can be used by a non-rightsholder for fair use purposes, the Supreme Court has recognized that “the extent of permissible copying varies with the purpose and character of the use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586–87 (1994).

145. Trendacosta, *supra* note 90. For an illustration of takedowns in the context of general education, see *Wikimedia Foundation Transparency Report/June 2017/DMCA Takedown Notices*, WIKIMEDIA, <https://perma.cc/SYL7-RWHL> (last visited Nov. 17, 2021) (detailing how, of eleven takedown notices received, fewer than one-third were granted). The Wikimedia Foundation’s mission is “to empower and engage people around the world to collect and develop educational content under a free license or in the public domain, and to disseminate it effectively and globally,” so it is likely that the invalid takedown notices it received were targeting a wider array of fair use content than just music. *Mission*, WIKIMEDIA, <https://perma.cc/762G-9LDT> (last visited Nov. 17, 2021).

146. Ernesto Van der Sar, *YouTube’s Copyright Mess Is Stifling Music Education*, TORRENT FREAK (Apr. 3, 2019), <https://perma.cc/JV2S-6N5Q>.

147. *Id.* (“[O]n paper YouTubers can ensure that their video is reinstated, but the risk is seen as too high, so they tend to avoid the process.”); Julia Alexander, *YouTubers and Record Labels Are Fighting, and Record Labels Keep Winning*, VERGE (May 24, 2019), <https://perma.cc/7TJX-U6S4> (“Independent music education channels—such as people teaching viewers how to play parts of songs or breaking down how tracks are constructed—are also struggling with record labels’ claims.”). An immediate observation surfaces—perhaps the problem really is music: (1) Content ID is particularly adept at targeting music, see Trendacosta, *supra* note 90 (“Transformative Music Content Suffers Because Content ID Disproportionately Affects Audio Material”); and (2) Content ID disproportionately handles YouTube’s copyright disputes. It is possible that, in another world without Content ID, these musical works would not be targeted with the same fervor. However, at the very least it is clear that music rightsholders are empowered under Content ID and the DMCA to target for removal any content they wish. It remains an open question how other kinds of educational content would be handled under different circumstances.

148. Of course, not every educational user has faced takedown notices. The Music Copyright Infringement Resource, sponsored by the George Washington University Law School and Columbia Law

of potential educational fair use warranting the issuance of a counter-notification, but that even under those legally permissible circumstances the process is not being used. That educational YouTubers have to turn to celebrities on Twitter to resolve takedown notices suggests that the counter-notification may in fact be an unreliable shield.¹⁴⁹

2. Excessive Percentage of Erroneous Counter-Notifications by Pirates

A second issue that is closely related to the apparent under-utilization of the counter-notification is its relative *over*-utilization for false purposes. The Copyright Office Report cited Comments from the American Association of Independent Music (“A2IM”) reporting that over 80% of counter-notifications received by the rightsholders in a separate study were erroneous.¹⁵⁰ The A2IM Comments suggest that this potential rate of erroneous counter-notifications is a sign that the counter-notification process is “much too easy” for uploaders generally,¹⁵¹ but such an assertion is not borne out by data that point to an extremely low incidence of counter-notifications relative to takedown notices.¹⁵² While it is true that one might expect high rates of infringement to lead to low rates of legitimate counter-notifications, if the process were really too easy for users writ large, one would expect a more substantial rate of legitimate *and* illegitimate counter-notifications overall. Instead, this Note suggests that the rate of erroneous counter-notifications is less likely to stem from educational fair users, who have a consistently legitimate basis to invoke the measure, and is more likely to stem from “pirates,” abusive notice-senders with a disregard for the law.

School, is a tool documenting every music infringement case since the nineteenth century—and includes various copyrighted audio clips. *Music Copyright Infringement Resource*, GW LAW BLOGS, <https://perma.cc/E6LB-H6GT> (last visited Nov. 17, 2021). Consulting the Lumen Database, there seem to be no documented instances of these institutional users having the need to field takedown notices. However, it is worth noting that this website is not a large OSP like YouTube: Not only may it fly under the radar, but the tools to expeditiously identify and remove copyrighted content are simply not there. However, one imagines if the professors started uploading lectures to YouTube on the various music copyright cases, the professors might have to familiarize themselves with the DMCA.

149. In a stunning turn of events, the copyright strike (takedown notice) that YouTuber and teacher Rick Beato received in response to one of his educational videos was resolved not by the counter-notification process, but by the power of Twitter: The strike was lifted after various famous musicians, including Steve Lukather of Toto, publicly objected and tagged the record label in question in response to Beato’s tweet about the strike. See Rick Beato, *How I Fixed My Copyright Strike Takedowns*, YouTube (Feb. 5, 2021), <https://perma.cc/HP5S-XLDN>.

150. COPYRIGHT OFFICE REPORT, *supra* note 2, at 33 n.150 (citing American Association of Independent Music (“A2IM”) et al., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 44 (Apr. 1, 2016)).

151. American Association of Independent Music (“A2IM”) et al., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 34 (Apr. 1, 2016).

152. While data on relative numbers of counter-notifications and takedown notices is limited, Reddit’s transparency report is illustrative: In 2019, the platform received 34,989 copyright notices—about 4,988 times the number of counter-notifications it received. *Transparency Report 2019*, REDDIT, <https://perma.cc/KV3W-3YAH> (last visited Nov. 17, 2021). It is unclear how many of these were § 512(c) takedown notices, which is the preferred focus of this inquiry.

As a preliminary matter, it is important to observe that there is still much too little specific data on erroneous DMCA notices in general. First, the transparency reports that document the numbers of invalid takedown notices sent to OSPs generally do not indicate whether the notices are from large-scale “copyright industries” (such as the music industry) or from individual rightsholders.¹⁵³ Second, the transparency reports do not indicate the extent to which invalid takedown notices target fair use content—let alone educational fair use content.¹⁵⁴ Analogously, it is difficult to ascertain who precisely is sending erroneous counter-notifications—that is, what percentage (if any) of these notices originate from institutional or non-institutional educational fair users—or even how many are being submitted to rightsholders from year to year overall.¹⁵⁵ Therefore, to the extent that the problem of excessive erroneous counter-notifications can be analyzed, general data on erroneous DMCA notices must be consulted.

But even in consulting existing general data, it seems apparent that connecting the problem of erroneous counter-notifications to all users is overly simplistic. Although, as of this writing, there appear to be only eight cases in which (1) a rightsholder initiated litigation in response to a user’s counter-notification, (2) the user asserted fair use as a defense, and (3) the fair use claims were actually decided on the merits,¹⁵⁶ the outcomes of these cases are illuminating. In particular, of the two cases in which the user actually prevailed, they succeeded in part under a first factor argument that they were criticizing or commenting on the work of the

153. Even Twitter’s 2019 transparency report, which documents the five rightsholders who send the most takedown notices to the platform (including Universal Music Group), does not disclose what percentage of the erroneous notices were sent by those rightsholders. See *Copyright Notices*, TWITTER, <https://perma.cc/5TN4-ZVZQ> (last visited Nov. 17, 2021). Moreover, even studies that discuss the takedown notices that copyright industries send do not seem to do a thorough analysis of the erroneous notices in particular. See generally Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 392 (2014).

154. Again, the Reddit transparency report provides a notable illustration: While it details how, for example, 0.2% of reviewed content was maintained for making a “fair use” of a rightsholder’s work, these data did *not* include the number of takedown notices actually targeting fair use content. See *Transparency Report 2019*, REDDIT, <https://perma.cc/KV3W-3YAH> (last visited Nov. 17, 2021). Even studies on erroneous takedown notices may not take into account the kinds of content being targeted. See Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 523 (2017) (“The methodology used in the [Urban, Karaganis, and Schofield takedown notices] study is sound, but there is some danger that the results could be misunderstood . . . the 4.2% of notices that were ‘fundamentally flawed’ are still quite likely to have been directed towards infringing content.”).

155. Google does not seem to indicate anything about the users who are sending erroneous counter-notifications. GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 31.

156. These cases were found in Westlaw by searching for § 512(g) litigation in which fair use was non-trivially discussed. See *TELUS Corp. v. Watson*, No. C 07-3434 VRW, 2009 WL 10703326, at *7 (N.D. Cal. Nov. 13, 2009); *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79, 96 (D. Mass. 2020); *Rosen v. Masterpiece Mktg. Grp., LLC*, No. CV 1506-629 SJO (ASX), 2016 WL 7444688, at *11 (C.D. Cal. Nov. 29, 2016); *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 45 (S.D.N.Y. 2017); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1164 (C.D. Cal. 2010); *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 414–15 (D.N.J. 2012); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 448 (9th Cir. 2020); *Hughes v. Benjamin*, 437 F. Supp. 3d 382, 390–92, 394 (S.D.N.Y. 2020). Notably, several of these cases involve YouTube, despite the fact that Content ID substantially limits the role of the § 512(g) counter-notification.

rightsholder.¹⁵⁷ And of the remaining cases where the user lost—having submitted evidently erroneous counter-notifications—the asserted purposes for their use of the rightsholder’s copyrighted work often diverged, ranging from “parody of the author” that “merely criticizes the author’s views (and not the author [or work] directly)”¹⁵⁸ to “draw[ing] attention to the unprofessional conduct of management.”¹⁵⁹

While none of these cases involved educational fair users in particular,¹⁶⁰ the users who were successful asserted purposes for their use of the rightsholders’ works that are notably listed alongside “education” in § 107 as likely examples of fair use under factor one.¹⁶¹ Contrariwise, a number of the unsuccessfully asserted purposes went far afield of any traditional examples of fair use.¹⁶² This caselaw, although very limited, suggests that erroneous counter-notifications may be less likely to originate from users such as educators, who are in a position to consistently and truthfully assert fair use, and instead may be more likely to originate from pirates or other careless users who have little concern for fair use at all.¹⁶³

Of course, a handful of cases will not on their own explain which categories of users are responsible for submitting erroneous counter-notifications. It is worth noting that YouTube rejects 66% of the counter-notifications it receives for failure to pass a “basic review” of whether the counter-notification meets all of the legal elements and provides a “sound rationale” for reinstatement.¹⁶⁴ “Erroneous”

157. See *Hosseinzadeh*, 276 F. Supp. 3d at 45 (finding that defendant’s criticism of plaintiff’s video constituted fair use); *Hughes*, 437 F. Supp. 3d at 390–92, 394 (same).

158. See *Henley*, 733 F. Supp. 2d at 1152, 1155. In discussing the defendant’s song “Tax”—which allegedly infringed Don Henley’s “Dance”—the court noted that the defendant’s song “makes no implicit or explicit reference to Henley or [the songwriter of ‘Dance’], much less ridicule them.” *Id.* at 1158. Merely mocking Henley’s viewpoints is “insufficient justification” for the use of his works, and the court ultimately argues in dicta that the song fails as either satirical or parodic fair use. *Id.*

159. See *TELUS Corp.*, 2009 WL 10703326, at *6.

160. One user offered an “educational” purpose as an ancillary justification—after asserting that his editorial choices made his infringing work transformative—but the court quickly noted that the record was “devoid” of any evidence that the user was an educator or was acting as one. See *Comerica Bank & Tr.*, 433 F. Supp. 3d at 92–93.

161. While not dispositive, “there is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107.” *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991).

162. See, e.g., *Rosen v. Masterpiece Mktg. Grp., LLC*, No. CV 1506-629 SJO (ASX), 2016 WL 7444688, at *12 (C.D. Cal. Nov. 29, 2016) (describing the purpose of the defendants’ use of the plaintiff’s photographs as being “to provide information to legitimate purchasers”) (citations omitted); *TELUS Corp.*, 2009 WL 10703326, at *6 (“Defendant . . . explains that his purpose in posting the YouTube clips was to draw attention to the unprofessional conduct of management during [internal corporate] sessions.”). Other cases asserted the more traditional “parody” justification for fair use, but even parody is a distinct subset of the overarching criticism or commentary categories.

163. As an example, the defendant in *Henley* was a politician seeking to win an election by poking fun at his political rivals using classic rock songs. See *id.* at 1148. This does not quite track with his failed defense: that he was actually seeking to parody Don Henley, the author of the songs. Such a parody, had it been the defendant’s real objective, may have constituted fair use. *Id.* at 1163–64. Another example: The defendant in *TELUS Corp.* was described as merely being an “individual,” with no apparent ties to educational services. *TELUS Corp.*, 2009 WL 10703326, at *1.

164. GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 31. While Google acknowledges receipt of invalid takedown notices, it does not disclose what percentage of its overall takedown notices are invalid.

counter-notifications, therefore, may still be issuing from either ill-intentioned “pirates” or merely ill-informed users. However, in an online survey conducted by Jonathon Penney, only 34% of respondents indicated that they would “take steps to legally challenge” a takedown notice—even if they believed it was wrong.¹⁶⁵ This level of hesitation in sending counter-notifications appears to be paralleled by a general hesitation in disputing Content ID claims as well.¹⁶⁶ Whether this reluctance stems from genuine fear of legal reprisal or from a lack of desire to pursue put back, it does not seem to comport with the behavior of either pirates or careless users. It suggests that, at the very least, the bulk of erroneous counter-notifications are *not* coming from established educational YouTubers concerned with avoiding the consequences of copyright disputes.

However, some rightsholders, particularly those involved in the music and movie industries, still fail to distinguish between categories of users in discussing the erroneous counter-notifications they receive.¹⁶⁷ Moreover, in 2015 the Motion Picture Association of America asserted to the Copyright Office not only that sending counter-notifications is not “onerous” for any users, but that takedown notices

165. The survey was conducted pursuant to crowdsourcing platform that has been “validated” by empirical studies. See Penney, *supra* note 13, at 436 n.110 (citing Gabriele Paolacci & Jesse Chandler, *Inside the Turk: Understanding Mechanical Turk as a Participant Pool*, 23 CURRENT DIRECTIONS PSYCH. SCI. 184, 186 (2014)). A further result of this survey: “A full 71% were also unlikely to take actions inconsistent with the legal directive embodied in the notice, such as re-sharing or re-posting targeted content” *Id.* at 477. In a concrete example of non-institutional user reluctance, the 3D printing services company Shapeways reported in its 2018 transparency report that one user submitted an ultimately successful counter-notification primarily to avoid triggering the company’s repeat infringer policy—and explicitly allowed for the material to be removed from the platform, so long as the strike against their account was removed as well. 2018 Transparency Report, SHAPEWAYS, <https://perma.cc/M33C-MAF9> (“The user counternoticed with a message that they believed that the accusation was baseless, but that they did not want to expose themselves to litigation costs by fully challenging it.”). Unfortunately, it is not clear whether this user was an educational fair user. It is also unclear if these situations are truly analogous for institutional educational YouTubers as well.

166. A few non-institutional educational YouTubers like David Bennett have described reluctantly attempting to forego the use of copyrighted works altogether in their uploaded content. These users seemingly seek to avoid pushing back against infringement claims, despite finding that “dancing around” copyright law is “annoy[ing]” and frustrating to their educational purpose. See David Bennett Piano, *How I Deal with Copyright Strikes | Q&A*, YOUTUBE (May 25, 2019), <https://perma.cc/35D5-BYHS> (describing YouTube educators’ general frustration at receiving copyright claims on educational content). “Red,” who produces weekly educational videos on history, literature and mythology as one half of Overly Sarcastic Productions, asserts that YouTube is “passively encouraging” users to reupload videos without allegedly infringing content, but believes that this is “the simplest [option].” Email from Red to Gersham Johnson (Apr. 4, 2021) (on file with author). Red’s observation is borne out by YouTube’s first-ever Copyright Transparency Report, which revealed that “[f]ewer than 1% of all Content ID claims made in the first half of 2021 have been disputed.” See *Copyright Transparency Report*, YOUTUBE 6, <https://perma.cc/XHH8-V67Z> (last visited Jan. 16, 2022).

167. Daniel Etcovitch, *DMCA § 512 Pain Points: Music and Technology Industry Perspectives in Juxtaposition*, 30 HARV. J.L. & TECH. 547, 564 (2017) (“[Music industry figures’] claim is that content uploaders know about the lawsuit requirement and know that copyright owners cannot possibly file a lawsuit for every infringement, so they have a clear incentive to send baseless counter-notices to get their content back online.”).

themselves are rarely fraudulent.¹⁶⁸ But the claim that rightsholders rarely send fraudulent takedown notices is contrary to the various studies, appellate briefs, and news reports on DMCA notices¹⁶⁹—and is of dubious veracity whether regarding general rightsholders or large rightsholders like those belonging to the MPAA specifically.¹⁷⁰ The MPAA’s own data on erroneous counter-notifications also seem to contradict their other claim: that it is “too easy” for all users to send counter-notifications.¹⁷¹ Moreover, there are several independent educators on YouTube who lawfully produce educational content and commentaries about (and sometimes incorporating) copyrighted music and film—and yet still face erroneous claims from rightsholders.¹⁷²

168. See Motion Picture Association of America, Inc., Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 20–21 (Apr. 1, 2016) [hereinafter MPAA Comments].

169. Compare *id.* (“There is no evidence of a widespread problem of fraudulent, abusive or unfounded takedown notices.”), with Caroline Womack, Note, *Revenge of the Retaliatory Takedown: Let’s Plays, Fair Use, and an Unstable DMCA*, 37 QUINNIAC L. REV. 757, 783–92 (2019) (discussing various instances of retaliatory and fraudulent takedown notices); Brief of Amici Curiae Automatic Inc. et al. Supporting Plaintiff-Appellee-Cross-Appellant Lenz, *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (Nos. 13-16106 & 13-16107), 2013 U.S. 9th Cir. Briefs LEXIS 49 (discussing various instances of abusive takedown notices faced by the amici curiae); and C. Fisher, *YouTube Sues User Who Extorted Others Through Fake Takedown Requests*, ENGADGET (Aug. 20, 2019), <https://perma.cc/ZF8B-RHGN> (discussing how a private individual repeatedly sent erroneous takedown notices to three established YouTubers, as part of a scheme to extort money).

170. Google directly acknowledges that they “find a large number of [takedown] requests represent a misunderstanding of the process or sometimes even outright abuse,” see GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 30, although it is unclear where any of the takedown notices originated—whether from “copyright industries” like MPAA or from individual creators. However, there have been documented instances of major rightsholders sending invalid or ultimately unsuccessful takedown notices as well. See, e.g., Eric Bangeman, *Viacom: We Goofed on Colbert Parody Takedown Notice; Case Dismissed*, ARS TECHNICA (Apr. 23, 2007), <https://perma.cc/HT87-7UXQ>; Greg Sandoval, *Warner Bros. Denies Abusing DMCA in Hotfile Case*, CNET (Nov. 14, 2011), <https://perma.cc/24EL-BMPL> (“In court documents, Warner indeed acknowledged sending erroneous takedown requests to Hotfile. The studio’s managers also revealed they did not eyeball every piece of content they claimed was infringing but instead relied on automated systems to identify alleged violations.”).

171. In a six-month period in 2013, MPAA members sent takedown notices for more than 13 million links directly to site operators, and received only *eight* counter-notifications. MPAA Comments, *supra* note 168, at 21. Though these were likely § 512(d) takedown notices, not the OSP-centric § 512(c) notices at the center of this Note, these data are nonetheless revealing.

172. Adam Neely, one of the most popular of these educators, faced a manual copyright claim from music publisher Warner Chappell for a video in which he was commenting on the “salient musical aspects” of two songs involved in a copyright dispute. See Adam Neely 2, *Warner Music Claimed My Video for Defending Their Copyright in a Lawsuit They Lost the Copyright For*, YOUTUBE (Feb. 6, 2020), <https://perma.cc/5T4X-DGWX> (discussing the manual copyright claim, which issued through YouTube but was not an automated Content ID claim). Remarkably, while the claim asserted that Neely had used the melody of the song owned by Warner Chappell, not only did that melody not appear in the video, but the musical passage that the claim highlighted was actually from the opposing party’s composition. See *id.* While it is unclear how this dispute was ultimately resolved, it seems that even large rightsholders are capable of erroneous takedown notices and copyright claims. Cf. Kastrenakes, *supra* note 9 (“YouTube is incentivized by law to work with copyright owners once it’s received a claim, which puts video creators at a disadvantage when they try to prove fair use. That can make it hard for YouTubers to make educational content that involves breaking down songs or movies, since they risk the videos being taken down . . .”).

Regardless of the “true” number of invalid takedown notices or counter-notifications, many commentators and OSP transparency reports seem to agree: It is likely not the case that it is “too easy” to file counter-notifications.¹⁷³ Even if it is too easy for *some* users, it is likely too easy only for those users who are unconcerned about lacking a legitimate or fair use basis for their content.¹⁷⁴ Indeed, there has been special attention paid to “pirate” (repeat offender) counter-notification senders from foreign jurisdictions like Ukraine, who may feel especially immune from the reach of the DMCA.¹⁷⁵ Even if the majority of counter-notifications are indeed erroneous, it remains unclear why there are so few of them, unless it is users who either lack the requisite knowledge or have reason to fear legal reprisal who are avoiding the process. Indeed, some of the very same requirements that likely deter educational fair users—i.e., the requirement of identification—may also be poor bars for pirates, who can just submit fake information, particularly because there is no identity verification in the DMCA.¹⁷⁶

3. The Chilling Timeframe

The final major and distinct issue posed by counter-notifications is the structural result of the ten to fourteen day “put back” time-period in which a user’s material is removed from an OSP before a counter-notification is successfully sent. Because user issuance of counter-notifications is unlikely, once user content is removed, it is unlikely to be put back. The put back window itself may therefore serve as a deterrent to issuing counter-notifications.¹⁷⁷ But the put back timeframe also poses its own issues: It affects users broadly in the sense that their individual expression is limited, or “chilled,” especially with regards to time-sensitive information.¹⁷⁸ This

173. At minimum, other transparency reports establish that the number of counter-notifications is dwarfed by the number of takedown notices. For example, Twitter reports that, between July and December 2019, it received nearly 151,000 takedown notices. This is about twenty-three times more than the number of counter-notifications it received during the same period. *See Copyright Notices*, TWITTER, <https://perma.cc/V2L7-U245> (last visited Nov. 3, 2021). But again, these numbers alone do not elucidate whether the number of counter-notifications corresponds to the rates of non-infringement; it only serves to highlight that the process does not at all inspire the same usage.

174. In explaining his reasons for not disputing Content ID claims on his educational videos, Rick Beato, who has over two million subscribers, simply said, “because I don’t want to have my channel taken down . . . you get three [copyright] strikes and that’s it.” Rick Beato, *I Got My First Copyright Strike . . . I’m Pissed*, YOUTUBE (Feb. 3, 2021), <https://perma.cc/B9RJ-XDRR>.

175. Urban, Karaganis & Schofield, *supra* note 13, at 46.

176. Elnar Mukhamediarov, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 2 (Apr. 1, 2016) (“There is no identity verification in the case of DMCA counter-notifications, which means that users can submit fake information and get away with it.”).

177. Due to the small number of successful counter-notifications, it is statistically unlikely for a user to see their content reposted. Therefore, the put back window itself may serve as a deterrent. *See* Mozilla, Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 8, 2016, Notice of Inquiry at 4 (Feb. 21, 2017) (“The group who are most unfairly disadvantaged by the inaccessibility of their content are those who regularly attempt to take advantage of their fair use rights, perhaps as part of a business or a hobby. Such people can find themselves in receipt of a large number of DMCA notices, and have to take the time and effort to challenge each one.”).

178. Urban, Karaganis & Schofield, *supra* note 13, at 128 (“The ten-day waiting period is routinely criticized for jeopardizing expression, especially time-sensitive expression.”).

is not only an issue for users whose content is removed, but also for rightsholders, who have a very limited time to respond to counter-notifications.¹⁷⁹ Not only does the timeframe issue affect users and rightsholders alike—in drastically different ways—but it may also be the most pressing issue for both.¹⁸⁰

It is unclear if educational content users are especially affected by the timeframe. It may be the case that the users most vulnerable to the effects of delayed put back are news reporters, whose work loses value exponentially over short periods of time.¹⁸¹ Regardless, the current delayed put back issue is a distinct and present problem that defines the efficacy of the counter-notification mechanism—and undoubtedly affects fair use more broadly.¹⁸²

B. WHY CURRENT PROPOSED SOLUTIONS ARE INADEQUATE TO RESOLVE THE TRIPARTITE PROBLEM

In its Report, the Copyright Office suggested a number of potential solutions to improve the notice-and-takedown system. While some of these solutions may marginally improve the counter-notification process, they are unlikely to substantially resolve the totality of the tripartite problem highlighted in Part II.A.

Both the Copyright Office Report and commentators have suggested some private form of alternative or online dispute resolution (ODR) that could precede the arduous litigation aspects of the counter-notification process. While a preliminary ODR may have several benefits—such as providing a private and less expensive forum to resolve infringement disputes before the DMCA is invoked—it is unclear if such a scheme is even permissible under the current DMCA.¹⁸³

More importantly, it is unclear if users would be in a better position to fight the potential takedown of their material in such negotiations. A non-institutional educator on YouTube is unlikely to have the legal acumen anywhere near that of a Sony or a Universal Music Group, for example; it is unclear what “good faith” negotiations would even look like under these circumstances; and it is unclear

179. COPYRIGHT OFFICE REPORT, *supra* note 2, at 6 (“Ten to fourteen days is both too long for legitimate speech to be blocked, and too short for a rightsholder to realistically prepare and file a federal lawsuit to prevent the return of infringing materials.”).

180. *Id.* at 159 (“[A] timeframe viewed as too long by some participants was seen as unacceptably short by others.”).

181. *Id.* at 33 n.153. Indeed, Red describes this as being less of a problem for her Overly Sarcastic Productions channel, but only because they “upload regularly and schedule in advance so there’s time to resolve any claims or issues.” Email from Red to Gersham Johnson (Apr. 4, 2021) (on file with author). It is unclear if this is the feasible reality for all, or even most, educational users.

182. The doctrine of fair use applies to news reporting on timely content. 17 U.S.C. § 107.

183. It would likely be permissible to utilize ODR before a video is uploaded to address *ex ante* blocking by Content ID. The concern is if ODR would actually delay the regular notice-and-takedown process. See Tarbell, *supra* note 34, at 50 (noting that rightsholders might bring suit to allege that a grace period for online dispute resolution might “violate [OSPs’] duties to act expeditiously in removing or disabling access to the allegedly infringing material”).

whether rightsholders would still be able to opt for takedown if ODR fails.¹⁸⁴ While it is true that institutional users are more likely to have access to the legal resources and knowledge necessary to succeed in ODR, at the end of any negotiation the rightsholder still has the substantial sword of the takedown notice, whereas the user only has the porous shield of the counter-notification.¹⁸⁵ Finally, because a positive ODR experience would likely necessitate the “manual review of every single claim” to ensure good faith negotiations, this solution may prove impracticable.¹⁸⁶

The Copyright Office has also proposed providing educational materials and standardizing counter-notification forms so that users will have a better sense of how to approach the process.¹⁸⁷ This solution will likely work to directly resolve the “lack of knowledge” issues that have been reported, but it will not solve the issues of intimidation that arise when users submit personal information and have to submit to a jurisdiction for a potential lawsuit after filing a counter-notification. Nor will this solution address the delayed put back issue affecting users and rightsholders alike. While Urban, Karaganis, and Schofield propose temporarily redacting names from counter-notifications (inasmuch as that information is *public*), this modification does not change the reality that, by sending counter-notifications, users still face the threat of a lawsuit—whether substantial or not.¹⁸⁸

Urban, Karaganis, and Schofield also propose immediate put back of user content in response to “valid” counter-notifications, but it is unclear how this solution will work to resolve intimidation issues.¹⁸⁹ And it is unclear how this solution will actually work in practice: Who determines whether a counter-notification is “valid,” and how long does that validation process take? For an OSP like YouTube, which

184. Although there is an alternative dispute resolution option under Article 17, *see* DSM Directive, Art. 17(9), it provides a poor illustration of the resolution process: As of November 15, 2021, only seven countries have implemented Article 17. *DSM Directive Implementation Tracker*, NOTION, <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879>. Under the DMCA, Scott A. Tarbell suggests that § 512(f) fines for misrepresentation could apply to the online dispute resolution process, but the subjective standard of good faith required may be a poor shield. Tarbell, *supra* note 34, at 53 (suggesting that *Rossi* and *Lenz* be overruled to establish an objective standard of misrepresentation that would benefit ODR).

185. This disparity alone may continue to dissuade users from pursuing counter-notifications, even under an ODR regime. Moreover, it is not always easy for users to even identify who the proper contact for dispute resolution will be. While some providers clearly give out contact information of the rightsholders, *see Counter Notification*, VERIZON MEDIA, <https://perma.cc/7L8L-25SZ> (“[I]n most circumstances, we will provide you with contact information.”), others like YouTube may not always make it clear. *See* Rick Beato, *I Got My First Copyright Strike . . . I’m Pissed*, YOUTUBE (Feb. 3, 2021), <https://perma.cc/B9RJ-XDRR> (discussing the inability of users to locate a rightsholder asserting a takedown notice).

186. Tarbell, *supra* note 34, at 50; *see also* COPYRIGHT OFFICE REPORT, *supra* note 2, at 172.

187. COPYRIGHT OFFICE REPORT, *supra* note 2, at 158; *see also* Asp, *supra* note 19, at 781 (“[Counter-notification] information should be standardized by the Copyright Office to promote consumers receiving a base level of knowledge.”).

188. Urban, Karaganis & Schofield, *supra* note 13, at 132. As discussed *supra* Part II.A.2, the incidence of DMCA-related litigation is not actually enormous, but users do not necessarily understand this.

189. *Id.* at 128.

received over 150,000 counter-notifications in 2017, this validation-before-put-back measure may take even longer than the current put back window.¹⁹⁰

A few commentators have alternatively proposed the implementation of delayed takedown, such as by amending the DMCA to allow users advance notice of takedown notices.¹⁹¹ This solution would enable each user the opportunity to provide a sworn affidavit of non-infringement, which would then allow the user's material to remain on the OSP.¹⁹² However, this affidavit of non-infringement is astonishingly easy to abuse, and one commentator's fix for this potential abuse—punitive damages to the individuals who “prevail in court”—may require rightsholders to regularly go to court over takedown notices.¹⁹³ This is not something that happens often in the present atmosphere,¹⁹⁴ and it seems that encouraging more litigation is an unhealthy option. While proponents of the affidavit of non-infringement proposal may argue that the mere *threat* of punitive damages will be sufficient to deter its abuse, if users are still overly deterred from using counter-notifications in general, it is unclear whether they will even be motivated to avail themselves of the affidavit option to begin with.

Finally, none of the current proposed solutions to the counter-notification process will be effective unless they take into account the effects of an OSP's intermediary business models.¹⁹⁵ As mentioned in Part I.B, Content ID allows rightsholders to block videos without initial recourse to the DMCA, which means that rightsholders cannot even assert counter-notifications upfront.¹⁹⁶ An effective update to the counter-notification process must therefore be equally effective in handling both the DMCA and Content ID.

190. See GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 31. The number of counter-notifications received is larger than reported by many other OSPs, but this number stands in contrast to the over 2.5 million takedown notices received in the same period. See *id.* at 30.

191. Joel D. Matteson, *Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How To Fix It*, 35 SANTA CLARA HIGH TECH. L.J. 1, 15 (2018).

192. *Id.* at 16.

193. *Id.* at 17.

194. In 2017, YouTube received about 150,00 counter-notifications. See GOOGLE TRANSPARENCY REPORT, *supra* note 31, at 31. But recall that this number was in response to over 2.5 million takedown notices, meaning that only 6% of takedown notices elicited a response. See *id.* at 30. Moreover, two-thirds of the counter-notifications were invalidated by YouTube for failing to contain all of the required elements or for being unjustified. See *id.* at 31. Therefore, it is likely that many rightsholders who submit takedown notices will have little reason to pursue litigation, mainly because users often fail to invoke the counter-notification, but also because takedown notices are inherently less costly. See Loren, *supra* note 23, at 760 (“In fact, a copyright owner who is attempting to use the takedown notice as a way to obtain removal of material that is clearly noninfringing will likely not file suit. That likelihood, however, may be lost on an individual who faces having to reveal his or her identity and sign a document consenting to jurisdiction in order to seek reposting.”).

195. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 506 (2016) (“[U]nder the DMCA, counter notices should be available in theory and in practice, regardless of the intermediary's internal business model.”).

196. *Id.* at 514 (“[A]n alleged infringer must dispute a Content ID claim before availing herself of the counter notice application.”).

III. THE SOLUTION: THE “FIRST SHOT” COUNTER-NOTIFICATION

Because of the myriad issues plaguing the counter-notification process, this Note proposes a solution: “the First Shot.” In addition to the standard counter-notification procedure, users should have recourse to a preemptive shield that allows them to notify the rightsholder—before either *ex ante* blocking by Content ID or *ex post* removal by takedown notice—that their copyrighted work is being incorporated by the user as an educational fair use. The First Shot would be most efficient as a statutory enactment (an addendum to § 512(g)), so that YouTube and other OSPs do not design systems that deliberately fail to comply.¹⁹⁷

A. THE FIRST SHOT: A BREAKDOWN

1. The “User Report” and “Automated Analysis”

In order to be eligible to participate in the First Shot addendum to the counter-notification, a user is first required to fulfill a basic “threshold test” established by the respective OSP. For non-institutional users, such a threshold test could be the simple requirement that the user has not faced any infringement claims in the past six months. For institutional users, who are more likely to be primarily producing fair use educational content, simple proof of their status as an accredited institution could suffice as a threshold test. Upon clearing this threshold, to successfully submit a First Shot an eligible educational user must first upload a “User Report” alongside the content that they are attempting to upload onto an OSP. Failure to upload a User Report will bar the user from issuing a First Shot for the particular uploaded content, but in the alternative the user may revert to utilizing the normal counter-notification procedure.

First, the User Report—which should be a digital form readily available from the OSP—will require each eligible content creator to declare why takedown would be improper; that is, the user will be required to consider educational fair use at the outset.¹⁹⁸ In a User Report, a user can point to various aspects of the content to demonstrate that they have generally satisfied the four factors of fair use: from the

197. This is not the first “reverse notice and takedown regime” to be proposed in the DMCA context. See Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime To Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1032 (2007) (“Under our proposal, any confrontation between the user community’s efforts to make non-infringing uses of material available to the public on a website and the copyright owners’ technological fencing under section 1201 could elicit a demand from the user group for a right to a limited bypassing of [technological protection measures] for legitimate purposes.”). Reichman’s scheme applies only to the anti-circumvention measures of § 1201, *not* to the § 512(c) notice and takedown regime that is the focus of this Note. Nevertheless, it is promising that the notion of users having the ability to preemptively defend their use of copyrighted materials is in active consideration.

198. If the user has not incorporated any copyrighted material at all into their uploaded content, there would appear to be little incentive to issue a First Shot.

duration or amount of a copyrighted work used (factor three of fair use),¹⁹⁹ to whether the work is used for a transformative (educational) purpose (factor one of fair use).²⁰⁰

Requiring a preliminary consideration of fair use will likely expose users to § 512(f)'s misrepresentation penalties, should they fail to have a subjective good faith belief that their use was fair.²⁰¹ Therefore, because of the difficult nature of determining educational fair use—and fair use generally—OSPs like YouTube should provide within the User Report form a simplified description of the four factors of fair use, with a clear emphasis on factors one and three.²⁰² To aid the layperson or non-institutional user unfamiliar with copyright law, aspects pertaining to the four factors could be presented in a checklist within the Report. Moreover, instructions could also be provided for the User Report that highlight that fair use is often invoked for nonprofit educational uses,²⁰³ alongside examples of user-generated educational content that are likely to satisfy a fair use analysis.

Second, and in tandem with their consideration of fair use, in their Report each eligible user would be required to confirm, under penalty of perjury, whether they are an institutional or non-institutional content creator. An institutional designation, which could be confirmed if the user in question is affiliated with and acting on the behalf of universities or other accredited educational institutions,²⁰⁴ may increase the presumption that the use was fair.²⁰⁵ But for institutional users and lay content

199. See Trendacosta, *supra* note 90 (noting that fair use has no bright-line rules for the amount of a copyrighted work that can be used, but that Content ID effectively only allows for “a few seconds” of music to be used under factor three).

200. First, as long as the educational use is sufficiently transformative, its commercial value need not be determinative of fair use. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 219 (2d Cir. 2015) (“Many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.”). Second, should this proposal be expanded to fair users beyond the educational context, similar principles of fair use will apply.

201. See 17 U.S.C. § 512(f); see also *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2016) (requiring a subjective good faith belief in issuing notices and counter-notifications). Because the standard is “subjective,” so long as the user actually harbors the belief, no liability will ensue—even if it is an unreasonable belief. However, it may be the case that this standard will become more exacting if it becomes a widespread requirement for all users, beyond the Ninth Circuit.

202. While factors one and four often dominate the analysis, in the case of educational fair use, users will undoubtedly need to contend with factor three, as there are no bright-line rules for how much of a copyrighted work is necessary to effectively teach. Moreover, factor four's focus on the market effects of the educational use may be harder to analyze by institutional and non-institutional users alike, and will nonetheless likely interact directly with factor one. See *Authors Guild*, 804 F.3d at 219 (“[W]e see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use.”).

203. 17 U.S.C. § 107(1). YouTube already provides information on fair use for counter-notifications, but it is buried behind multiple sets of links. *Submit a Copyright Counter Notification*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/59CR-YKYD> (last visited Nov. 5, 2021).

204. The “institutional” designation would apply to an institution like the Berkman Klein Center for Internet & Society—which runs its own YouTube channel—because it is affiliated with Harvard University, an accredited institution.

205. A full consideration of fair use must not stop at the kind of user, but must also consider the nature of the use as well. See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1264 (11th Cir. 2014)

creators alike, a satisfactory explanation of a presumptively valid educational fair use defense would still be necessary.

Finally, the User Report should also be accompanied by an “Automated Analysis,” an algorithmic process proposed by this Note that will serve as an addition to Content ID, to give an independent fair use assessment. Commentators such as Asha Velay have previously proposed a fair use analysis to accompany Content ID, with a particular emphasis on the first factor.²⁰⁶ As the first factor’s emphasis on the transformative nature of the use tends to favor the defendant-user, an automated algorithm designed to detect educational uses that appear to satisfy the first factor could help YouTube assess the validity of a User Report.²⁰⁷ The realities of Content ID would likely require this algorithm to consider the third factor as well, as some commentators have noted that Content ID currently substantially limits the amount of copyrighted content that can be borrowed by users, particularly educational content creators who utilize audio tracks.²⁰⁸

Regardless of the fair use factors considered, the actual form that such an algorithm takes could vary. Velay mentions algorithms that could potentially detect “a high level of distortion combined with brief clips of copyrighted material” (for example a YouTube video featuring brief clips of copyrighted music in the background).²⁰⁹ Other commentators suggest “training” algorithms to recognize the biases they introduce by studying the characteristics of content they correctly identify versus the false positives they produce.²¹⁰ Indeed, YouTube is in the process of updating Content ID’s existing system to better detect copyright issues at upload.²¹¹ While this alteration appears to be minor—and it remains unclear exactly how or if

(“GSU is a nonprofit educational institution. While this is relevant, our inquiry does not end there: we must consider not only the nature of the user, but the use itself.”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 921–22 (2d Cir. 1994) (“A court’s focus should be on the use of the copyrighted material and not simply on the user, although it is overly simplistic to suggest that the ‘purpose and character of the use’ can be fully discerned without considering the nature and objectives of the user.”) (emphasis removed).

206. Velay’s proposal also suggests a potential human-review component, but the Automated Analysis itself would just be an algorithm. See Velay, *supra* note 44, at 75–76 (“The screening test can also be implemented through educational measures, such as a ‘fair use’ analysis bootcamp similar to the copyright bootcamp YouTube makes accused infringers watch.”). Any subsequent human review would be only of the Automated Analysis in tandem with the User Report: This is the First Shot, described *infra* Part III.A.2.

207. The Automated Analysis will only aid in an assessment of a User Report to the extent that the user is incorporating a copyrighted work whose reference file is stored in Content ID. Because 2% of YouTube’s many infringement disputes are handled outside of Content ID, and because it is unclear how many of these disputes concern educational content, the Automated Analysis’s true efficacy is speculative—although in all likelihood it will be high.

208. This limited timeframe is especially burdensome on educators who seek to create musical content incorporating copyrighted music. See Trendacosta, *supra* note 90 (“Content ID only determines whether a few seconds of a video matches a few seconds of something in its database. So while fair use has no bright-line rule about how much a creator can or cannot use, Content ID does. And it’s just a few seconds.”).

209. Velay, *supra* note 44, at 80.

210. Lester & Pachamano, *supra* note 74, at 69.

211. Jonathan Bailey, *YouTube Testing Copyright Checks During Upload*, PLAGIARISM TODAY (Mar. 17, 2021), <https://perma.cc/P7GH-M2WE>.

the new process is applying fair use factors—the mere fact that YouTube is open, however marginally, to updating Content ID to better serve users is promising.

While the general feasibility of these specific suggestions is beyond the scope of this Note, commentators seem to agree on the importance of increasing Content ID’s ability to handle fair use analyses, so as to avoid false positives. Under the First Shot regime, an updated Content ID algorithm should be used in concert with User Reports to establish a preemptive counter-notification. But importantly, such an Automated Analysis could also, in theory, be incorporated directly into the current Content ID regime, regardless of whether the First Shot is fully incorporated.

2. The First Shot: A Preemptive Counter-Notification

A First Shot—the combination of the User Report and the Content ID Automated Analysis—is effectively a preemptive counter-notification that should encourage users to avail themselves of their § 512(g) protections. A First Shot requires that: (1) during the content upload process the user submit a User Report, via the OSP’s designated agent,²¹² to the rightsholder; and (2) that this Report be accompanied by an Automated Analysis sent by Content ID. Unlike the traditional counter-notification, the user need not at this stage submit their full identification information nor consent to the jurisdiction of a federal court; simply identifying their challenged material, confirming the veracity of the notice (under penalty of perjury),²¹³ and providing their signature should suffice.²¹⁴ Therefore, unlike the counter-notification, the First Shot will not be reviewed by the OSP’s designated agent for procedural missteps like a misspelled address. Some OSPs do not forward procedurally flawed notices,²¹⁵ but the First Shot is an active step by the user to assert fair use; succinctly fulfilling the four statutory requirements is not the point, and any review by the OSP would only be a substantive assessment of the fair use assertions.²¹⁶

To be clear, issuing a single First Shot on its own will not provide any additional benefits to the user. It is just like a counter-notification in that there is no guarantee that the user’s content will not get blocked by Content ID or taken down by a

212. This process of delivering a First Shot to a rightsholder is analogous to the current process for delivering a counter-notification. See 17 U.S.C. 512(g)(3).

213. It is arguable whether users should still be required to submit to a federal jurisdiction—so as to prevent the threat of litigation from being toothless. However, even if users in general are subject to this requirement, “Fair Users,” discussed *infra*, may still be exempt.

214. This Note proposes that only 17 U.S.C. §§ 512(g)(3)(A)–(C) need to be complied with at the First Shot stage. The First Shot would still be subject to the § 512(f) good faith requirement.

215. See TUMBLR, COPYRIGHT AND TRADEMARK TRANSPARENCY REPORT (2019), <https://perma.cc/6W5K-V5DZ> (“Tumblr notifies the user that their counter-notice is invalid.”).

216. Thus, “incompleteness” of a First Shot will be adjudged based on the four factors of § 107 (fair use), not the four elements of § 512(g) (the counter-notification). While this Note does not propose a definitive methodology for determining incompleteness, it is possible to imagine non-institutional users being required to highlight aspects of all four factors of fair use in their Report, even if only from a checklist. Due to their greater resources and experience, institutional users may be less likely to inaccurately consider fair use than their non-institutional counterparts. As such, it may make sense to grant these ostensibly more sophisticated users the privilege to not declare all four factors.

rightsholder’s DMCA notification. Rather, the First Shot allows eligible educational fair users to “skip the line”: If a rightsholder were to ultimately send a takedown notice (thus resulting in the removal of the user’s uploaded content), a user who has issued a First Shot need only “reaffirm” it to the OSP’s designated agent to trigger the standard counter-notification mechanism. Similarly, if a video is slated to be blocked before upload, the First Shot signals that the user intends to dispute the Content ID claim.²¹⁷ If the user is ultimately victorious—i.e., if the rightsholder fails to rebut the First Shot and keep the user’s content down—the First Shot is thus deemed a “success.”²¹⁸

All users must submit three successful First Shots before they achieve the designation of educational “Fair User,”²¹⁹ which provides two new benefits: that takedown will not occur automatically after receiving a notice from a rightsholder and blocking will not occur automatically after content is identified by Content ID. Instead, after three successful First Shots, a Fair User will be able to have a review period for the OSP to assess whether takedown or blocking are proper *before* the material is disabled—whether by online dispute resolution with the rightsholder or via an impartial review by agents of the OSP. The First Shot is therefore, broadly speaking, a substitute for issuing a standard counter-notification. By extension, because it is issued during the upload process, the First Shot is in effect a substitute for disputing a Content ID claim.

All other users may continue to participate in the regular counter-notification procedure, but the First Shot is intended to be a privilege for educational fair users. But even amongst educational fair users, the benefits of the First Shot mechanism only accrue to those who successfully employ it. Users who are unsuccessful at issuing a First Shot will not achieve the “Fair User” designation at all and will receive none of the benefits of attempting to issue a First Shot. Moreover, an eligible educational fair user who unsuccessfully issues *three* First Shots should be banned from issuing another for a limited period, depending on whether they are institutional.²²⁰ Finally, to ease administrative burden, an unsuccessful First Shot cannot be followed by a regular counter-notification for the same content. The First Shot is therefore an additional functionality of § 512(g): A preemptive shield to be used in lieu of the counter-notification, and one that only provides benefits to the users who can consistently and honestly execute it.

217. Note that the First Shot *only* applies to the blocking of videos: Other Content ID processes such as demonetization may be able to proceed undisturbed.

218. For a more in-depth discussion of the rightsholder’s response, see *infra* Part III.A.3.

219. Due to the nature of the User Report, which requires the user to declare whether they are institutional, an institutional user will likely fare better in submitting First Shots, and ultimately becoming Fair Users. But to what extent they will be more successful is still fact-dependent.

220. That is, the user will lose their eligibility. Institutional users should face a longer ban, as they are more likely to be successful in advancing First Shots anyway.

3. The Rightsholder's Response and User's Reply

Once a rightsholder receives a First Shot, she has two choices: (1) allow the user to maintain the material on the OSP, or (2) proceed with either the blocking or takedown of content. Under the First Shot mechanism, a rightsholder's response will ultimately work to determine if the First Shot is a "success" or a "failure." If a rightsholder issues no response, the First Shot is automatically considered a success. This success is then tabulated as either the first or second or third of the three required First Shots to achieve "Fair User" status. If the user already has a Fair User status, then no added benefit accrues to the user.

On the other hand, if the rightsholder issues a takedown notice or the video was preemptively blocked by Content ID before upload,²²¹ four outcomes may result (depending on the status of the educational user). For users lacking the Fair User status, either: (1) the user concedes and the material is immediately taken down (or is never uploaded) or (2) the user reaffirms the First Shot and the rightsholder is free to sue as usual (with the content remaining disabled until resolution).²²² For users who have already attained Fair User status, either: (3) The Fair User concedes and the material is immediately taken down (or is never uploaded), or (4) the Fair User reaffirms the First Shot, the material is not immediately taken down, and the rightsholder is free to pursue remedies such as a lawsuit or online dispute resolution.

For Fair Users, the outcome following a reaffirmation of a First Shot will be the same regardless of whether the user is institutional or non-institutional. However, institutional users who have not attained Fair User status and who reaffirm their First Shot should be prioritized for any initial reviews conducted by the OSP, such as when the OSP invalidates takedown notices for being procedurally flawed or for targeting clearly fair use material.²²³ Moreover, rightsholders who submit takedown notices against an institutional user despite not having a colorable rebuttal to that user's educational fair use claims should face a potentially higher level of § 512(f) damages,²²⁴ and the converse should hold true for users in general who abuse the First Shot process.

221. Because Content ID is automated, it is likely the case that a rightsholder will have preemptively selected a single option—block, demonetize, or track viewership statistics—for all videos, thus limiting opportunities for individual review. However, rightsholders do have the option to manually claim videos. *See What Is a Manual Claim?*, YOUTUBE HELP: HELP CENTER, <https://perma.cc/KVE9-4RZ5> (last visited Nov. 5, 2021).

222. Note that in this scenario the material will eventually be put back if the rightsholder does not initiate a lawsuit, pursuant to 17 U.S.C. § 512(g)(2)(c). Incidentally, the incidence of lawsuits in response to counter-notifications seems to be relatively low. On Westlaw, only about one hundred cases were identified that explicitly discussed both the DMCA and the counter-notification procedure.

223. As an example, Reddit lists in its transparency report the number of takedown notices it invalidates per year. *See Transparency Report 2019*, REDDIT, <https://perma.cc/KV3W-3YAH> (last visited Nov. 17, 2021).

224. Importantly, this Note rejects an analogous "trusted rightsholder" designation, in a deviation from Professor Leistner's Article 17 model, discussed *supra* Part I.C. Leistner imagines various potential conflicts between users and rightsholders of different stripes: normal users versus trusted rightsholders, normal users versus normal rightsholders, trusted users versus normal rightsholders, and trusted users

In summary, if in response to an educational fair user’s reaffirmation of their First Shot, the rightsholder fails to file a lawsuit or if the lawsuit is unsuccessful—the First Shot is a success. However, if the user ultimately loses such a challenge, they either lose their Fair User status or, if they had not attained the status, they accrue their first, second or final strike—the last of which will bar them from using the feature for a specified duration.

B. RESOLUTION OF THE TRIPARTITE PROBLEM

The First Shot is intended to combat the tripartite problem that plagues the current counter-notification scheme.²²⁵ The delayed takedown enabled by the First Shot regime (as well as the administration of the User Report in particular) should counteract several of the issues pertaining to intimidation, confusion and timing that inhibit users’ ability to challenge potentially invalid takedown notices. However, the logistics and practicality of the First Shot may pose complexities that need to be addressed.

1. Resolution I: Under-Utilization by Fair Users

The lessened legal exposure required to issue a First Shot and the greater likelihood of avoiding takedown will likely incentivize educational fair users to pursue this preemptive counter-notification. In submitting their User Report, these users will not need to consent to any jurisdiction or declare their full identity when uploading. Moreover, users will have access to greater information on fair use and how to successfully rebut an erroneous infringement claim. Given the number of studies that hypothesize information requirements as being a primary disincentive to the use of the counter-notification process,²²⁶ the User Report alone will likely alleviate some of the bars preventing users from asserting a right to maintain their work on OSPs such as YouTube.

This delayed takedown option may also encourage more users to pursue this preemptive counter-notification measure, as it would help to prevent some of the adverse “chilling effects” that come with removing speech for a certain amount of

versus trusted rightsholders. Leistner, *supra* note 107, at 69–72. This Note is reticent to recommend a “trusted rightsholder” designation because some powerful rightsholders already seem to receive preferential treatment from OSPs. *See* Weinberg, *supra* note 98 (describing the growing trend of “voluntary agreements” between online service providers and rightsholders). Moreover, because the incidence of takedown notices far outweighs counter-notifications, rightsholders do not need an incentive to challenge users’ content. It is conceded that some smaller rightsholders may find a delayed takedown period problematic, particularly depending on the industry. *See* COPYRIGHT OFFICE REPORT, *supra* note 2, at 161–62 (discussing how certain rightsholders operate in “time-sensitive” industries, such as music, where takedown should happen more expeditiously).

225. *See supra* Part II.A.

226. COPYRIGHT OFFICE REPORT, *supra* note 2, at 172 (“Commenters and roundtable participants expressed broad support for more educational initiatives and materials about general copyright concepts, such as fair use.”).

time.²²⁷ If users have the opportunity to achieve “accreditation” under this system—via the “Fair User” moniker—this will likely provide a stronger incentive to pursuing this preemptive counter-notification. Given that counter-notifications are currently so under-utilized, there is simply little evidence for users of what the actual benefits are for being able to successfully fight a takedown notice (or Content ID block). The First Shot will hopefully provide that evidence.

One obvious pitfall that may undermine this resolution is the added complexity of the First Shot process—both in terms of user understanding and administrative burden. To address this, it may be best to turn again to Professor Leistner’s analogous “trusted user” paradigm for Article 17 of the EU Copyright Directive,²²⁸ which contains positive and negative attributes that seem to parallel the First Shot system.

Leistner’s system also encourages users to preemptively flag their use of rightsholders’ content as being justified, and because of this he acknowledges that users may simply not understand enough of copyright law to know when and whether to flag their content as presumptively satisfying fair use. But in response, Leistner notes simply that users can be *informed* of their options.²²⁹ Indeed, in the case of the First Shot, the User Report could incorporate supporting instructions to alleviate some of the issues of transparency that plague regular counter-notifications. In fact, because the First Shot is tailored to educational users, there should be a clear ability to highlight “educational use” in the User Report—and the user could elaborate in an attached comment *what* kind of educational user they are, whether institutional or non-institutional.

An additional problem of any system that requires more information—both when users are supplied with information and when users themselves supply the information—is that there may be various processing issues. In addition, it is unclear how effective the Automated Analysis performed by the Content ID will be, or whether there will need to be a potentially costly human review component. But in theory the First Shot mechanism will discourage litigious conduct from both parties, particularly if both users and rightsholders run a greater risk of running afoul of § 512(f) misrepresentation standards.²³⁰ Moreover, an additional human review component could be introduced to address more complex educational fair use questions. But of course, it is conceded that the overall administrative burden will likely be higher under this system.

227. Asp, *supra* note 19, at 753–54 (“This ‘notice and takedown’ scheme . . . raises questions about the chilling of free speech.”).

228. Discussed *supra* Part I.C.

229. Leistner, *supra* note 107, at 72.

230. Some commentators have even proposed strengthening § 512(f) with statutory damages, to further dissuade reckless misrepresentation. See Marc J. Randazza, Lenz v. Universal: *A Call To Reform Section 512(f) of the DMCA and To Strengthen Fair Use*, 18 VAND. J. ENT. & TECH. L. 743, 774 (2016).

2. Resolution II: Over-Utilization by Pirates

A natural concern of an easier-to-apply preemptive user shield is that it may exacerbate the complaints from rightsholders that there are too many erroneous counter-notifications.²³¹ To rebut this complaint, it is helpful to turn once again to Leistner's "trusted user" solution and the analogous problems faced in the Article 17 EU Copyright Directive. Leistner acknowledged the potential for users to abuse a system where they could preemptively declare their content justified to avoid takedown.²³² However, Leistner notes two counterarguments, at least with respect to the behavior of otherwise good faith users: (1) procedural sanctions such as the loss of trusted user status may act as a deterrent and (2) "legitimate YouTubers" would have a genuine interest in achieving the trusted user status and not jeopardizing it with frivolous notices.²³³

Both of Leistner's observations will likely hold true for the educational Fair Users employing First Shots as well. First, because users are still subject to the § 512(f) misrepresentation standards, they still face many of the same penalties already in place. Second, a First Shot only accrues benefits to the user if it is successful; if the user sends an erroneous one, they not only lose an opportunity to become a Fair User, they also lose an opportunity to send another counter-notification to protect the same work. Because both institutional and non-institutional creators of educational content are often legitimate and established users of their chosen OSPs,²³⁴ the sanctions will provide an incentive for many of these users to not abuse the system, as will the ability to become a Fair User.

Of course, the current conception of the First Shot may require a significant increase in the punitive nature of the sanctions that already exist under the DMCA. For pirates who are undeterred by the normal threat of litigation, it is arguable that the First Shot mechanism will not substantially reduce their numbers. However, the First Shot will likely reduce the *relative* number of abusive counter-notifications. Moreover, the abusive counter-notifications will likely continue to come from the *standard* counter-notifications procedure; it is unlikely that a pirate would go through the trouble of filling out a User Report and falsely making an educational fair use argument that they knew would be even less likely to succeed than the regular counter-notification.²³⁵ This system does not fully resolve the issue of erroneous counter-notifications, but it will likely ensure that the number of erroneous counter-notifications becomes a smaller fraction of the total number.

231. COPYRIGHT OFFICE REPORT, *supra* note 2, at 33 ("[M]any rightsholders argue that the scale of notices sent makes section 512(g)'s requirement of court action to contest a counter-notice infeasible.").

232. Leistner, *supra* note 107, at 72.

233. *Id.*

234. See Randazza, *supra* note 230, at 751, for a discussion of how Professor Larry Lessig had to fight a DMCA takedown notification for uploading a lecture to YouTube.

235. Indeed, it may even become easier to weed out erroneous claims at the First Shot stage: A user who declared that their purpose in incorporating a copyrighted work was "to provide information to legitimate purchasers," *see* Rosen v. Masterpiece Mktg. Grp., LLC, No. CV-1506-629 SJO (ASX), 2016 WL 7444688, at *12 (C.D. Cal. Nov. 29, 2016), probably would not get far.

3. Resolution III: The Timeframe Issue

The delayed takedown that would result from becoming a “Fair User” would likely be an immediate benefit to all educational users. This resolution is, therefore, perhaps the most obvious of the three. One criticism does immediately assert itself, however: This timeframe is even worse for rightsholders, who often need sufficient time to “adequately research and file a complaint in federal court.”²³⁶

A second issue that plagues rightsholders—the time-sensitive nature of content—may also be exacerbated by delayed takedown. In the competitive music industry, an all-new album may lose value very quickly.²³⁷ Therefore, while it is worth investigating if the window for delayed takedown can be extended from the maximum of fourteen days to, for example, twenty days, rightsholders will likely need assurances that “expeditious” removal for certain content can be prioritized.

The First Shot, as currently proposed, should help to alleviate several of the issues stemming from the tripartite problem of the current counter-notification scheme: (1) it will allow a number of educational fair users a greater opportunity to protect their uploaded content, thus helping to alleviate under-use; (2) it will hopefully work to reduce confusion and intimidation, and therefore reduce the rate of erroneous counter-notifications overall; and (3) it will address users’ current criticism of the timeframe for takedown-and-put-back of content. While this solution has certain pitfalls—it is still unclear how to fully dissuade abusive pirate counter-notifications without greater sanctions—hopefully this solution will help establish a better balance for users, OSPs, and rightsholders alike within the internet ecosystem.

IV. CONCLUSION

Content creators and other users of online service providers will continue to be a driving force as the internet expands into the future. While the Digital Millennium Copyright Act is still a widely used law protecting the interests of rightsholders and online service providers, the system must be updated to better protect the contributions of users as well. In particular, if users who create and upload educational fair use content are not able to fully avail themselves of the statutory defenses and caselaw in place to protect this content, then it is unlikely that any users will be sufficiently protected should their material be erroneously removed.

This Note identifies a tripartite framework for understanding the issues that plague counter-notifications, specifically when sent by educational fair users: (1) they are often under-utilized generally, (2) they are often over-utilized by bad faith users, and (3) the timeframe for putting back excised material is excessively cumbersome. The First Shot, an addendum to the current counter-notification process, aims to address this by giving educational fair users an opportunity to preemptively assert fair use and keep their uploaded content online. While the tripartite problem identified by this Note seems to substantially cover many of the issues highlighted in the literature,

236. COPYRIGHT OFFICE REPORT, *supra* note 2, at 162.

237. *Id.* at 161.

more studies need to be done to understand the scope of the problem, particularly as it pertains to education.

A survey of educational content creators on OSPs, divided into institutional and non-institutional users, might be useful to ascertain how (1) their educational content actually incorporates copyrighted works; (2) whether they routinely face potentially fraudulent or erroneous takedown notices; and (3) whether these users have felt comfortable availing themselves of the counter-notification (or Content ID dispute resolution) process. Additionally, more data on DMCA notices are necessary to make sense of how these notices are processed. For example, data involving the reasons for removal and reinstatement of material seem to be in short supply, as are data on how many invalid counter-notifications are actually received by OSPs.²³⁸ Finally, it would be especially useful if websites' transparency reports began more clearly listing the kinds of rightsholders who are issuing takedown notices. Whether some or all of these options are taken, hopefully greater transparency is on the horizon in the world of DMCA notices. A successful internet ecosystem requires that all participating parties be able to reap its benefits. Section 512(g) and the counter-notification process should be amended to better reflect the realities of the twenty-first century Internet.

238. For example, Facebook's summary of its transparency report seems to only focus on the "copyright reports" (ostensibly, takedown notices) that it receives. FACEBOOK, FACEBOOK & IP PROTECTION, <https://perma.cc/8VEK-QSAF> (last visited Nov. 5, 2021). And YouTube's transparency report notes that over 60% of Content ID disputes are resolved in favor of users, but does not seem to discuss why this is the case. See *Copyright Transparency Report*, YOUTUBE 6, <https://perma.cc/XHH8-V67Z>.