

The Law of YouTubers: The Next Generation of Creators and the Legal Issues They Face

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It's undeniable that, by generating billions of daily views and hundreds of millions of hours in watch time over the course of a single day, YouTube is the go-to destination for video consumption on the internet.¹ Teenagers are now spending more time on YouTube than cable television.² YouTube videos hold the top spot for video consumption by millennials when watching online video on smartphones, tablets, and computers.³ Over 1,000 YouTube accounts, referred to on the platform as "channels," reached a million subscribers in 2016, more than double the number of channels in 2015.⁴ "YouTubers," a term that refers to the content creators that upload videos to the video sharing platform, are rapidly taking over as the next generation of celebrities. Their sales potential spreads well beyond the YouTube platform to include dozens of New York Times bestselling book deals as well as crossover productions to more traditional mediums, such as cable television series and feature film productions.

YouTube, a subsidiary of Google Inc., is a unique platform in that anyone can create an account, and upload video content. YouTube currently offers direct upload options up to 4K video resolution and 60 frames per second (fps), as well as live streaming and multi-person Google Hangout streaming options. Through the YouTube Partner Program, anyone that meets basic criteria can opt-in to monetizing their videos with advertisements through Google AdSense. The criteria are currently: i) availability of the program within a YouTuber's country or territory; ii) original ownership of content; iii) avoidance of sensitive or mature content; iii) acceptance of YouTube's Terms of Service and Community Guidelines; and iv) review of YouTube's copyright education materials.⁵ To get paid, YouTubers have to link their YouTube channel with a Google AdSense account and individually mark videos as monetized—a fatal oversight many creators miss out on until their video has gone viral. As of April 2017, YouTube requires a channel reach a minimum of 10,000 total views, across all videos uploaded to the channel, before ads will be served and revenues earned by the YouTuber.⁶ The move comes amid public backlash for the service placing ads on videos with hate speech and extremist messages resulting in more than 250 advertisers pulling ads from Google's network.⁷

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Copyright Infringement

Since its launch in 2005, YouTube has found itself at the center of several landmark copyright court decisions. Viacom filed a lawsuit against YouTube in 2007 claiming over 150,000 unauthorized video clips of Viacom's shows were uploaded by users.⁸ Viacom further alleged that YouTube failed to take action in an effort to increase popularity of the platform. After a second appeal process began, the case was settled in March 2014.⁹ Another well-known case, *Lenz v. Universal Music Corp.*, was filed by YouTuber Stephanie Lenz in 2007 after Universal Music requested that her 29-second video of her toddler son dancing be removed because it contained a portion of "Let's Go Crazy" by Prince playing in the background. In March 2016, the Ninth Circuit Court of Appeals issued a controversial opinion which held that copyright owners must consider whether an allegedly infringing work constitutes fair use when they claim videos.¹⁰ Starting in 2009 with the expiration of a key licensing deal, YouTube faced concerns over the request for increased royalty payments by GEMA, the German performing rights organization, for music videos and user generated content that were being posted to the site. The conflict led to a lawsuit being filed in 2010, which YouTube ultimately lost when the German court held YouTube responsible for the content uploaded by YouTubers.¹¹ As a result of growing legal concerns, YouTube recognized the need for an automatic system with the capabilities to detect potential infringement within content that is uploaded by YouTubers, and the Content ID system was created.

Content ID is a system implemented by YouTube to assist copyright owners with the identification, management, and protection their content. Copyright owners, usually limited to those with large catalogs of content, can register with YouTube and submit their works to be digitally fingerprinted, a processed referred to as Automatic Content Recognition ("ACR") and included in the Content ID database. Whenever content is uploaded to YouTube, the Content ID system scans the new content and checks for matches of copyrighted content already within the Content ID database. The Content ID program, in theory, should help copyright owners prevent unauthorized use of their works, but if one's work is used without permission, YouTube offers a website, separate from the Content ID system, for submissions of copyright takedown notices to be sent in accordance with 17 U.S.C. 512(c), referred to as Digital Millennium Copyright Act takedowns ("DMCA takedowns").¹²

Many confuse Content ID claims with copyright takedown notices sent in accordance with the DMCA. The major difference is a DMCA takedown is governed by U.S. copyright law, 17 U.S.C. 512(c), while Content ID claims are not and are the result of self-monitoring by YouTube. Content ID claims also do not initially result in a copyright strike on a YouTuber's channel, while a DMCA takedown notice directed at a channel will result in a copyright strike immediately until a counter notification is submitted. A copyright strike is a warning that is communicated to YouTubers in an effort to educate and help the creator understand they may be engaging in potentially unlawful activity. Too many copyright strikes on one's account can lead to termination of the account.

A claimant has four options when a newly uploaded video matches to their copyrighted content: they can block the video, mute the audio on video, monetize the video with ads, or track the video.¹³ The four options can be further customized to include territory-specific restrictions, such as a viewer from Germany being blocked from the video entirely, while a viewer from Japan may see the video, but with an advertisement. A YouTuber whose monetized video is claimed has a few options: leave the claim alone

and, after five days, revenue will begin to be sent to the claimant; file a dispute within five days of the claim and revenue will be held in escrow from the day the claim was issued; or file a dispute after five days and the revenue from monetization will then be held in escrow from the date the dispute was filed. Before this system of disputing monetized videos was active, when a claim was placed on a video, the claimant essentially had a fourth option to allow the use of their alleged content while monetization is placed on the video and delivered to the claimant. Now, assuming the video has monetization activated, the money accrued during the Content ID dispute process is held in escrow based on the aforementioned five-day window stipulation. From the moment a YouTuber disputes a claim, it gets more difficult for them to deal with the issue directly within the YouTube platform and often, the YouTuber must seek options for handling the dispute with outside measures. Of course, content owners that find their content being used on YouTube are free to pursue legal action outside of these built-in options.

From the perspective of YouTubers, the newer “escrow system” for disputing Content ID claims on monetized videos is a major step in the right direction for YouTube. Content ID remains one of the hottest topics surrounding YouTube because Content ID is often abused much like DMCA takedowns are sometimes abused.¹⁴ Early issues with Content ID surrounded mass, illegitimate claims sent by Russian companies in an effort to hijack revenues from popular videos.¹⁵ When Content ID automatically claims a video on behalf of a legitimate rights management or media company, the video is often uploaded by a small or hobbyist YouTuber. Most YouTubers do not have the time or resources to dispute claims. Additionally, a YouTuber that received a notice one of their videos has been claimed must take fair use into account before they submit a dispute to the claim. Fair use is complex and varies by jurisdiction and will likely require an attorney who specializes in copyright law, which is an expense some YouTubers are not willing to incur. This makes disputing Content ID claims a daunting and sometimes scary process because the YouTuber disputing a claim risks receiving a copyright strike on their channel if they get their fair use analysis wrong. As a result, the YouTuber who receives the claim will usually not risk having a strike on their channel because with that comes YouTube Copyright School, restrictions, bans, or even termination of a channel if 3 strikes are received. After a YouTuber receives a strike on their channel it will expire in three months as long as they complete YouTube’s Copyright School, which consists of four basic questions about copyright law and a video.¹⁶ It is clear that the Copyright School video is viewed as unpopular, having nearly 60,000 “dislikes” by the more than 6.6 million viewers at the time of this publication.¹⁷ It remains unclear whether Copyright School serves as an effective method of teaching YouTubers about copyright law or helping them understanding how those laws impact both their creative process and business.

Back in 2014, Michelle Phan, a YouTube makeup personality, was sued by Ultra Records for the use of their artist’s songs as background music to her videos.¹⁸ Phan’s videos were claimed via Content ID. However, she alleged that had an agreement with Ultra whereby she would credit the artist and put an iTunes purchase link in the description of the video in exchange for the use of the music. She alleged that she came to this agreement with a senior manager at Ultra and the agreement gave her a license to the songs. Ultra Records continued to issue DMCA takedowns, alleging infringement by Phan, and ultimately filed a copyright infringement suit. Phan countersued and alleged licensing fraud. The two parties reached an undisclosed settlement in 2015, but the ripples from this case have been felt throughout the YouTube and music industries.¹⁹ Even the artist whose music she used, Kaskade, spoke out against

the infringement suit.²⁰ The situation serves as an important lesson in how YouTubers, and content creators in general, both misunderstand music licensing and view it as a difficult area of the business. One way attorneys can assist is by taking proactive measures to educate their clients on important issues with running a media business, such as master use and synchronization licenses. Music licensing issues, specifically for background music on YouTube and Twitch, continues to be a major problem in the industry.²¹

YouTube does offer a library of pre-licensed royalty-free music to all YouTubers. Additionally, YouTube created a tool, called Music Policies, that allows YouTubers to research songs and find out whether a song's sound recording or publishing rights have been licensed or pre-cleared by the copyright owners for the YouTube platform. The Music Policies tool specifically helps YouTubers that upload cover songs to determine whether their uploads will be allowed or blocked in specific territories due to the underlying publishing rights. The tool also gives YouTubers the aforementioned details for situations where they may choose to use the original recording as background music.

Although copyright holders and YouTubers seemingly have an adversarial relationship, there are occasions where they can get along. Sometimes, copyright holders realize that the YouTuber using and tweaking their copyrighted material may actually give them exposure. Take, for example, the recently released unauthorized short film based on the "Mighty Morphin' Power Rangers" children's franchise, but approached from a darker, more mature tone.²² The short film was created as part of an on-going "Bootleg Universe," wherein the film's producer, Adi Shankar, releases "bootleg" versions of films on YouTube, largely based on existing superhero feature films and comics. Saban Capital Group, Inc., the company that owns the rights to the Power Rangers, tried to have the video removed from YouTube. After months of animosity and back and forth negotiations, Saban and Khan/Shankar reached an agreement and the film was put back up on YouTube.²³

Around the same time, another fan film resulted in a high-profile lawsuit challenging the boundaries of fair use and the previous toleration of fan art by a media company. Axanar Productions raised \$1 million on the Kickstarter and Indiegogo crowdfunding platforms to create a fan film set in the Star Trek universe and, in August 2014, proceeded to upload a 20-minute trailer, called "Prelude to Axanar," in an effort to raise additional funding for a feature-length film. The owners of the rights to the Star Trek franchise, Paramount Pictures Corporation and CBS Studios, filed a complaint in federal court in California in December 2015 alleging copyright infringement by Axanar.²⁴ In January 2017, the parties announced a settlement had been reached allowing the existing video to remain on YouTube, without advertisements, and the production of two more fan films with a maximum length of fifteen minutes each.²⁵ Paramount and CBS continue to allow fan films and provide a website dedicated to providing guidelines for fans.²⁶

Anatomy of MCN Agreements

Multi-channel networks, or MCNs, are third-party companies, not endorsed by Google or YouTube, that partner with independent YouTube channels to provide additional services in exchange for a revenue share. MCNs are commonly based around a particular content style or topic, such as education, beauty, or "let's play" gaming videos, a newer format where YouTubers record or live stream their screen as they

play video games. Some of the more well-known MCNs include: Maker Studios, acquired by Disney Interactive in 2014²⁷; Machinima, acquired by Warner Bros. in 2016²⁸; AwesomenessTV, a joint venture between DreamWorks Animation, Hearst and Verizon²⁹; VEVO, a joint venture between Universal Music Group, Sony Music Group, Abu Dhabi Media, Google, and more recently Warner Music Group³⁰; Fullscreen; and My Damn Channel. As with any specialized area of contract law, there are specific terms and provisions to keep in mind during review.

The YouTuber gives up anywhere from 10% to 30% of their YouTube revenue in a standard MCN deal. The variation in percentage largely depends upon the social rank of the YouTuber, calculated by analyzing statistics such as video views, channel subscribers, and viewer comments. Key considerations by MCNs include the number of subscribers, monthly viewership statistics, lack of copyright violations on a channel, and other related metrics.

The basic terms of a YouTuber's MCN partnership should include: higher cost per thousand impressions (known as "cost per *mille*" or "CPM" and which refers to a measurement of potential viewers to an advertisement) opportunity, brand deals, copyright strike support, production support, and channel optimization experts. Some of the more established MCNs offer access to sound production libraries, enhanced analytic dashboards, and productivity tools for managing content on YouTube and responding to fan communities. The biggest draw to MCNs, particularly those with an established presence in a specific genre or style, are the brand deals. Most YouTubers are unable to seek out, negotiate, and execute brand deals on their own. Instead of relying on a manager or agent to do this, MCNs can offer corporate sponsorship opportunities in a massive one-stop operation, sharing the revenue along the way. Additionally, MCNs often have direct contacts within YouTube they can work with to resolve frequent copyright issues YouTubers face on the platform. However, YouTube recently unveiled a new support system that allows any YouTube Partner Program member access to one-on-one e-mail support with a one-day turnaround time or less.³¹

A quick Google search will reveal an abundance of publicly available generic partner agreements from a variety of small to mid-level MCNs. The typical term length is one year, and it's common for MCNs to try and lock uneducated YouTubers into multi-year deals with no options to terminate or exit early. Additional deal considerations can be made, such as 30-day trial periods before committing to an agreement for a year or more. It's also important to make sure that, in the event of termination, licensing rights to any music library tracks do not also expire and the YouTuber maintains ownership of videos uploaded during the term.

Rights Ownership, Entity Formations, and More

Many YouTubers are unaware of the tax implications, personal liability, or general intellectual property "best practices" for building a media empire when faced with a sudden explosion in popularity and revenues on a platform like YouTube. Many of the underlying legal protections are the same for YouTubers as with a traditional media company. YouTubers should work with a tax professional and attorney to make sure they select the correct type of entity and form in the correct state or jurisdiction that is in their best business interest. Personal liability for issues such as copyright infringement, as discussed above, can snowball into a costly mistake and cripple the future viability of a YouTuber's business.

Just as with a more traditional creative client, attorneys should avoid transfer of ownership in the intellectual property rights surrounding the content created by YouTubers. Larger MCN deals can include production financing, options to create original programming, and, for talent with a heavy amount of clout, maintaining ownership of intellectual property rights.

In addition to intellectual property ownership, YouTubers should tread carefully with channel ownership. Loss of a channel with millions of subscribers can have a devastating impact on the future success of a YouTube star. In the standard setup by YouTube, MCNs are only granted controls to redirect advertising revenue to their AdSense account and access to YouTube Analytics data. Some MCNs obtain a higher level of access and control to a YouTuber's channel by way of Google's YouTube Data API and OAuth credentials to enable functions such as video management, playlist management, and more. As with any business, there are also cyber security concerns of which YouTuber should be aware when allowing third parties access to their account.³² In 2014, a highly publicized breakup occurred with well-known YouTuber, Grace Helbig, and the MCN My Damn Channel leading to a contract dispute and ownership of a YouTube channel.³³ MCN contracts continue to crop up as one of the more prominent legal issues with YouTube, and will continue to so long as MCNs exist.

Many YouTubers make significantly more revenue through brand deals and branded content than they do from ads run alongside or before their YouTube videos. Everything from a YouTuber's videos to tweets and Instagram videos can be transformed into strategically planned marketing campaigns. Being that the YouTube and video game streaming Twitch platforms have been accumulating so many viewers in recent years, naturally advertisers want in on it. Usually, a creator endorsing a product on their channel is not a huge issue. A general setup for a product endorsement within a video has the YouTuber say "company X gave me X product and it's great, you guys should check it out" at the end of their video.

The FTC ("Federal Trade Commission") regulates advertising in the United States and requires that disclosures have to be clear and conspicuous. What this means is that the consumers should not have to look for the disclosure that the content creator is endorsing the product, it should be out in the open for all to see. This means putting it IN the video, and NOT in the description. Many YouTubers think that putting their disclosures in the description of the video is enough but the FTC explicitly says that it's not enough.³⁴ The popular video game *Counter-Strike: Global Offensive* ("CS:GO") found itself at the center of gambling issues that arose in the summer of 2016, providing a valuable example of the issues that can occur with improper disclosure.³⁵ Some YouTubers were outwardly promoting certain websites for CS:GO gambling; but, at the same time they owned, operated, and collected revenue from the websites. This situation is more than a standard endorsement deal where a company pays a person to promote their product. Instead, these YouTubers owned the company and failed to disclose anywhere in their videos about their ownership interest or that the websites were paying them.

What these YouTubers did was deceitful and potentially career threatening. YouTubers should either seek legal advice or, at the very least, check with the FTC guidelines to assure they are compliant before they endorse a product on their channel. In an effort to highlight sponsored content, YouTube recently

unveiled a new “paid promotion disclosure” option for videos in October 2016.³⁶ The new feature, if activated by a YouTuber on a video, displays the text notice “includes paid promotion” and allows for another method of disclosing a paid endorsement.

Looking to the Future

The future is promising for YouTubers and content creators that earn a living from online media platforms. An estimated 2.15 billion people, or 28% of the Earth’s population, will consume online video by the end of 2017.³⁷ Additionally, online video is predicted to reach global revenues ranging from \$38 billion³⁸ to \$42 billion³⁹ by 2020. As more platforms launch video sharing capabilities and compete for viewers, the need for quality content will continue to be in high demand. Technological advancements, such as widespread broadband internet speeds and increased processing power on mobile devices, have laid the groundwork for continued growth into the next generation of video consumption.

YouTube TV, a recently launched live and on-demand local and cable television subscription service that lives within YouTube, represents a new era for YouTube.⁴⁰ It is best compared to the current ‘on-the-go’ offerings available to traditional Comcast Xfinity or DirecTV subscribers, which allow for viewing live and on-demand content without using a cable or satellite set-top box. YouTube TV is currently only available in select markets within the U.S. with additional markets added on an as-yet unannounced basis. Offering access to traditional programming the platform once sought to disrupt theoretically proves beneficial to YouTubers as viewers will now stay within the YouTube ecosystem when consuming video content. Being still in the early stages of YouTube TV, it’s difficult to forecast what plans YouTube currently has for the TV platform. Ideally, once an on-demand TV episode ends, YouTube would use its powerful recommendation engine to suggest a related video, such as a behind-the-scenes promotional video uploaded to YouTube by the television studio, or a reaction video from a fan’s channel. While functionality along those lines is buried within the current user-interface design, there is presently a strong segmentation within the YouTube TV app between traditional YouTube video offerings and traditional television programming.⁴¹

YouTube continues to take the lead in areas such as live streaming, 360-degree videos and virtual reality. However, Facebook is quickly catching up with a reported viewership of 8 billion videos viewed each day in 2015 and offering 360-degree videos and pictures.⁴² Attorneys will always be left dealing with rapidly outdated laws that fail to directly address advances in technology. However, staying informed about new platforms and trends, and actually using and experiencing them ourselves, will allow for the development of equally creative legal solutions to meet the needs of clients.

Attorneys looking for the next generation of clients must become familiar with newer digital industry revenue models and educated about digital media outlets ranging from established players like YouTube to platforms with as-yet uncertain futures like Snapchat and Musical.ly. This new generation of creators is facing a changing media landscape. A recent example is when Facebook implemented updates to its video player, including the introduction of live broadcast features, without any initial backend support for monetization or ad placements. Creators, specifically YouTubers, are struggling with ways to monetize on platforms that do not have an established advertising revenue business model like YouTube.

Just as in other areas of the law, becoming a part of the community is an important step in gaining trust. Examples can include putting together panels at conferences like VidCon or assisting with resource building within organizations like the recently established Internet Creators Guild. Industry news sites, such as Tubefilter.com, offer ways to keep track of news and developments within the online video business and stay abreast of potential issues clients may be facing. Staying updated on developments in new media platforms is vital for an attorney representing YouTubers.

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