

“SWIFTIES” OR SWIFT SUPPRESSION? HOW POLICE OFFICERS EXPLOIT COPYRIGHT LAW AND PRACTICE ONLINE TO EVADE PUBLIC ACCOUNTABILITY

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INTRODUCTION

The video recording of the tragic killing of George Floyd by Minneapolis police officers had an immediate and profound impact on the public.¹ The video held essential evidentiary value in the prosecution of **Floyd’s killers, as it told a very different story than** what the police officers had made the situation out to be.² It was by no means the first recording of police misconduct that generated significant attention from the public, but it remains among the most notable.³

Now, imagine that the world had never seen the extent of this horrific incident. In this alternate universe, the video never transmitted across social media platforms and the extensive conversations around police brutality that followed simply never occurred. And what if the public never saw the video because of something as absurd as Officer Derek Chauvin playing Taylor Swift music from his own cell phone while being filmed?

As foolish as this hypothetical appears, it depicts a growing phenomenon. Police officers, attempting to prevent bystander footage

¹ Kristina Roth & Alli McCracken Jarrar, *Justice for George Floyd: A Year of Global Activism for Black Lives and Against Police Violence*, AMNESTY INT’L (May 24, 2021), <https://www.amnesty.org/en/latest/campaigns/2021/05/justice-for-george-floyd-a-year-of-global-activism-for-black-lives-and-against-police-violence> [https://perma.cc/4YQJ-X6AB] (“**Darnella Frazier, a 17-year-old Black woman, filmed the murder, released the video, and the planet erupted with rage at yet another police killing of a Black man in the USA.**”); Sam Blake, *Why the George Floyd Protests Feel Different—Lots and Lots of Mobile Video*, DOT.LA (June 12, 2020), https://dot.la/george-floyd-video-2646171522.html?utm_campaign=post-teaser&utm_content=i87yytb3 [https://perma.cc/5MAN-KFUV] (“**Pex, which helps creators and rights holders audit, measure and monetize their audio and visual intellectual property across the web, has found that 80% of the 100 most-viewed videos on Twitter in the 12 days following George Floyd’s death were related to Black Lives Matter.**”).

² Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html?smid=url-share> [https://perma.cc/R66X-K8KB].

³ *Id.* (describing the impact of the 2014 killing of Eric Garner at the hands of police officers and noting that “**Mr. Garner’s repeated plea of ‘I can’t breathe’—also recorded by a cellphone—became a rallying cry at demonstrations against police misconduct around the nation**”).

from circulating online, will broadcast copyrighted music so that these recordings are more likely to be taken down from video sharing platforms due to the unauthorized use of that copyrighted music.⁴

Copyrighted music has previously caused the disruption of public speech in other forums⁵ and has been utilized in similar ways to this current police practice.⁶ What makes this form of copyright weaponization unique (and what makes this issue particularly nuanced) is that the police are not themselves infringing.⁷ Instead, by playing music **that gets captured in the bystander’s recording, the officers, creatively, are causing the bystander to infringe** when the recording is inevitably posted and circulated online.⁸ This clever scheme functions, in essence, to prevent the dissemination of police recordings and to dampen police accountability activists’ voices on popular platforms.⁹ In this moment of increased calls for police accountability, it presents a chilling reality if officers can so readily evade the public eye.¹⁰

There are strong policy and practical reasons for protecting the wholesale dissemination of police bystander recordings online.¹¹ These recordings may very well constitute constitutionally protected speech, and they have tremendous evidentiary value.¹² But the law currently does

⁴ See, e.g., Samantha Cole, “WHYYYYYYY?”: Police Upset Idiot Colleague Played Taylor Swift to Trigger YouTube Filter, VICE (Aug. 10, 2021, 9:00 AM), <https://www.vice.com/en/article/4avp4m/alameda-county-police-department-taylor-swift-filming-youtube> [https://perma.cc/79FA-DEL5]; Trending, *The Cops Weaponising Copyright*, BBC, at 15:20 (Aug. 28, 2021), <https://www.bbc.co.uk/sounds/play/w3ct1xzw> [https://perma.cc/M5DR-6U86].

⁵ Mike Masnick, *Copyright Blocks Interview of Protesters Because Marvin Gaye’s ‘Let’s Get It On’ Was Playing in the Background*, TECHDIRT (June 3, 2020, 11:01 AM), <https://www.techdirt.com/2020/06/03/copyright-blocks-interview-protesters-because-marvin-gayes-lets-get-it-was-playing-background> [https://perma.cc/PZM6-HGEF].

⁶ See *The Cops Weaponising Copyright*, *supra* note 4; see also Cory Doctorow, *Clever Hack That Will End Badly: Playing Copyrighted Music During Nazis Rallies so They Can’t Be Posted to YouTube*, BOING BOING (July 23, 2019, 1:23 PM), <https://boingboing.net/2019/07/23/double-edged-swords-r-us.html> [https://perma.cc/9BF3-63LH] (discussing a proposed tactic by protestors to disrupt a Nazi rally by blasting copyrighted music to prevent recordings of the rally from being circulated online).

⁷ Matt McCarthy, *New Police Tactic “Weaponizing” Copyright Raises First Amendment Violation Concerns*, J. HIGH TECH. L. (Mar. 31, 2021), <https://sites.suffolk.edu/jhtl/2021/03/31/new-police-tactic-weaponizing-copyright-raises-first-amendment-violation-concerns> [https://perma.cc/3RPA-6F9H].

⁸ Tim Cushing, *Latest Anti-Accountability Move by Cops Involves Playing Music While Being Recorded in Hopes of Triggering Copyright Takedowns*, TECHDIRT (Feb. 10, 2021, 9:31 AM), <https://www.techdirt.com/2021/02/10/latest-anti-accountability-move-cops-involves-playing-music-while-being-recorded-hopes-triggering-copyright-takedowns> [https://perma.cc/8U6Q-NUQQ].

⁹ *Id.*

¹⁰ See Roth & Jarrar, *supra* note 1.

¹¹ See *infra* Section I.C.

¹² See *infra* Section I.C.

not prioritize these interests. The Digital Millennium Copyright Act (DMCA) enables **corporate policies like YouTube’s content identification system (Content ID)** to prioritize rightsholders in removing infringing content from online platforms.¹³ And while scholars have evaluated some of the fundamental flaws of these regimes in general terms,¹⁴ none have focused exclusively on these police recordings—whether as critical issues in their own right or as a case study on how the governing statutes and principles of copyright law online are inadequate for safeguarding speech essential to public discourse.¹⁵

This Note puts forward the following arguments: (1) there are important reasons for categorically protecting bystander police recordings online from widespread claims of copyright infringement; (2) copyright law and practice cannot adequately ensure the dissemination of these recordings online; and (3) there are several potential reforms to both law and industry policy that could further promote civilian access to these recordings online. In reaching these conclusions, Part I introduces statutory copyright regimes, like the DMCA, and private copyright protection regimes, **like YouTube’s Content ID program**, and shows how they favor protecting the interests of rightsholders over the users of online platforms.¹⁶ Next, this Part offers context as to how police officers intentionally weaponize these regimes by broadcasting music while being filmed.¹⁷ Part I concludes with a demonstration of how these police recordings especially warrant

¹³ 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, 9 (2018).

¹⁴ See *id.* at 9–10; Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1082, 1085 (2017) (“A robust copyright enforcement infrastructure without sufficient checks may limit access to noninfringing materials, prevent permissible uses of copyrighted works and, overall, may constrain free speech and access to knowledge.”); Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 STAN. TECH. L. REV. 412, 419 (2019) (“DMCA notices have also long been criticized for potentially having serious chilling effects, impacting people’s autonomy, freedom of expression, and privacy online.”).

¹⁵ See Katharine Trendacosta, *What Cops Understand About Copyright Filters: They Prevent Legal Speech*, ELEC. FRONTIER FOUND. (July 16, 2021), <https://www EFF.org/deepinks/2021/07/what-cops-understand-about-copyright-filters-they-prevent-legal-speech> [https://perma.cc/7WZG-9HUD]; see also Shreya Tewari, *The Weaponization of Copyright by Police Officers and the Need to Automate Fair Use*, LUMEN (Aug. 6, 2021), https://lumendatabase.org/blog_entries/the-weaponization-of-copyright-by-police-officers-and-the-need-to-automate-fair-use [https://perma.cc/N98U-2P5G]; McCarthy, *supra* note 7. While these respective authors have written broadly on the legal issues surrounding the dissemination of police recordings, this Note aims to dive deeper in providing an array of solutions to combat this problem.

¹⁶ See *infra* Section I.A.

¹⁷ See *infra* Section I.B.

safeguarding because of their potential First Amendment protections,¹⁸ as well as their practical value.¹⁹

Part II primarily argues that these police recordings make for compelling fair uses under copyright law.²⁰ However, the existing limitations of the fair use defense—both by its very nature and in the context of DMCA takedowns—prevent the defense from being the end-all-be-all solution to keeping police recordings online.²¹

Finally, Part III argues for several legislative, judicial, and private sector remedies to curtail this police action and promote the dissemination of the recordings online.²² These recommendations include amending pertinent provisions of both the DMCA and the 1976 Copyright Act, giving greater weight to First Amendment considerations, applying a new standard of secondary liability against police officers, and recommending automation of fair use for private platforms, like YouTube.²³ The analysis set forth in this Part demonstrates that the proposed reforms to private platforms are ultimately the most realistic and practical solutions.

I. BACKGROUND

A. *What Empowers Police to Suppress Recordings: Copyright Infringement, the DMCA Safe Harbor, and Content ID*

Before unpacking the statutory framework governing copyright infringement online, it is first important to provide a brief explanation of copyright infringement more broadly. Section 106 of the 1976 Copyright Act lays out the exclusive rights of a rightsholder, including the rights to “reproduce the copyrighted work in copies or phonorecords”²⁴ and “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”²⁵ Generally, in order to prevail in an action for copyright infringement, a plaintiff must demonstrate that (1) they have ownership of (or other entitlement to enforce) a valid

¹⁸ See *infra* Section I.C.1.

¹⁹ See *infra* Section I.C.2.

²⁰ See *infra* Section II.A.

²¹ See *infra* Section II.B.

²² See *infra* Part III.

²³ See *infra* Part III.

²⁴ 17 U.S.C. § 106(1).

²⁵ *Id.* § 106(6).

copyright and (2) one of their § 106 rights was violated.²⁶ If the plaintiff meets this burden, the defendant has the opportunity to raise defenses.²⁷ The fair use defense is the most prominent limitation on the rights granted to a copyright owner.²⁸

The fair use defense, originally a creature of common law, was codified in the 1976 Copyright Act.²⁹ Fair use is an affirmative defense to a copyright infringement cause of action; when this defense is raised, the user is essentially conceding that copyrighted material was used without **the rightsholder's permission, but the particular use of material is legally permissible.**³⁰ As will be explained, the application of the fair use defense under the DMCA has numerous limitations that hinder the circulation of online speech.

1. The DMCA and the § 512 Safe Harbor Provision

To understand how copyright law subjects bystander police recordings to immense scrutiny online, it is first essential to recognize how *any* speech with copyrighted material can be deemed infringing and removed from online platforms. In the 1990s, the internet quickly became a tremendous platform for speech and the rapid “dissemination of ideas, information, and commerce.”³¹ The widespread movement of ideas online, coupled with the existing low bar for the creation of copyright generally, made it so that the policing of online content would be especially necessary.³² Congress was also quick to recognize the need to protect online service providers (OSPs)³³ from widespread copyright

²⁶ JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI & MAUREEN A. O'ROURKE, *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 245 (5th ed. 2019).

²⁷ *Id.*

²⁸ *Id.* at 489.

²⁹ *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use/#:-:text=The%20Fair%20Use%20Index%20tracks,be%20fair—or%20not%20fair> [<https://perma.cc/JE7R-9PY8>] (Nov. 2023).

³⁰ *What Is Fair Use*, STANFORD COPYRIGHT & FAIR USE, <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use> [<https://perma.cc/Q5VK-4SXY>]. Fair use will be elaborated upon in Part II.

³¹ Matteson, *supra* note 13, at 4.

³² *Id.*

³³ 17 U.S.C. § 512(k)(1)(A) (“[T]he term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”). Online service providers include internet service providers, email providers, news providers, entertainment providers, et cetera. Jess Rhodes, *What Is an Online Service Provider?*, EASYTECHJUNKIE, <https://www.easytechjunkie.com/what-is-an-online-service-provider.htm> [<https://perma.cc/K6N8-34MS>] (Aug. 17, 2023).

infringement occurring on their platforms.³⁴ Congress desired to promote strong incentives for both service providers and copyright owners to collaborate in responding to copyright infringement online.³⁵ So, in 1998, Congress passed the DMCA “to adapt copyright law to emerging digital technologies that potentially could be used to **exponentially increase infringing activities online.**”³⁶ Specifically, the Online Copyright Infringement Liability Limitation Act, which was passed as part of the DMCA,³⁷ added § 512 to the federal copyright statute.³⁸

Known colloquially as the “safe harbor” provision, § 512 protects OSPs from secondhand liability for user activity on their respective platforms.³⁹ Among others, platforms that “store[] digital content that users have uploaded for public consumption or for sharing purposes” like YouTube are covered by the safe harbor.⁴⁰ While there are innumerable online video platforms, YouTube has both vast market share⁴¹ and its own unique mechanisms for maintaining compliance with § 512.⁴²

The safe harbor exempts OSPs from being held liable for infringing material “hosted” by users on the OSP’s servers.⁴³ Among other requirements, to qualify for this safe harbor, the OSP must not have “actual knowledge” that material on its platform is infringing.⁴⁴ Upon receiving proper notification of an infringement claim from a

³⁴ CONG. RSCH. SERV., R43436, SAFE HARBOR FOR ONLINE SERVICE PROVIDERS UNDER SECTION 512(C) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (2014).

³⁵ S. REP. NO. 105-190, at 40 (1998).

³⁶ CONG. RSCH. SERV., *supra* note 34, summary.

³⁷ Online Copyright Infringement Liability Limitation Act, Title II of the Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877–86 (1998) (codified at 17 U.S.C. § 512).

³⁸ 17 U.S.C. § 512.

³⁹ CONG. RSCH. SERV., *supra* note 34, at 1.

⁴⁰ *Id.* summary.

⁴¹ YouTube has approximately 2.5 billion worldwide users in 2023 and “is the second-most popular search engine right after Google.” Maryam Mohsin, *10 YouTube Stats Every Marketer Should Know in 2023*, OBERLO (June 20, 2023), <https://www.oberlo.com/blog/youtube-statistics> [<https://perma.cc/4WS5-PN4B>]; Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. (Dec. 10, 2020), <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> [<https://perma.cc/NA3T-QZZY>] (“Because YouTube is the dominant player in the online video market, its choices dictate the norms of the whole industry.”).

⁴² See *infra* Section I.A.3.

⁴³ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 26, at 619 (listing examples of qualifying infringing material as “blog entries, photos, and videos shared online”).

⁴⁴ 17 U.S.C. § 512(c)(1)(A)(i).

rightsholder,⁴⁵ the OSP must act “expeditiously” to remove or block access to the material in question.⁴⁶ Thus, if the OSP complies with the § 512 requirements for notice and takedown, it avoids being held monetarily liable for the infringing actions of its users.⁴⁷

In its deliberations in passing the DMCA, Congress considered providing recourse for users whose material might be taken down.⁴⁸ But Congress also recognized that the statutory framework of § 512 could result in lawful content being removed from the internet without judicial scrutiny, advance notice, or opportunity by a user to contest the removal.⁴⁹ It is apparent that Congress was primarily interested in protecting OSPs and rightsholders, seemingly at the expense of users.⁵⁰ **This conclusion is reached through an understanding of the DMCA’s codified processes for taking down online content.**

2. How Rightsholders Issue DMCA Takedowns

To qualify for the safe harbor, OSPs must comply with the DMCA’s notice and takedown procedures.⁵¹ The process for issuing a DMCA takedown begins with the rightsholder (or an authorized party) sending a **written takedown notice to the OSP’s authorized agent alleging that their copyright has been infringed upon.**⁵² Among the notification requirements is that the notice must be issued under a good faith belief by the rightsholder that the use of copyrighted material was not **authorized by the “owner, its agent, or the law.”**⁵³ This good faith belief has been interpreted by courts to mean a *subjective* good faith belief and

⁴⁵ *Id.* § 512(c)(3)(A) (“To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following . . .”).

⁴⁶ *Id.* § 512(c)(1)(A)(iii).

⁴⁷ *Digital Millennium Copyright Act*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/dmca> [<https://perma.cc/74QQ-FHM4>].

⁴⁸ S. REP. NO. 105-190, at 21 (1998) (detailing that “[t]he provisions in the bill balance the need for rapid response to potential infringement with the end-user’s legitimate interests in not having material removed without recourse”).

⁴⁹ Katharine Trendacosta & Corynne McSherry, *What Really Does and Doesn’t Work for Fair Use in the DMCA*, ELEC. FRONTIER FOUND. (July 31, 2020), <https://www EFF.ORG/deepinks/2020/07/what-really-does-and-doesnt-work-fair-use-dmca> [<https://perma.cc/TLB5-ZPPT>] (“Congress knew that Section 512’s powerful incentives could result in lawful material being censored from the Internet, without prior judicial scrutiny, much less advance notice to the person who posted the material, or an opportunity to contest the removal.”).

⁵⁰ Matteson, *supra* note 13, at 9.

⁵¹ 17 U.S.C. § 512(c)(1)(C).

⁵² Matteson, *supra* note 13, at 7–8.

⁵³ 17 U.S.C. § 512(c)(3)(A)(v).

requires that the rightsholder conduct a fair use analysis of the allegedly infringing material.⁵⁴ If the takedown notice is issued without such good faith belief, the rightsholder can be liable for misrepresentation and will have to pay damages.⁵⁵

When it comes to conducting the required fair use analysis, “[c]ontent owners are the ultimate arbiters” and there is no hearing or opportunity for a user to present their case to a neutral body.⁵⁶ And the standard by which courts have decided that such fair use analysis must be conducted favors the taking down of content.⁵⁷

Upon receipt of notice, the OSP must notify the user and allow the user the opportunity to respond with a counternotice alleging that the use of copyrighted material was in fact legally permissible.⁵⁸ The counternotice must include, among other things, that the user consents to jurisdiction in a U.S. district court.⁵⁹ At this point, the OSP is statutorily obligated to take the material down for ten to fourteen days (regardless of whether the material is in fact infringing) to allow the rightsholder to seek a court order against the user.⁶⁰ If no order is filed, the OSP can reinstate the content, but it has no obligation (and little incentive) to do so.⁶¹

Thus, OSPs may effectively take down content without providing ex ante relief for the user.⁶² These takedown procedures are tantamount to a prior restraint in silencing speech before it is properly adjudicated.⁶³ Moreover, bystander police recordings that require timely dissemination to the public lose their value if they are temporarily or permanently removed from platforms like YouTube.

In theory, the DMCA does provide *some* process for a user accused of infringing.⁶⁴ However, § 512(f)’s remedies are largely inaccessible to users and its deterrence against flawed takedown notices has been limited

⁵⁴ See *infra* Section II.B.

⁵⁵ 17 U.S.C. § 512(f) (“Any person who knowingly materially misrepresents under this section—that material or activity is infringing . . . shall be liable for any damages . . .”).

⁵⁶ 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, 1294 (2016).

⁵⁷ See *infra* Section II.B.

⁵⁸ 17 U.S.C. § 512(g)(3).

⁵⁹ *Id.* § 512(g)(3)(D).

⁶⁰ *Id.* § 512(g)(2)(C).

⁶¹ See Matteson, *supra* note 13, at 8 (“If the OSP values its enterprise’s legal immunity over an individual poster’s free speech or fair use, the material comes down.”); Trendacosta, *supra* note 41 (“[T]he threat of liability and the large damage awards possible in copyright cases encourages YouTube and other service providers to take things down quickly in response . . .”).

⁶² See 17 U.S.C. § 512(g)(2)(A).

⁶³ Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 176 (2010).

⁶⁴ See 17 U.S.C. § 512(g)(3).

in practice because rightsholders are given great deference in deciding whether their content is being infringed upon.⁶⁵ Further, if a user alleges that a rightsholder has misrepresented the infringement, recourse is available through litigation, which is inaccessible for most users.⁶⁶ In sum, the § 512 takedown process is disadvantageous for users.⁶⁷

3. Content ID: YouTube's Digital Fingerprinting System

While § 512 exists to protect OSPs from liability, major OSPs like YouTube are so fearful of liability that they cannot rely upon § 512 alone.⁶⁸ No one, including Congress, could have anticipated the rapid rise of material distributed across the internet.⁶⁹ Reliance on manual DMCA takedowns alone was not enough for YouTube to prevent widespread infringement on its platform, and so YouTube developed Content ID partially as a response to major lawsuits it faced.⁷⁰

YouTube has essentially created its own secondary check on copyright infringement.⁷¹ Content ID is likely the most expansive, intelligent, and costly copyright enforcement system ever created,⁷² and **yet the system's procedural uncertainties are highly demonstrative of how potentially legal speech, like police recordings, can be so easily targeted**

⁶⁵ See *infra* Section II.B; see also Trendacosta, *supra* note 41.

⁶⁶ See Frank Guzman, *The Tension Between Derivative Works Online Protected by Fair Use and the Takedown Provisions of the Online Copyright Infringement Liability Limitation Act*, 13 NW. J. TECH. & INTEL. PROP. 181, 196 (2015) (“The current scheme [of DMCA takedown procedures] discourages the users that post allegedly infringing work from fighting back, encouraging them to err on the side of caution and setting a very high bar to prevail in a suit against the copyright owner for lacking an adequate good faith basis for the takedown notice.”).

⁶⁷ *Id.*

⁶⁸ JENNIFER M. URBAN, JOE KARAGANIS & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 58 (U.C. Berkeley Pub. L. Rsch. Paper No. 2755628, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 [https://perma.cc/N3D8-56XT] (“[Adopting filtering technology] is a reflection of the fact that we don’t think that how the DMCA as written and interpreted [offers enough protection from liability].” (quoting an unidentified OSP (alterations in original))).

⁶⁹ See U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> [https://perma.cc/Q3C6-ZWKX].

⁷⁰ See Abigail R. Simon, Note, *Contracting in the Dark: Casting Light on the Shadows of Second Level Agreements*, 5 WM. & MARY BUS. L. REV. 305, 314 (2014).

⁷¹ See *Using Content ID*, YOUTUBE HELP, <https://support.google.com/youtube/answer/3244015?hl=en> [https://perma.cc/2ECC-X3ZM].

⁷² *How Explaining Copyright Broke the YouTube Copyright System*, ENGELBERG CTR. ON INNOVATION L. & POL’Y, <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown> [https://perma.cc/GNF8-FQKR].

online.⁷³ Content ID is a digital fingerprinting system that scans uploaded videos against the database of music that rightsholders have submitted.⁷⁴ If there is a match, rightsholders can choose from one of the following options: (1) the whole video is taken down and blocked from public viewing, (2) the rightsholder may monetize the video by having advertisements placed on it or by claiming revenue from advertisements already on it, or (3) **the video’s viewership statistics may be shared with the rightsholder.**⁷⁵

The ultimate irony is that this system is meant to identify piracy of copyrighted material, but because the automated filtering cannot detect legal nuances or realize ambient or background use of music, the system is unable to account for instances that would not in fact be infringing.⁷⁶ Thus, Content ID cannot appreciate the difference between, for example, a product review video with unauthorized copyrighted audio and a news report with incidental copyrighted audio because the system is “ill-equipped to take note of context.”⁷⁷ And, interestingly, because qualifying Content ID rightsholders must be the exclusive owners of “a substantial body of original material” on YouTube,⁷⁸ the system aims to protect prominent media entities, including major music labels.⁷⁹

To make matters worse for the potentially innocent user, the process by which a user can dispute a Content ID claim (in belief that their material is legal) can be quite complicated.⁸⁰ In a sense, Content ID is **YouTube’s way of effectuating § 512** because it similarly prevents users from seeking adequate recourse when they are accused of copyright infringement.⁸¹ This is most evinced by the fact that a user can only issue

⁷³ Trendacosta, *supra* note 41 (“Any description of Content ID will by necessity be very involved. If you are confused, then you are in the same position as the YouTubers who deal with Content ID every day. Their livelihoods depend on guessing correctly.”).

⁷⁴ *Using Content ID*, *supra* note 71.

⁷⁵ Trendacosta, *supra* note 41.

⁷⁶ See URBAN, KARAGANIS & SCHOFIELD, *supra* note 68, at 8 (“[R]elying on machines to make decisions about sometimes nuanced copyright law raises questions about the effect on expression.”); Trendacosta, *supra* note 15 (“What’s the harm in automating the identification and removal of things that have copyrighted material in them? The harm is that you are often removing lawful speech.”).

⁷⁷ Tewari, *supra* note 15.

⁷⁸ *How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=9282364 [<https://perma.cc/NJN7-JGNE>].

⁷⁹ See Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 510 n.210 (2016).

⁸⁰ *Dispute a ContentID Claim*, YOUTUBE, <https://support.google.com/youtube/answer/2797454?sjid=12764779192602266791-NA> [<https://perma.cc/PGX2-PUCD>].

⁸¹ Perel & Elkin-Koren, *supra* note 79, at 514 (“Content ID implements the DMCA’s counter-notice feature in a way that diminishes due process.”).

a counternotice if the user elects to dispute the infringement claim.⁸² However, YouTube discourages users from issuing counternotices through intimidation and the threat of engaging in legal action.⁸³ Even worse, the rightsholder can issue a DMCA takedown at any point in the process.⁸⁴ The process ultimately ends in the rightsholder either releasing the Content ID claim or issuing the takedown.⁸⁵

Thus, with lingering fear over litigation or losing access to their YouTube accounts altogether, most users just “bow to the system” instead of considering issuing a counternotice or suing for misrepresentation.⁸⁶ These users, such as bystanders who record the police, are everyday laypeople who are not legally savvy and cannot necessarily afford to engage in litigation.⁸⁷

While Content ID aims to provide YouTube with a secondary shield against liability,⁸⁸ and while the fingerprinting system has its share of beneficial qualities for rightsholders,⁸⁹ it currently fails to serve the needs of users posting legal speech. The system favors protecting the legal and monetary interests of major rightsholders⁹⁰ and YouTube itself.⁹¹ And though there have been recent reforms to Content ID,⁹² such reforms do little to address the takedown of legal speech.

⁸² *Id.* at 506.

⁸³ *Id.* at 514 (“YouTube implicitly discourages users from filing a dispute, emphasizing that an invalid dispute may cause the copyright owner to takedown the allegedly infringing video, and when this happens, the target user’s account could be subject to restrictions imposed by a copyright strike.”); Trendacosta, *supra* note 41 (“There’s a built-in possibility of legal action . . . and the chance of losing your entire account and having all your videos deleted. . . . By creating a private system that dead-ends in the DMCA . . . YouTube has leveraged fear of the law to discourage video creators from challenging Content ID.”).

⁸⁴ Trendacosta, *supra* note 41.

⁸⁵ *Id.*

⁸⁶ See Trending, *supra* note 4, at 15:20.

⁸⁷ 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, 772 n.197 (2016).

⁸⁸ Simon, *supra* note 70, at 314.

⁸⁹ DeLisa, *supra* note 56, at 1288 (“Content ID has positively impacted rightsholders by revolutionizing the management and monetization of copyrighted content.”).

⁹⁰ In YouTube’s Copyright Transparency Report for the first half of 2022, it reported that “99 percent of all unique claims were made through the automated system, despite the fact that only a tiny fraction of the rightsholders have access to it.” Ernesto Van der Sar, *Fewer Rightsholders Use YouTube Content ID, but They Flag More Content*, TORRENTFREAK (Nov. 9, 2022), <https://torrentfreak.com/fewer-rightsholders-use-youtube-content-id-but-they-flag-more-content-221109> [https://perma.cc/GM6A-J94N]. Further, “[h]undreds of thousands of entities sent copyright claims to YouTube over the reporting period. Of these, just 4,773 actively used the Content ID system.” *Id.*

⁹¹ Simon, *supra* note 70, at 314.

⁹² Taylor Lane, *YouTube Announces Faster Content ID Appeals Process*, MARKETANDGROW (Aug. 2, 2022), <https://marketandgrow.com/blog/youtube-announces-faster-content-id-appeals-process> [https://perma.cc/BX39-X8Z6].

B. *What Police Officers Are Doing to Avoid Going Viral*

As more civilians have taken up filming police officers on duty,⁹³ officers have developed tactics to stop the filming altogether.⁹⁴ However, the current trend is less focused on preventing the recordings themselves, but instead focused on preventing the world from seeing them.⁹⁵ More than simply weaponizing copyright law, officers are weaponizing algorithms designed to prevent infringement on online platforms.⁹⁶

In one particularly illustrative incident, Deputy Shelby of the Alameda County Sheriff’s Office was being recorded outside an Oakland courthouse by an activist group, and organizers were questioning why the Deputy was asking them to move their demonstrations.⁹⁷ Quite suddenly, the video depicts Deputy Shelby taking his phone out, playing “Blank Space” by Taylor Swift, and proclaiming, “You can record all you want, I just know it can’t be posted on YouTube.”⁹⁸

At the time, although the Alameda County Sheriff’s Office had no official language in its internal policy prohibiting this kind of conduct, the Office was quick to condemn the officer’s actions and launched an investigation into the matter.⁹⁹ Subsequently, the Office revised its internal policy to prevent this practice going forward.¹⁰⁰ In similar

⁹³ Vincent Nguyen, Note, *Watching Big Brother: A Citizen’s Right to Record Police*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 637, 637 (2018).

⁹⁴ Police officers have physically blocked bystanders from recording videos and have utilized threats, intimidation, and harassment. A.W. Ohlheiser, *The Tactics Police Are Using to Prevent Bystander Video*, MIT TECH. REV. (Apr. 30, 2021), <https://www.technologyreview.com/2021/04/30/1024325/police-video-filming-prevention-tactics> [<https://perma.cc/435E-FHA9>].

⁹⁵ See Cushing, *supra* note 8.

⁹⁶ Ann Potter Gleason, *Weaponizing Copyright?*, NAT’L L. REV. (Sept. 28, 2021), <https://www.natlawreview.com/article/weaponizing-copyright> [<https://perma.cc/2NFH-W34Q>].

⁹⁷ Megan Munce, *Sheriff’s Sergeant Plays Copyrighted Music to Keep Activists from Uploading Video to YouTube*, PLEASANTON WEEKLY (July 4, 2021, 4:32 PM), <https://pleasantonweekly.com/news/2021/07/04/sheriffs-sergeant-plays-copyrighted-music-to-keep-activists-from-uploading-video-to-youtube> [<https://perma.cc/C8YL-J2QC>].

⁹⁸ KTVU FOX 2 San Francisco, *RAW: Sheriff Plays Taylor Swift to Speak to Protesters*, YOUTUBE, at 0:52 (July 1, 2021), https://www.youtube.com/watch?v=rwwU4_VUx1A&ab_channel=KTVUFOX2SanFrancisco [<https://perma.cc/A52A-YQLG>].

⁹⁹ “According to Alameda County sheriff’s spokesman Sgt. Ray Kelly, the video has been referred to the office’s internal affairs bureau for investigation. In a statement, Kelly said it was ‘not approved behavior’ and ‘will not happen again.’” Munce, *supra* note 97.

¹⁰⁰ Cole, *supra* note 4. The internal policy is especially detailed. *See id.* The policy states that

‘[a]gency members shall not, purposefully and knowingly, use or broadcast any copyrighted body of work in a manner that will adversely impact the level of professionalism, performance, conduct and productivity that is expected of a peace officer or professional staff member,’ and ‘[c]opyrighted work shall not be used in a

instances around the country, some city councils have proposed ordinances banning police officers from broadcasting music during bystander encounters.¹⁰¹

While these measures may be encouraging, it may not be enough to rely solely on local departments and city councils to institute change, especially if these responses come only after such incidents have already occurred.¹⁰² Regardless, police officers seem to understand that the presence of copyrighted music in a recording, even incidentally in the background, can prevent the recording from remaining on popular online platforms.¹⁰³ **They recognize that YouTube's Content ID system cannot distinguish between recordings of police officers featuring a snippet of Taylor Swift music and, for example, a Taylor Swift music video published without her permission.**¹⁰⁴ By inventively manipulating copyright law and policy, police officers are preventing the dissemination of videos whose publication carries potential societal benefit.

C. *The Compelling Value of Civilian Bystander Recordings of Police*

Previous scholarship sheds light on the troubling ways in which lawful speech is suppressed online.¹⁰⁵ This Note aims to push this conversation forward by focusing on how civilian recordings of police are worthy of special attention in and of themselves to warrant reforms to existing copyright law and practice. There are numerous reasons why this particular medium of speech warrants protection.

manner as to limit the public's ability to exercise their First Amendment rights as set fourth [sic] in the United States Constitution.'

Id.

¹⁰¹ See, e.g., City of Santa Ana, *Santa Ana Council April 19, 2022—ENGLISH*, YOUTUBE, at 7:39:45 (Apr. 19, 2022), <https://youtu.be/ssEyzGOj0G0> [<https://perma.cc/PAS8-Z5NT>].

¹⁰² See Sarah A. Seo & Daniel Richman, *Police Reform Won't Work Unless It Involves Federal and State Governments*, WASH. POST (July 7, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/07/07/police-reform-wont-work-unless-it-involves-federal-state-governments> [<https://perma.cc/43DU-9YER>]. Conversations surrounding police reforms often focus on fixing problems at the individual or departmental level because policing has always been under local control. *Id.* However, history and practice suggest that intervention from entities like state and federal governments will better ensure oversight and accountability of local police departments. *Id.*

¹⁰³ See, e.g., KTVU FOX 2 San Francisco, *supra* note 98.

¹⁰⁴ Trendacosta, *supra* note 15 ("It's as easy to play a song out of your phone as it is to film with it. Easier, even. And copyright filters work by checking if something in an uploaded video matches any of the copyrighted material in its database. A few seconds of a certain song in the audio of a video could prevent that video from being uploaded. That's the thing the cops in these stories are recognizing. And while it's funny to see a cop playing Taylor Swift and claiming we can't watch a video on YouTube that we are actually watching on YouTube, how many of these stories *aren't* we hearing about?").

¹⁰⁵ See discussion *supra* note 14.

1. First Amendment Right to Film (and Distribute) Police Recordings

Several federal courts¹⁰⁶ and the Department of Justice¹⁰⁷ have taken the position that individuals have a First Amendment right to film police officers who are performing their duties in public. This right to film the police in their official capacity has become an emerging issue in First Amendment jurisprudence¹⁰⁸ in part because many civilians now carry cell phones with the ability to readily produce such recordings.¹⁰⁹

In *Glik v. Cunniffe*, the First Circuit asserted that there is a strong First Amendment interest in promoting the widespread distribution of information about the government to the public.¹¹⁰ Thus, this right could extend beyond merely recording police officers and could include the dissemination of such recordings. And there is clear recognition that such **a right would exist not only to promote the general public’s viewing, but** also to protect recording bystanders from potential repercussions at the hands of police.¹¹¹

There are notable limitations in consideration of this potential constitutional right. First, several states have recently introduced and

¹⁰⁶ See e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

¹⁰⁷ See Statement of Interest of the United States at *1, *Sharp v. Balt. City Police Dep’t*, No. 11-cv-02888 (D. Md. Jan. 10, 2012), 2012 WL 9512053.

¹⁰⁸ David L. Hudson Jr., *Filming the Police*, FIRST AMEND. ENCYCLOPEDIA (2020), <https://www.mtsu.edu/first-amendment/article/1550/filming-the-police> [<https://perma.cc/LN79-8UJH>].

¹⁰⁹ Nguyen, *supra* note 93.

¹¹⁰ 655 F.3d at 82 (“Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

¹¹¹ Brief of Amicus Curiae Electronic Frontier Foundation in Support of Plaintiffs-Appellees Martin and Pérez and Affirmance of the Opinion Below at 3, *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (Nos. 19-1586, 19-1629, 19-1640), 2019 WL 5081502 (“Many civilians reasonably fear how police will react to open recording. Unfortunately, some officers prevent civilians from recording them or retaliate against those who do, for example, by ordering them to stop recording, deleting the recordings, destroying the devices, or arresting them.”); Jessie Rossman, *ACLU of Massachusetts Statement on Martin v. Rollins*, ACLU MASSACHUSETTS (Dec. 16, 2020, 7:15 AM), <https://www.aclum.org/en/news/aclu-massachusetts-statement-martin-v-rollins> [<https://perma.cc/83FL-XYJU>] (“People’s recordings of police interactions have started crucial conversations about police reform, and we all suffer when fear of retribution or prosecution stifles these movements.”).

passed legislation criminalizing the recording of the police.¹¹² There is a compelling newfound fear that officers may use this legislation to target civilian bystanders who share these recordings online.¹¹³ Further, there exists a fundamental longstanding tension between the First Amendment and the copyright regime in that they serve diametrically opposed purposes.¹¹⁴ Even so, “courts have been reluctant to recognize any real conflict between copyright and the First Amendment.”¹¹⁵ Courts generally view the fair use doctrine and the idea-expression dichotomy, both creatures of copyright law, as “easily dispos[ing] of First Amendment defenses in copyright cases.”¹¹⁶ Justice Ginsburg famously referred to the fair use defense as a “built-in free speech safeguard[,]”¹¹⁷ and the defense has frequently been described as copyright’s “‘safety valve’ for the First Amendment.”¹¹⁸

Thus, in any practical sense, First Amendment considerations for the dissemination of police recordings with copyrighted audio would give way to a fair use defense.¹¹⁹ And the fair use defense alone is not enough to curtail the suppression of potentially legal online speech.¹²⁰ Regardless of these limitations, there is a clear recognized importance in promoting and preserving the dissemination of police recordings online.

¹¹² Trone Dowd, *Your Right to Film the Police Is Under Attack*, VICE NEWS (Mar. 25, 2022, 10:51 AM), <https://www.vice.com/en/article/g5qn57/filming-police-legality> [https://perma.cc/8CSP-3YDM]. In some states, like Arizona, district courts have entered into stipulated permanent injunctions, preventing government officials from enforcing such laws. See *Ariz. Broadcasters Ass’n v. Mayes*, 2:22-cv-01431 (D. Ariz. 2023).

¹¹³ *Id.* (“For example, an officer can use the new stratagem of not going after the initial recording of a situation but the subsequent publication of it because of what appears in that video . . .”).

¹¹⁴ See Edmund T. Wang, Comment, *The Line Between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests*, 13 U. PA. J. CONST. L. 1471, 1471 (2011) (“In the most basic terms: the First Amendment protects expression while copyright law regulates it. The First Amendment prohibits government actions that restrict people’s freedom of speech. Copyright, on the other hand, is a government creation that restricts speech by prohibiting people from using certain words or images in their expression.”); see also Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 833 (2010).

¹¹⁵ Wang, *supra* note 114, at 1472.

¹¹⁶ *Id.* at 1480.

¹¹⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

¹¹⁸ Krista L. Cox, *The First Amendment and Copyright Law: Can’t We All Just Get Along?*, ABOVE THE L. (Aug. 31, 2017, 3:20 PM), <https://abovethelaw.com/2017/08/the-first-amendment-and-copyright-law-cant-we-all-just-get-along> [https://perma.cc/A25P-QU4K].

¹¹⁹ See Wang, *supra* note 114, at 1480.

¹²⁰ See *infra* Section II.B.

2. Evidentiary and Social Value

Beyond the constitutional discourse, there are important practical considerations for why this medium of content is worthy of protection. There are numerous uses of civilian recordings of the police that give them widespread societal benefit.

First, the dissemination of viral videos, like that of the killing of George Floyd, has fostered new considerations for how police officers should be trained.¹²¹ The video’s prevalent display of the three standby officers has elevated calls for peer-intervention training to ensure officers keep each other accountable and prevent deaths like that of George Floyd.¹²²

Beyond training, it is not enough to rely on self-produced videos from the police to ensure that they are acting properly while on the job. In 2014, after a series of civilian shootings by police officers, there were widespread calls for police officers to wear body cameras.¹²³ Since that time, there remains broad recognition that mandating the wearing of these body cameras could positively impact policing.¹²⁴ Despite this, a majority of law enforcement agencies around the country do not use body cameras,¹²⁵ and, as of 2021, only seven states mandated the use of such cameras.¹²⁶ State statutes and police department policies often give

¹²¹ Cheryl Corley, *1 Year Later, the Video of George Floyd’s Death Has Lasting Impacts*, NPR, at 4:21 (May 7, 2021, 5:03 AM), <https://www.npr.org/2021/05/07/994539600/1-year-later-the-video-of-george-floyds-death-has-lasting-impacts> [<https://perma.cc/VJ3Z-RZWR>]. (“Today, videos are making us think, how are we training officers? What should have been done? How do we intervene?”).

¹²² Matt Vasilogambros, *Training Police to Step In and Prevent Another George Floyd*, STATELINE (June 5, 2020, 12:00 AM), <https://stateline.org/2020/06/05/training-police-to-step-in-and-prevent-another-george-floyd> [<https://perma.cc/4P3Z-JP9Y>].

¹²³ Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 831–32 (2015).

¹²⁴ See, e.g., Jeffrey Bellin & Shevarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 FORDHAM L. REV. 1425, 1426 nn.2–4 (2019).

¹²⁵ *Research on Body-Worn Cameras and Law Enforcement*, NAT’L INST. OF JUST. (Jan. 22, 2023), <https://nij.ojp.gov/topics/articles/research-body-worn-cameras-and-law-enforcement> [<https://perma.cc/R7CW-M7H2>].

¹²⁶ *Body-Worn Camera Laws Database*, NAT’L CONF. OF STATE LEGS., <https://www.ncsl.org/civil-and-criminal-justice/body-worn-camera-laws-database> [<https://perma.cc/9X9G-JBDB>] (Apr. 30, 2021).

officers broad discretion¹²⁷ or are ambiguous¹²⁸ as to whether and when officers can turn off their body cameras.

Beyond their limited uses, evidence suggests that body cameras may not even be effective in increasing the quality of evidence and reducing complaints from citizens.¹²⁹ Thus, reliance on secondhand recordings of police officers can be beneficial in ensuring that there is a record of alleged police misconduct in the absence of body cameras.

Recordings of police officers are also becoming increasingly utilized as admissible evidence in trials.¹³⁰ In fact, in major lawsuits involving excessive police force, civilian recordings have served as a key component of the prosecutions' cases.¹³¹ Even where body-worn video camera footage is not admissible as evidence,¹³² these bystander police recordings may nevertheless serve to supplement the record.

Finally, and most profoundly, not only do these recordings often **contradict an officer's testimony of how a situation played out, but they** also create tremendous public pressure for action to be taken against officers.¹³³ More broadly, educating civilians about the power to record the police promotes greater public oversight of the police.¹³⁴

Overall, there are numerous compelling reasons to support the widespread dissemination of police recordings online. In considering the practical measures that can be taken to achieve this goal, it is worth exploring applications of the fair use defense.

¹²⁷ See Kirsten Swanson, *Officers Across Minnesota Allowed to Turn Off Body Cameras in Middle of Investigations*, KSTP (Jan. 10, 2022, 2:58 PM), <https://kstp.com/kstp-news/top-news/officers-across-minnesota-allowed-to-turn-off-body-cameras-in-middle-of-investigations> [<https://perma.cc/6Q2Z-SYQE>].

¹²⁸ See N.J. STAT ANN. § 40A:14-118.3 (West 2023). The language of the statute is open to a variety of interpretations about, for example, “whether an immediate threat to the officers’ life or safety makes activating the body worn camera impossible or dangerous.” *Id.* § 40A:14-118.5.

¹²⁹ *Research on Body-Worn Cameras and Law Enforcement*, *supra* note 125.

¹³⁰ Burch & Eligon, *supra* note 2 (“**Videos of police interactions with civilians, whether captured by the people involved or bystanders, now act as a central witness, often challenging official accounts.**”).

¹³¹ Cheryl Corley, *How Using Videos at Chauvin Trial and Others Impacts Criminal Justice*, NPR (May 7, 2021, 10:28 AM), <https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice> [<https://perma.cc/7EJB-G954>].

¹³² See Bellin & Pemberton, *supra* note 124, at 1428–29 (“**The admissibility of police body camera statements hinges on how courts unpack an unresolved tension in evidence law.**”).

¹³³ Richard Pérez-Peña & Timothy Williams, *Glare of Video Is Shifting Public's View of Police*, N.Y. TIMES (July 30, 2015), <https://www.nytimes.com/2015/07/31/us/through-lens-of-video-a-transformed-view-of-police.html?smid=url-share> [<https://perma.cc/4AH8-Q8QS>].

¹³⁴ Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. REV. 1639, 1652 (2018).

II. CAN FAIR USE ALONE PREVENT THE TAKEDOWN OF POLICE RECORDINGS?

As it stands, the law does not provide a wholesale solution to prevent the suppression of police recordings online. Currently, fair use may be the most appropriate avenue through which to claim legal use of copyrighted music in a police recording.¹³⁵ But because of the fact-specific nature of the fair use doctrine, as well as its unreliable application in the context of DMCA takedowns, the defense alone is unlikely to be of much help.¹³⁶

A. *Police Recordings as Fair Use*

While there are four factors to consider in judging a claim, the fair use statute describes criticism, comment, and news reporting as protected material.¹³⁷ These uses share the interest of developing a shared common culture in our society.¹³⁸ While the 1976 Copyright Act specifies that these categories of use generally would qualify as fair use,¹³⁹ the particular use at issue still needs to satisfy all four elements of the claim.¹⁴⁰

The elements of a fair use defense are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion taken, and (4) the effect of the use upon the potential market.¹⁴¹ While the nature of fair use analysis is highly contextual, the police recordings at issue could satisfy all four of these elements.

¹³⁵ See *Fair Use*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2023), <https://www.dmlp.org/legal-guide/fair-use> [<https://perma.cc/MEX3-42YZ>] (“[T]he courts and then Congress have adopted the fair use doctrine in order to permit uses of copyrighted materials considered beneficial to society, many of which are also entitled to First Amendment protection.”).

¹³⁶ See *infra* Section II.B.

¹³⁷ 17 U.S.C. § 107.

¹³⁸ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 26, at 490 (“Such [fair] uses help to produce a public that is educated and informed not only about current events, but also about shared values, interests, and debates.”).

¹³⁹ § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

¹⁴⁰ *Fair Use*, COPYRIGHT ADVISORY SERVS., <https://copyright.columbia.edu/basics/fair-use.html> [<https://perma.cc/A7Q3-MHG6>] (noting that the application and balancing of the four fair use elements is critical “for the law to adapt to changing technologies and to meet innovative needs of higher education”).

¹⁴¹ § 107.

The first element focuses on the purpose and character of the use.¹⁴² “[A] court is more likely to excuse a use as fair [use] if it is transformative,”¹⁴³ meaning it takes the original and “add[s] new expression or a new message.”¹⁴⁴ Using “another’s copyrighted work for the purpose of criticism, news reporting, or commentary . . . will weigh in favor of fair use.”¹⁴⁵ More deference is often given to transformative uses that are “in the public interest” as opposed to uses that simply aim to generate profits.¹⁴⁶ Often, this factor ends up being the most important to consider in the fair use inquiry.¹⁴⁷ In the context of police recordings, the use of copyrighted music seems most certainly to satisfy the transformative requirement.¹⁴⁸ Here, the use of the copyrighted music in the recording is transformative in that it brings greater attention to the officers’ conduct and thus ultimately aids in holding officers accountable.¹⁴⁹ More broadly, given that these recordings largely serve as critiques or commentary of police misconduct, the recording of police fits squarely into the categories of publicly beneficial activities that are set forth in the language of the 1976 Copyright Act.¹⁵⁰

The second element is centered around analyzing the nature of the original copyrighted work: whether the work is “factual or creative, and whether it is published or unpublished.”¹⁵¹ Courts are generally more protective of creative works and thereby apply fair use more expansively when the original work is nonfiction.¹⁵² In police recordings, the underlying music is creative, which would cut against fair use. However,

¹⁴² *Id.*; see also DIGIT. MEDIA L. PROJECT, *supra* note 135.

¹⁴³ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 26, at 528. The idea that “transformation” plays a significant role in the application of the fair use defense was prominently articulated in the first American fair use case, *Folsom v. Marsh*. Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 145 (2011). Justice Story proclaimed that “if [someone] thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.” *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4,901).

¹⁴⁴ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 26, at 528.

¹⁴⁵ DIGIT. MEDIA L. PROJECT, *supra* note 135 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994)).

¹⁴⁶ DIGIT. MEDIA L. PROJECT, *supra* note 135 (quoting *Online Pol’y Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004)).

¹⁴⁷ See *Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

¹⁴⁸ Scott Hervey, *Don’t Film So Close to Me: Can Copyrighted Music Keep Vids of Police Encounters Off the Internet?*, JD SUPRA (July 23, 2021), <https://www.jdsupra.com/legalnews/dont-film-so-close-to-me-can-3373288> [<https://perma.cc/9ME5-XYKH>].

¹⁴⁹ *Id.*

¹⁵⁰ See 17 U.S.C. § 107.

¹⁵¹ *Id.*; see also DIGIT. MEDIA L. PROJECT, *supra* note 135.

¹⁵² COPYRIGHT ADVISORY SERVS., *supra* note 140.

while the right of first publication is merely a creature of common law in the United States,¹⁵³ courts generally weigh unpublished material against a finding of fair use.¹⁵⁴ In these police recordings, the music would necessarily have been published for it to be recognized and detected by OSPs, thus supporting a finding of fair use.

The third element evaluates both the quantitative amount of copyrighted material used relative to the original and how qualitatively **“important” the portion of material was**,¹⁵⁵ which relates back to the first element.¹⁵⁶ There is no definitive measure of how much used material constitutes infringement, but generally more material taken from the original content means less fair use protection.¹⁵⁷ With these police recordings, there are a multitude of variables that could dictate how much copyrighted audio is included, including how long the recording is and how much of the recording includes the copyrighted audio. But when inquiring into the qualitative substantiality of the copyrighted material (essentially asking for the transformative nature of the music used), fair use seems more certain.¹⁵⁸

The final element focuses on the potential impact the use will have **on the copyrighted material’s market**.¹⁵⁹ This element is largely focused on whether **“unrestricted and widespread” use similar to the one in question would have a “substantially adverse impact on the potential market for the [work].”**¹⁶⁰ It is unlikely that the inclusion of portions of copyrighted music in these police recordings would cause such severe disruption to the economic viability of the music itself, unless the rightsholder could present contesting evidence.¹⁶¹ Further, the potential

¹⁵³ RONALD B. STANDLER, COMMON-LAW COPYRIGHT IN THE USA 26 (2013).

¹⁵⁴ COPYRIGHT ADVISORY SERVS., *supra* note 140.

¹⁵⁵ § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

¹⁵⁶ *Campbell*, 510 U.S. at 586–87 (“[T]he [third element] enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (noting that “even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech” but not in a scoop of a soon-to-be-published memoir).

¹⁵⁷ *The Meaning of the Four Fair Use Factors*, BYU COPYRIGHT LICENSING OFF., <https://copyright.byu.edu/the-meaning-of-the-four-fair-use-factors> [<https://perma.cc/3T5R-NKCW>].

¹⁵⁸ See DIGIT. MEDIA L. PROJECT, *supra* note 135.

¹⁵⁹ § 107; DIGIT. MEDIA L. PROJECT, *supra* note 135.

¹⁶⁰ *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 80–81 (2d Cir. 1997) (quoting *Campbell*, 510 U.S. at 590).

¹⁶¹ For example, in a recent Second Circuit case, the court held that the defendants’ use of eight seconds of the plaintiffs’ song in a film was fair within the meaning of § 107 because the use of a small portion of the song for documentary purposes did not influence the potential market for the song. *Brown v. Netflix, Inc.*, 855 F. App’x 61, 64 (2d Cir. 2021).

noneconomic harm to the rightsholder through the public's association of the rightsholder's music with police injustice is irrelevant to the inquiry, as this fourth element is only concerned with the *economic* harm induced by use of copyrighted material.¹⁶²

Stepping back from the elements of the defense, these police recordings fit squarely within paradigmatic examples of fair use in journalism and broadcasting. Fair use has been found in cases where copyrighted music is incidentally a part of the background of the broadcasted story.¹⁶³ The Southern District of New York, for example, has ruled that the incidental use of copyrighted music does not have recognizable potential to impair potential markets for the respective music.¹⁶⁴ Similar arguments could very well be raised in defense of these police recordings that similarly contain mere snippets of copyrighted music. Additionally, Congress, as well as the Center for Media and Social Impact, has recognized more broadly that the incidental reproduction of copyrighted material in journalism has application in fair use.¹⁶⁵ Thus, even outside of the case-by-case application of the elements, there is demonstrated support for a fair use finding of these bystander police recordings.

¹⁶² DIGIT. MEDIA L. PROJECT, *supra* note 135; *Campbell*, 510 U.S. at 591–92 (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

¹⁶³ *See, e.g.*, *Italian Book Corp. v. Am. Broad. Cos., Inc.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (finding that defendant's incidental use of plaintiff's song in the background of a televised parade was protected as fair use); *see also* *Coleman v. ESPN, Inc.*, 764 F. Supp. 290 (S.D.N.Y. 1991) (denying plaintiffs' motion for summary judgment on a copyright infringement claim for background music incidentally picked up in an ESPN televised broadcast and demonstrating that such incidental uses of music are not sufficient to constitute copyright infringement as a matter of law).

¹⁶⁴ *Italian Book Corp.*, 458 F. Supp. at 68 (“ABC's television newscast constitutes a medium and setting which were noncompetitive with the media and settings in which the song would normally be offered or used. ABC's use of the song did not, and could not, have any adverse effect upon the market for the song, the song's value, or the song itself.”); *Coleman*, 764 F. Supp. at 295 (“On this record, the unresolved factual issues precluding summary judgment on the complaint include whether each of the copyright takings alleged in the complaint is substantial and whether any individual taking is likely to impair the potential market for or value of the copyrighted work.”).

¹⁶⁵ In its early deliberations over what would constitute the 1976 Copyright Act, Congress presented ideas for what courts may regard as fair use, including “incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.” H.R. REP. NO. 94-1476, at 65 (1976) (quoting STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REP. ON GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961)). Additionally, the *Set of Principles in Fair Use for Journalism* states that “[f]air use applies to the incidental and fortuitous capture of copyright material in journalism” and that “[e]xcluding (or drastically curtailing) the amount of such material contained in reporting would compromise the truth-telling mission of journalism.” CTR. MEDIA & SOC. IMPACT, SET OF PRINCIPLES IN FAIR USE FOR JOURNALISM 10 (2013), https://cmsimpact.org/wp-content/uploads/2016/01/principles_in_fair_use_for_journalism.pdf [<https://perma.cc/KN7X-TYQA>].

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B. *Fair Use Limitations Both Generally and in DMCA Takedown Procedures*

There are several notable shortcomings in relying solely on fair use to ensure that police recordings remain online. First, fair use analysis is **highly contextual and discretionary, and there is no guarantee that one’s use will qualify as fair use.**¹⁶⁶ Thus, for a creator wanting to raise the affirmative defense, there is little *ex ante* guarantee that it will protect their speech.¹⁶⁷ This uncertainty creates a chilling effect in which individuals may refuse to even attempt the publication of their content online if they know that they are relying solely on an unpredictable defense.¹⁶⁸

Both the difficult nature of relying upon this defense and its potential for chilling speech have been exacerbated through its application in DMCA takedowns.¹⁶⁹ When issuing a DMCA takedown notice, a rightsholder is required to provide a statement that they have a good faith belief that the use of their copyrighted material was not authorized by the rightsholder or the law.¹⁷⁰

The question of whether this good faith belief requires a rightsholder to apply the fair use defense was not addressed by any court until *Lenz v. Universal Music Corp.*¹⁷¹ In *Lenz*, the Ninth Circuit announced that rightsholders are indeed required to decide whether the material constitutes fair use (and is thereby not infringing) before issuing a takedown notice.¹⁷² Under *Lenz*, a jury would have to evaluate “whether [the rightsholder’s] actions were sufficient to form a subjective good faith belief about [a] video’s fair use or lack thereof.”¹⁷³ Further, the court announced that a rightsholder “knowingly” misrepresents that material is infringing under § 512(f) only when the rightsholder has *actual* knowledge of the misrepresentation.¹⁷⁴

¹⁶⁶ *Fair Use Defense to Copyright Infringement Lawsuits*, JUSTIA (Oct. 2023), <https://www.justia.com/intellectual-property/copyright/fair-use> [<https://perma.cc/9L3Z-MELC>].

¹⁶⁷ See James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 192 (2005); see also Bruce E. Boyden, *The Surprisingly Confused History of Fair Use: Is It a Limit or a Defense or Both?*, MARQUETTE UNIV. L. SCH. FAC. BLOG (Oct. 9, 2022), <https://law.marquette.edu/facultyblog/2022/10/the-surprisingly-confused-history-of-fair-use-is-it-a-limit-or-a-defense-or-both> [<https://perma.cc/UUX6-KWQS>].

¹⁶⁸ See Gibson, *supra* note 168 (“[I]n many cases the uncertainty of the [fair use] outcome would undoubtedly have a chilling effect on socially beneficial behavior.”).

¹⁶⁹ See MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? 4–5 (2005).

¹⁷⁰ 17 U.S.C. § 512(c)(3)(A)(v).

¹⁷¹ 815 F.3d 1145 (9th Cir. 2016).

¹⁷² *Id.* at 1151.

¹⁷³ *Id.* at 1154.

¹⁷⁴ *Id.*

While *Lenz* initially gave hope that DMCA takedown abuses would subside,¹⁷⁵ the decision has been criticized on numerous grounds.¹⁷⁶ First, the Ninth Circuit provided an unclear standard for how legitimate the fair use analysis must be, only stating that rightsholders cannot merely pay “lip service” in considering the defense.¹⁷⁷ Further, the court’s interpretation of the § 512(f) knowledge standard means that, in essence, a challenging user would have to *prove* that the rightsholder did not actually believe the material falls outside of fair use.¹⁷⁸ Thus, the low bar for a rightsholder to conduct the fair use analysis and the high bar for a user to prove misrepresentation of that analysis together provide little incentive for rightsholders to take the fair use inquiry seriously.¹⁷⁹ As a result, rightsholders remain largely unchallenged under § 512(f), thereby causing potential content to be taken down without fair consideration of the defense.¹⁸⁰ In any event, *Lenz* is still the law of only one circuit.

There are certainly compelling arguments to raise in favor of police recordings satisfying each element of the fair use defense. However, its subjectiveness, as well as its application in DMCA takedowns, prevents this “exceptionally elusive”¹⁸¹ defense from categorically protecting police recordings.

¹⁷⁵ See *Important Win for Fair Use in ‘Dancing Baby’ Lawsuit*, ELEC. FRONTIER FOUND. (Sept. 14, 2015), <https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit> [<https://perma.cc/5XC8-5BJX>].

¹⁷⁶ See Recent Case, *Lenz v. Universal Music Corp.*, No. 13-16106, 2016 WL 1056082 (9th Cir. Mar. 17, 2016), 129 HARV. L. REV. 2289 (2016); see also Guzman, *supra* note 66, at 196; Trendacosta, *supra* note 41, at 21–22.

¹⁷⁷ *Lenz*, 815 F.3d at 1154.

¹⁷⁸ See *id.*

¹⁷⁹ Recent Case, *supra* note 176, at 2293 (“This high evidentiary burden, along with the court’s refusal to explicitly establish what kinds of fair use analyses are necessary, creates an unsavory incentive for copyright holders to avoid learning conclusively whether a use constitutes fair use.”); Trendacosta, *supra* note 41 (“This leads to a virtually incoherent result: a rightsholder must consider fair use, but has no incentive to actually learn what such a consideration should entail. After all, if she doesn’t know what the fair use factors are, she can’t be held liable for not applying them thoughtfully.”).

¹⁸⁰ Guzman, *supra* note 66, at 189.

¹⁸¹ *Marvin Worth Prods. v. Superior Films Corp.*, 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970).

III. WHAT REFORMS CAN FURTHER PROMOTE THE DISSEMINATION OF POLICE RECORDINGS ONLINE?

There already exists recognition that there is no one-size-fits-all solution to preventing online infringement.¹⁸² The same is true in understanding what remedies should exist to prevent the takedown of legal speech. In advising the recorder of a police encounter on ex ante solutions to prevent takedown, a lawyer could recommend that the recorder obtain a license to use the song in the recording.¹⁸³ Though there is no clear way of knowing whether rightsholders would consent to licensing songs in these situations, even if they did consent, getting permission to license music generally takes between one and three months,¹⁸⁴ which runs the risk of preventing the police recording from having an immediate impact online.

This Note puts forward several recommendations for how to best combat both the police officers’ act of playing music and the taking down of recordings online. It is more practical to focus on finding solutions to the latter. For one, it does not appear realistic to rely solely upon the passage of local ordinances or the self-policing of police departments because local action alone will not lead to extensive police reforms.¹⁸⁵ Additionally, the ideal solutions for combatting online takedowns are those that relieve users from having to litigate, as most users do not have the resources to challenge takedown notices.¹⁸⁶

¹⁸² See, e.g., Alden Abbott, Adam Mossoff, Kristen Osenga, Brian O’Shaughnessy & Mark Schultz, *Creativity and Innovation Unchained: Why Copyright Law Must Be Updated for the Digital Age by Simplifying It*, REGUL. TRANSPARENCY PROJECT 8 (Oct. 27, 2017), <https://rtp.fedsoc.org/paper/creativity-innovation-unchained-copyright-law-must-updated-digital-age-simplifying> [<https://perma.cc/RMK8-C6MN>] (“Curtailing online infringement will require a combination of effective laws, robust enforcement, and private sector cooperation.”).

¹⁸³ Belle Wong, *Avoid Infringement by Getting Copyright Permission*, LEGALZOOM, <https://www.legalzoom.com/articles/avoid-infringement-by-getting-copyright-permission> [<https://perma.cc/BQ3E-ZT5R>] (Dec. 13, 2023).

¹⁸⁴ Rich Stim, *The Basics of Getting Permission*, STANFORD COPYRIGHT & FAIR USE, <https://fairuse.stanford.edu/overview/introduction/getting-permission> [<https://perma.cc/V9DU-VB37>].

¹⁸⁵ See *supra* note 102 and accompanying text.

¹⁸⁶ Cathy Gellis, *New Decision in Dancing Baby DMCA Takedown Case—and Everything Is Still a Mess*, TECHDIRT (Mar. 18, 2016, 12:44 PM), <https://www.techdirt.com/2016/03/18/new-decision-dancing-baby-dmca-takedown-case-everything-is-still-mess> [<https://perma.cc/79YL-3F3D>].

A. *Statutory Reforms*

1. Amend Pertinent DMCA Provisions

The DMCA notice and takedown process needs to ensure greater protection for innocent users before their material is removed from OSPs.¹⁸⁷ As it stands, § 512(f), which is meant to give users remedies against rightsholders, is not strong enough to provide those protections.¹⁸⁸ Thus, changes should be made to § 512 that provide users with more faith that the takedown process is adequately fair because users are often legally unsophisticated.¹⁸⁹

One potential reform calls upon Congress to amend § 512(f) to require a rightsholder to demonstrate an *objective* good faith belief that their copyright has been infringed upon as opposed to the *subjective* standard interpreted by the Ninth Circuit.¹⁹⁰ An objective standard would replace the “current and inefficient subjective standard”¹⁹¹ and better ensure the fair use inquiry is conducted legitimately by rightsholders.¹⁹² Such an objective standard would also lessen the evidentiary burden placed on users in proving that the rightsholder acted in bad faith when conducting a fair use analysis.¹⁹³

This objective standard is especially pertinent for unequivocal instances of fair use. There are some mediums of content that some scholars argue are so important to the public and fit so squarely into the four elements of the fair use inquiry that they are “unequivocal fair use.”¹⁹⁴ Unequivocal fair use would mean that no reasonable rightsholder, **in evaluating the use before issuing a DMCA takedown**, “could conclude that the use is anything but fair use”¹⁹⁵ If courts were to accept this approach, there would be compelling reasons to believe that the police

¹⁸⁷ URBAN, KARAGANIS & SCHOFIELD, *supra* note 68, at 127 (“[N]otice and takedown needs better mechanisms for ensuring that an infringement is actually likely before material comes down and stays down, and better due process mechanisms for targets.”).

¹⁸⁸ The DMCA makes it overly difficult for plaintiffs to seek recourse for misrepresentation in DMCA takedowns. Randazza, *supra* note 87, at 772. (“Section 512(f) is largely toothless—after all, Stephanie Lenz [the plaintiff in *Lenz*] was only able to bring her case because an advocacy organization took up the cause.”). See also *supra* notes 179–81 and accompanying text.

¹⁸⁹ Jordan Koss, Note, *Protecting Free Speech for Unequivocal Fair Users: Rethinking Our Interpretation of the § 512(f) Misrepresentation Clause*, 28 CARDOZO ARTS & ENT. L.J. 149, 164 (2010).

¹⁹⁰ See Randazza, *supra* note 87, at 775.

¹⁹¹ *Id.*

¹⁹² See *supra* note 179 and accompanying text.

¹⁹³ *Id.*

¹⁹⁴ See Koss, *supra* note 189, at 152–53.

¹⁹⁵ *Id.* at 152.

recordings would be viewed as deeply important for public consumption¹⁹⁶ and would satisfy the four elements of the fair use inquiry.¹⁹⁷ While this objective standard would still require contextual fair use analysis, the unequivocal nature of police recordings would ensure that they are deemed fair use more often than not.¹⁹⁸

There are other procedural amendments to § 512 that can be instituted to better protect users. For one, § 512(g) should require that a user receive advance notice of a takedown before the material is removed for the ten-to-fourteen-day period.¹⁹⁹ This temporary shutdown period “can mean the difference between a major impact and total obscurity” for videos like police recordings that require timely dissemination.²⁰⁰ Other proposals include increasing penalties for rightsholders who misuse or abuse the DMCA takedown process.²⁰¹ This includes imposing statutory damages on rightsholders who carry out extrajudicial prior restraint of speech by misrepresenting under § 512(f).²⁰²

Currently, there is pending legislation that seeks to reform specific provisions of the DMCA. The Strengthening Measures to Advance Rights Technologies Copyright Act of 2022 (also known as the SMART Copyright Act of 2022) was introduced by United States Senator Thom Tillis (R-NC) on March 17, 2022.²⁰³ It proposes adding a new section 514 to the DMCA which would empower the Copyright Office to establish certain designated technical measures (DTMs) that OSPs must implement.²⁰⁴ For example, YouTube’s Content ID system, a digital fingerprinting system, is essentially a voluntarily created DTM;²⁰⁵ however, this law would require existing and emerging OSPs beyond YouTube to adopt them.²⁰⁶

¹⁹⁶ See *supra* Section I.C.

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ See Koss, *supra* note 189, at 158.

¹⁹⁹ Matteson, *supra* note 13, at 15.

²⁰⁰ See Elec. Frontier Found., Comment Letter on Section 512 Study 16 (Apr. 1, 2016), https://www.eff.org/files/2016/04/01/eff_comments_512_study_4.1.2016.pdf [<https://perma.cc/Y574-SF23>].

²⁰¹ See *generally* Randazza, *supra* note 87.

²⁰² *Id.* at 774.

²⁰³ SMART Copyright Act of 2022, S. 3880, 117th Cong. (2022).

²⁰⁴ See *id.*; see also Keith Kupferschmid, *A SMART New Approach to Combatting Piracy*, COPYRIGHT ALLIANCE (Mar. 24, 2022), <https://copyrightalliance.org/smart-copyright-act-s3880> [<https://perma.cc/9PC8-YMFJ>].

²⁰⁵ See SMART Copyright Act, *supra* note 204; see also Technical Measures: Public Consultations, 86 Fed. Reg. 72638, 72639 (proposed Dec. 22, 2021).

²⁰⁶ Nicholas Garcia, *Not So Smart: The SMART Copyright Act’s Dangerous Approach to Online Copyright Protection*, PUB. KNOWLEDGE (Apr. 28, 2022), <https://publicknowledge.org/not-so-smart-the-smart-copyright-acts-dangerous-approach-to-online-copyright-protection> [<https://perma.cc/7VY7-BHPW>].

Proponents of the bill emphasize its commitment to fighting rampant online copyright piracy through collaboration and consensus between rightsholders and platforms.²⁰⁷ However, the mandatory adoption of DTMs could simply compound existing concerns with automated filtration systems like Content ID—namely, concerns **stemming from the systems’ inability to filter potentially permissible uses from impermissible uses.**²⁰⁸ Thus, it is unclear how this legislation would work to mitigate any of the harms of automated takedowns that are currently plaguing the online ecosystem.

2. Amend § 107 of the 1976 Copyright Act

There are also ways that the fair use provision of the 1976 Copyright Act can be altered to assure greater recognition for works like police recordings. There are, of course, already illustrative categories of fair uses laid out in the Act,²⁰⁹ as well as in parallel copyright statutes around the world.²¹⁰ Thus, one solution to help protect police recordings online is to amend the language of § 107 to include **“documentation of public officials” or “documentation of police officers” as an expressly protected category.**²¹¹

Alternatively, the four-element test laid out in § 107 can be amended to add a fifth element that explicitly considers the public importance in allowing the unauthorized use of the copyrighted material. Currently, the fair use inquiry fails to consider the public value as its own standalone element, as it is generally evaluated with the purpose and character of the

²⁰⁷ See, e.g., Jaci McDole, *Why the SMART Copyright Act Is a Smart Idea*, INFO. TECH. & INNOVATION FOUND. (Oct. 7, 2022), <https://itif.org/publications/2022/10/07/why-the-smart-copyright-act-is-a-smart-idea> [<https://perma.cc/DMP8-LZY4>]; *AG Supports Introduction and Passage of the SMART Copyright Act of 2022*, AUTHOR’S GUILD (Mar. 18, 2022), <https://authorsguild.org/news/ag-supports-introduction-and-passage-of-the-smart-copyright-act-of-2022> [<https://perma.cc/U74Q-KYTX>]; Kupferschmid, *supra* note 204; *RIAA & NMPA Applaud Tillis/Leahy Proposal Encouraging Private Sector Efforts to Combat Piracy Online*, RIAA (Mar. 18, 2022), <https://www.riaa.com/riaa-nmpa-applaud-leahy-tillis-proposal-encouraging-private-sector-efforts-to-combat-piracy-online> [<https://perma.cc/UX9S-JWBH>]; Technical Measures: Public Consultations, 86 Fed. Reg. at 72639.

²⁰⁸ Garcia, *supra* note 206 (“Automated content filters—powered by content-recognition algorithms and proprietary databases of content ‘fingerprints’—that scan content as it is uploaded and actively comb through content are the corporate content industry’s favored copyright enforcement technical measure. These filters are unable to accurately accommodate fair use, will chill free speech, and hinder the creativity of content makers. The very existence of DTM mandates will throw up barriers to entry that harm competition, limit innovation, and drive further consolidation and centralization on the internet.”).

²⁰⁹ See 17 U.S.C. § 107.

²¹⁰ COHEN, LOREN, OKEDIJI & O’ROURKE, *supra* note 26, at 572.

²¹¹ See § 107.

use.²¹² Creating a separate factor focused on public necessity could ensure greater protection for content that may otherwise receive constitutional safeguarding.²¹³

Even if adopted, these changes to the Act alone will not ensure categorical protection of police recordings. First, the statutory categories outlined in § 107 are not *prima facie* evidence alone of fair use, as the inquiry still requires an assessment of the elements of the defense.²¹⁴ Additionally, fair use analysis remains highly contextual and requires a case-by-case analysis.²¹⁵ As such, amending the elements of § 107 would not necessarily guarantee any outcomes. In any event, legislative reform of fair use is highly unrealistic, and any reforms to the nature of the fair use inquiry would more likely come about from the courts.²¹⁶

B. *Expanding First Amendment Protection*

There may be a First Amendment right to record the police.²¹⁷ Is there a way that the First Amendment can be utilized with fair use as a vehicle for safeguarding these recordings online? In understanding the relationship between the copyright regime and the First Amendment, courts have held that the fair use doctrine already embodies the goals of the First Amendment.²¹⁸ However, this confident reliance on fair use alone in satisfying First Amendment concerns is misguided.²¹⁹

The inadequacy of this reliance is demonstrated through the Supreme Court’s seminal fair use decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*.²²⁰ In that case, *The Nation*, a magazine,

²¹² Bauer, *supra* note 114, at 855–56.

²¹³ *Id.* at 855 (“[T]he four factors enumerated in § 107 for determining whether a particular use is fair do not include what is probably the most compelling concern embodied in the First Amendment: the public interest, or even public necessity, in permitting unauthorized use of certain copyrighted material.”).

²¹⁴ See *Fair Use Defense to Copyright Infringement Lawsuits*, *supra* note 166.

²¹⁵ Lauren Gorab, *A Fair Use to Remember: Restoring Application of the Fair Use Doctrine to Strengthen Copyright Law and Disarm Abusive Copyright Litigation*, 87 *FORDHAM L. REV.* 703, 712–13 (2018).

²¹⁶ See Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 *MINN. J.L. SCI. & TECH.* 273 (2015) (arguing that “federal courts are more hospitable than Congress to pro-user fair use reform, and that doctrinal scholarship is more fruitful than proposing ideal-type legislation”); *id.* at 312–13 (demonstrating through recent fair use legislative proposals that “Congress is in no way inclined to support legislation that would strengthen fair use or otherwise improve the position of users and second-generation creators vis-à-vis content owners”).

²¹⁷ See *supra* Section I.C.1.

²¹⁸ Wang, *supra* note 114, at 1472.

²¹⁹ See Bauer, *supra* note 114, at 859.

²²⁰ 471 U.S. 539 (1985).

summarized and quoted from President Gerald Ford's unpublished memoirs, in which he discussed his decision to pardon former President Richard Nixon, and the memoir's publisher, Harper & Row, sued for infringement.²²¹ The Second Circuit found that, despite the unpublished nature of the original work, the content at issue constituted fair use because it disseminated important information valuable to the general public.²²²

The Supreme Court reversed, and rejected, among other things, the notion that more protection was necessary for works of greater public value.²²³ In dissent, Justice Brennan voiced similar concerns as those raised by the Second Circuit—that a finding against fair use would prevent the public from accessing vital information that makes for a more informed citizenry.²²⁴ In its fair use analysis, the Supreme Court minimally acknowledged the need for “rapid dissemination” of important civic information to the public—a principle encapsulated by the First Amendment.²²⁵

The fair use defense is a “poor vehicle” for advancing First Amendment values.²²⁶ So, what can be made of this? Perhaps First Amendment interests need to be considered by rightsholders in conjunction with fair use analysis in evaluating whether online speech is permissive. In certain instances, the First Amendment interests may trump the copyright interests and allow for speech to prevail.²²⁷

Practically speaking, these reforms are difficult to envision, as the prevailing belief remains that fair use alone already satisfies First Amendment values.²²⁸ However, this conceptual recognition of First

²²¹ *Id.* at 542–43.

²²² *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 208 (2d Cir. 1983) (“Throughout our consideration, we have been guided by our conviction that [§ 107 of the 1976 Copyright Act] was not meant to obstruct the citizens’ access to vital facts and historical observations about our nation’s life.”), *rev’d*, 471 U.S. 539 (1985).

²²³ *Harper & Row Publishers, Inc.*, 471 U.S. at 559 (“It is fundamentally at odds with the scheme of copyright to accord lesser rights [to a rightsholder] in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike.”).

²²⁴ *Id.* at 579 (Brennan, J., dissenting) (“[T]his zealous defense of the copyright owner’s prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture.”); *id.* at 604 (“[T]he Court . . . risk[s] the robust debate of public issues that is the ‘essence of self-government.’” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964))).

²²⁵ Bauer, *supra* note 114, at 861.

²²⁶ Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 397 n.27 (2005).

²²⁷ Bauer, *supra* note 114, at 914 (“First Amendment interests should prevail over copyright claims when there is a compelling public interest in allowing that unauthorized use . . . and when there are no reasonable alternatives available to obtain actual consent to that use.”).

²²⁸ See *supra* Section I.C.1.

Amendment implications remains valuable in arguing that certain speech, such as police recordings, should remain readily available in the public discourse.

C. Common-Law Reforms

The proposals put forth thus far have primarily focused on protecting the dissemination of potentially legal online content.²²⁹ However, there has yet to be a proposal specifically aimed at curtailing the police from acting to suppress bystander recordings. While certain police departments have made efforts to amend internal policies to prevent this police behavior,²³⁰ it is quite unrealistic to rely upon the state to amend police practices—at least without imposing some liability that would prompt them to do so.²³¹

One potential avenue for shifting liability directly onto the police is through a theory of inducement liability. This form of secondary liability is fairly new and was first announced in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*²³² In this case, rightsholders (including songwriters and music publishers) brought claims against peer-to-peer file sharing companies alleging that such companies were enabling users to infringe on copyrighted musical works.²³³ Companies, like Grokster, “took active steps to encourage infringement” by users and generated income through advertising which increased as more users interacted with the platform.²³⁴ In its decision, the Ninth Circuit relied upon *Sony Corporation of America v. Universal City Studios, Inc.*²³⁵ to say that Grokster could not be held liable because its peer-to-peer file sharing platform was capable of non-infringing uses, and Grokster did not have actual knowledge of specific infringing uses on its platform.²³⁶

In a unanimous decision, the Supreme Court reversed, finding that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps

²²⁹ See *supra* Sections III.A–III.B.

²³⁰ Cole, *supra* note 4.

²³¹ See Denise Lavoie, Tatyana Monnay & Juliette Rihl, *Some States Are Struggling to Implement Policing Reforms Passed After George Floyd’s Murder*, PBS (Oct. 31, 2022, 11:50 AM), <https://www.pbs.org/newshour/nation/some-states-are-struggling-to-implement-policing-reforms-passed-after-george-floyds-murder> [<https://perma.cc/39XH-DFAC>].

²³² 545 U.S. 913 (2005).

²³³ *Id.* at 919–21.

²³⁴ *Id.* at 924, 926.

²³⁵ 464 U.S. 417 (1984).

²³⁶ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160–63 (9th Cir. 2004).

taken to foster infringement, is liable for the resulting acts of **infringement by third parties.**²³⁷ The Court was clear that merely having knowledge of potential infringing uses is not enough for inducement liability, but instead the rule “**premises liability on purposeful, culpable expression and conduct.**”²³⁸

On this language alone, it appears the police intentionally playing music during bystander interactions constitutes something akin to inducement liability in that they are purposefully triggering subsequent infringement when the recorder inevitably publishes the video online.²³⁹

The commentary and criticism born out of *Grokster* seem primarily **focused on the ruling’s future implications for technology companies** distributing copyrighted material, like *Grokster*.²⁴⁰ However, secondary liability doctrines, like the inducement theory, originated through common law,²⁴¹ perhaps giving space for this new application of the doctrine to be tested.

There is reason to believe that police officers could be held liable for broadcasting music to trigger copyright infringement online. Moreover, from the perspective of major rightsholders, it is more rational to pursue litigation against a police department with deeper pockets instead of seeking recourse against the individual that recorded the police.²⁴²

D. *Private Reforms*

In an ideal world, Congress and courts would work in conjunction to implement the previous proposals. However, with statutory, constitutional, and common-law changes being both inadequate and

²³⁷ *Metro-Goldwyn-Mayer Studios, Inc.*, 545 U.S. at 936–37.

²³⁸ *Id.* at 937.

²³⁹ See KTVU FOX 2 San Francisco, *supra* note 98.

²⁴⁰ See, e.g., Tiffany A. Parcher, Comment, *The Fact and Fiction of Grokster and Sony: Using Factual Comparisons to Uncover the Legal Rule*, 54 UCLA L. REV. 509 (2006); Evan F. Fitts, Note, *Inducement Liability for Copyright Infringement Is Born: The Supreme Court Attempts to Remedy the Law’s Broken Leg with a Cast on the Arm*, 71 MO. L. REV. 767 (2006).

²⁴¹ Connie Davis Powell, *The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions*, 3 AKRON INTELL. PROP. J. 189, 190 (2009).

²⁴² Public entities are often targeted for lawsuits because they can afford to pay larger settlements. See Miriam Schulman, *Deep Pockets in the Public Sector*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Oct. 23, 2015), <https://www.scu.edu/government-ethics/resources/deep-pockets-in-the-public-sector> [<https://perma.cc/8HA9-LG3A>]. Krista L. Cox, *Does Sharing a Link to Online Content Amount to Copyright Infringement?*, ABOVE THE L. (Nov. 2, 2017, 1:25 PM), <https://abovethelaw.com/2017/11/does-sharing-a-link-to-online-content-amount-to-copyright-infringement> [<https://perma.cc/6ND8-DDYA>] (“**Instead of pursuing action** to simply remove infringing content through takedown processes, [rightsholders] may have an incentive to go after deeper pockets . . .”).

unrealistic for the reasons discussed prior,²⁴³ it is worth considering private reforms among OSPs. Major online platforms cannot wait around for the legislature and the judiciary to intervene and work towards fixing this broken system. Instead, calling upon OSPs, like YouTube, to deploy better filtration algorithms may prove to be the most realistic and compelling solution.

With respect to DMCA takedowns, perhaps rightsholders should not be entrusted at all to conduct fair use analyses.²⁴⁴ One might assume that rightsholders can more accurately apply the defense because they are often more sophisticated entities, like major music labels. However, such an assumption is naive.²⁴⁵ Without the current DMCA takedown processes, fair use analysis would normally be conducted by a judge.²⁴⁶ But even amending § 512 to require a judge to conduct this fair use analysis defeats the purpose of not subjecting users to ex post litigation, which is often too daunting and expensive.²⁴⁷

Because of these concerns, scholars have proposed deploying algorithms to conduct fair use analysis in copyright law.²⁴⁸ Just because the algorithmic technology is currently not perfect does not mean it cannot be gradually tested in more limited contexts.²⁴⁹ The public value of police recordings is high enough to warrant a test pilot program in automated fair use to better protect the dissemination of these videos.²⁵⁰

OSP should consider employing algorithmic fair use systems for several reasons. First, intelligent machines are unlikely to have their fair use analyses clouded by emotion when issuing DMCA takedowns.²⁵¹ Additionally, well-programmed models can more efficiently and accurately determine elements of the fair use inquiry like the amount and substantiality of the portion used.²⁵² And these models could account for

²⁴³ See *supra* Sections III.A–III.C.

²⁴⁴ See DeLisa, *supra* note 56, at 1294 (“It seems preposterous that fair use copyright adjudications are being made by anyone other than a judge, let alone in such large numbers.”).

²⁴⁵ See *id.* at 1293–94, 1293 n.122. (“If a user disputes a claim on a fair use basis, the decision of whether to honor the dispute rests largely in the hands of interns and other unqualified individuals.”).

²⁴⁶ Gellis, *supra* note 186.

²⁴⁷ Guzman, *supra* note 66, at 188–90.

²⁴⁸ Peter K. Yu, *Can Algorithms Promote Fair Use?*, 14 FIU L. REV. 329, 348 (2020); Elkin-Koren, *supra* note 14.

²⁴⁹ Yu, *supra* note 248, at 339.

²⁵⁰ See *supra* Section I.C.

²⁵¹ Karni Chagal-Feferkorn, *The Reasonable Algorithm*, 2018 U. ILL. J.L. TECH. & POL’Y 111, 144 (“Unlike humans, algorithms do not have self-interests affecting their judgement, they do not omit any of the decision-making stages or base their decisions on heuristics or biases, and they are not subject to human physical or emotional limitations such as exhaustion, stress or emotionality.”).

²⁵² Yu, *supra* note 248, at 344.

the most recent fair use case precedent more readily than rightsholders who have more limited bandwidth.²⁵³ To be sure, the shift to relying upon automation in conducting fair use analysis would not necessarily remove the legal system altogether from participation.²⁵⁴ In fact, courts can examine the strength of particular algorithms and ensure that algorithms are in full compliance with the law.²⁵⁵

There are, however, several shortcomings with automating the § 512 fair use inquiry. It is already difficult to rely upon automated mechanisms for filtering online speech that cannot account for nuances in the law.²⁵⁶ There is skepticism around using automated systems to mimic the case-by-case fair use analysis normally employed by humans.²⁵⁷ This is especially true because courts, for example, refrain from making *ex ante* determinations about what constitutes fair use, while an automated system would necessarily be programmed with applicable caselaw in advance of any particular dispute.²⁵⁸ Finally, there is concern that automated programs would be unable to process information and pertinent facts external to the algorithm that are relevant in the fair use analysis.²⁵⁹

More generally, automation in the law will likely create issues of fairness, transparency, and accountability.²⁶⁰ Removing humans from the fair use inquiry may not solve the existing inadequacies of the defense.²⁶¹ And such automation of fair use would require extensive buy-in from numerous stakeholders as well as transparency and data collection requirements for creating stronger algorithms.²⁶²

Despite the potential limitations, these proposed private reforms are best suited for protecting police recordings online. An automated fair use inquiry would limit human biases and rely upon more extensive information in making its determinations.²⁶³ Additionally, it is most practical to deploy algorithms for an analysis that current rightsholders

²⁵³ *Id.* at 349.

²⁵⁴ Elkin-Koren, *supra* note 14, at 1098–99.

²⁵⁵ *Id.*

²⁵⁶ *See supra* Section I.A.3.

²⁵⁷ Yu, *supra* note 248, at 332.

²⁵⁸ *Id.*

²⁵⁹ Elkin-Koren, *supra* note 14, at 1096 (“[S]uch technical analysis may not fully capture the nuances of fair use legal analysis.”); *see, e.g.*, Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMMS. & HIGH TECH. L. 101, 110–11 (2007).

²⁶⁰ Penney, *supra* note 14, at 461–62.

²⁶¹ URBAN, KARAGANIS & SCHOFIELD, *supra* note 68, at 35 (“OSP respondents expressed concern that these systems are particularly ill-suited for complex legal decision-making, such as assessments of whether a particular use may be making a fair use of copyrighted content.”).

²⁶² Tewari, *supra* note 15.

²⁶³ Chagal-Feferkorn, *supra* note 251, at 144.

are simply ill-equipped to conduct.²⁶⁴ The promising capability of these reforms, along with the deeply important public interests at stake in accessing bystander police recordings, necessitate serious consideration by OSPs, like YouTube. At a minimum, OSPs should at least pilot automated fair use programs.

In sum, there are a myriad of viable routes that can be taken to prevent the takedown of police recordings. While each route has its own shortcomings, and imminent resolution through statutory responses seems unlikely, there is a great need to find a solution that can best ensure that the public has access to documented police misconduct.

CONCLUSION

The 2020 killing of George Floyd had a profound and pervasive impact on the global conscience.²⁶⁵ **The disturbing recording of Floyd’s** encounter with police officers reached millions around the world and gave rise to heightened conversations around racial discrimination and police violence.²⁶⁶ Had the public not been so widely exposed to this atrocity, it is difficult to imagine that the subsequent protest movement would have had as much vigor.²⁶⁷

With increased public pressure for greater police accountability, there is immense value in creating and disseminating bystander recordings of police interactions with civilians.²⁶⁸ Police officers, often aware that they are being filmed, have utilized various tactics to prevent such recordings,²⁶⁹ despite the potential First Amendment right to record and disseminate them.²⁷⁰ However, some officers have found a new method of suppressing police recordings by taking advantage of existing copyright law and practice online.²⁷¹

What remains clear is that the law is wholly unequipped to ensure these recordings remain online and to protect the civilians who are simply trying to engage a more informed citizenry.²⁷² OSPs, like YouTube, are primarily focused on preventing their own secondary liability, and so they

²⁶⁴ See DeLisa, *supra* note 56, at 1294.

²⁶⁵ Roth & Jarrar, *supra* note 1.

²⁶⁶ *Id.*

²⁶⁷ See *supra* note 1 and accompanying text.

²⁶⁸ See *supra* Section I.C.

²⁶⁹ Ohlheiser, *supra* note 94.

²⁷⁰ See *supra* Section I.C.1.

²⁷¹ McCarthy, *supra* note 7.

²⁷² See *supra* Sections I.A–I.B.

are more inclined to remove more speech than not.²⁷³ The DMCA and § 512 empower this behavior by failing to go far enough to advance the protections of users.²⁷⁴ The fair use defense as it exists is inadequate for protecting online speech.²⁷⁵ And police officers, who should be the main focus, are left unscathed simply because they themselves are not infringing on copyrighted material online.²⁷⁶

This Note has put forward several recommendations for how to better ensure that our citizenry have access to information vital to the public discourse.²⁷⁷ It is essential that these reforms be considered to ensure that all instances of police misconduct make it into and remain in the public arena.

²⁷³ See *Digital Millennium Copyright Act*, *supra* note 47.

²⁷⁴ See *supra* Sections I.A.

²⁷⁵ See *supra* Section II.B.

²⁷⁶ See *supra* Section I.B.

²⁷⁷ See *supra* Part III.