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YouTube and Copyright

How YouTube and Copyright Owners
Manage Copyrights?

What are the rights of YouTubers?

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Date: September 14, 2022

Overview

- I have been working in the IP field since the early 80's. However, I never had a chance to practice copyright (CR) law in my career.
- For the past several years, I found myself spending more time watching YouTube than regular TV programs.
- As we know, we can listen to millions of music and watch music videos on YouTube substantially for free.
- This made me wonder how CR is managed in YouTube.
- This lecture briefly discusses how YouTube and CR owners (e.g., musicians, record labels, publishers) go after YouTubers when copyrighted music/videos are uploaded, and some proposals by a YouTuber to solve this issue.

Copyright

- CR is a type of IP that provides **original work of authorship** as soon as an author **fixes** the work in a **tangible form of expression**.
- Works are **original** when they are independently created by a human author and have a minimal degree of creativity. Independent creation simply means that you create it yourself, without copying.
- The SC said that, to be creative, a work must have a “spark” and “modicum” of creativity.

Copyright (Cont'd)

- A work is **fixed** when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time. For example, a work is fixed when you write it down or record it.

Copyright (Cont'd)

- Who is a CR owner?
 - Once you create an original work and fix it, like recording a new song, you are the author and the owner.
 - Companies, organizations, and other people besides the work's creator can also be CR owners.
 - CR ownership can also come from contracts like assignments or from other types of transfers like wills and bequests.
- Rights Provided to CR owners
 - Among other rights, CR law provides the owner of CR the right to authorize others to exercise rights provided to CR owners, subject to certain statutory limitations.

YouTube

- YouTube began as a venture capital-funded technology startup. The first video was uploaded in April 2005. In February 2005, the company activated www.youtube.com. The site launched officially on December 15, 2005, by which time the site was receiving 8 million views a day.
- On October 9, 2006, Google acquired YouTube for \$1.65 billion, in Google stock. In November of 2006, YouTube issued the slogan “Broadcast Yourself.”

Uploading Music on YouTube

- If you create a video (or music), the CR belongs to you. However, if you upload content created by someone else, the CR belongs to that person, and you need to get their permission before you upload it.
- If you use someone else's work in your video without that person's permission, it does not make less of an offence just because you give the person credit.
- Note that the CR holder can decide whether the uploaded video should be removed, flagged in certain regions, or even monetized (i.e., CR holder receives all monetization proceeds).

Uploading Music on YouTube (Cont'd)

- Cover Songs
 - Cover songs are recording of songs that were first recorded or made popular by somebody else.
 - Whether a cover song video involves a rock band performing live or a six-year-old on a piano, most of these cover songs are posted without the permission of the song's CR holder.
 - When someone records and releases a song, you are free to do your own cover version of that song by obtaining a mechanical or “compulsory” license. Then, every time your cover version is sold or reproduced, you (or your record label) must pay the statutory royalty fee for that song.

Uploading Music on YouTube (Cont'd)

- Cover Songs
 - But a mechanical license is not enough. The original artist holds certain rights in the song under CR law, including the exclusive right to reproduce, to prepare derivative works, to distribute copies, to publicly perform, and to publicly display the work. The mechanical license covers reproduction and distribution, but not public performance and display. Therefore, you need a synch license as well as a mechanical license to legally publish a cover song on YouTube.
 - YouTube deals with many record and publishing companies through its Content ID Program. Under this program, at the CR owner's sole discretion, YouTube may monetize your video with advertisements rather than take it down, and the CR owner gets a share of the profits.

Uploading Music on YouTube (Cont'd)

- Possible Consequences
 - Two things can happen if you commit a CR violation:
 - **Takedown notice:** If someone spots content they have created being used without their permission, they can send YouTube a complaint. If it is a breach, YouTube takes down the video and issues the offender a **CR strike**.
 - **Content ID Match:** Content ID is a system YouTube uses to automatically match content that violates CR against millions of videos (and music) uploaded every month to the site. For Content ID to work properly, CR owners need to upload so-called -reference files-; original versions of their work that prove they own the rights.
- (CR strike and Content ID will be described in detail later)

Uploading Music on YouTube (Cont'd)

- Normally, record labels, movie studios, or TV stations go through this process for all the work they publish, so individual artists do not have to worry about it (However, one of the members of Eagles hires 60 people working for him 5 days a week in an attempt to manually file claims).
- Every new uploaded video (music) is checked against the huge library of reference files, and if there is a match, YouTube automatically files a CR claim for the owner of the work.
- In the event of the content is uploaded by a mistake, you can send a notice saying that an error occurred.

Copyright Strikes

- There are Two types of YouTube Strikes:
 - **Community guidelines strike:** This type results ranging from uploading objectional content to having a misleading thumbnail or caption.
 - **Copyright strike:** If some part of your video includes content from another creator and that creator did not grant you permission, you get the CR strike. You can appeal it or take down the video to avoid a possible strike.

Consequences of CR Strikes

- **Mandatory copyright school must be completed:** After a first strike, YouTube requires that YouTubers take an online course and take a quiz to be sure you are up to speed on CR regulations.
- **Strikes come down eventually:** As long as you have not struck out, community guideline strikes and CR strikes disappear after 90 days from the time they are issued. At that point YouTube restores any privileges you lose while you waited out the strike. If you draw three strikes over a 90-day period, your YouTube channel will be terminated.

Content ID

- Content ID is a digital fingerprinting system developed by Google which is used to identify and manage copyrighted content on YouTube. Videos uploaded on YouTube are compared against audio and video files registered for any matches.
- Content ID creates an ID file for copyrighted audio and video material, and stores it in a database. If a match is found, the uploaded content will be flagged as a CR violation.
- Content owners (CR owners) have the choice to have matching content blocked or to monetize it.
- This system began to be implemented around 2007, and by 2016, it had cost \$60 million to develop and led to around \$2 billion in payments to CR holders.
- By 2018, Google has invested at least \$100 million into the system. (from Wikipedia)

Content ID (Cont'd)

- A YouTuber who disagrees with a decision by Content ID can fill in a form disputing the decision. However, this claim is sent directly to the party that owns the supposed CR, who has the final decision in the matter unless legal action is pursued. If the reporting party denies their claim, the channel receives a strike.
- The music industry (Universal Music Publishing Group (UMPG)) criticized Content ID as inefficient alleging that “Content ID fails to identify upwards of 40% of the use of UMPG’s compositions on YouTube.” (From Wikipedia)

Content ID (Cont'd)

- Further, CR violation notices were sent to uploaders who recorded themselves playing public domain classical music, with Sony Music asserting CR over more the 1,100 compositions by Johann Sebastian Bach via Content ID.
- In 2018, TheFatRat complained that Content ID gave preferences to an obvious scammer who used the automated system to claim ownership of his content and thereby steal his revenue.



Exceptions to CR Infringement

- Fair Use
 - Fair Use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of CR-protected works in certain circumstances. Section 107 of the CR Act identifies certain types of uses -criticism, comment, news reporting, teaching, scholarship, and research- as examples of activities that may qualify as Fair Use.
 - Courts look at how the party claiming Fair Use is using the copyrighted work, and will more likely find that nonprofit educational and noncommercial uses are fair.

Exceptions to CR Infringement (Cont'd)

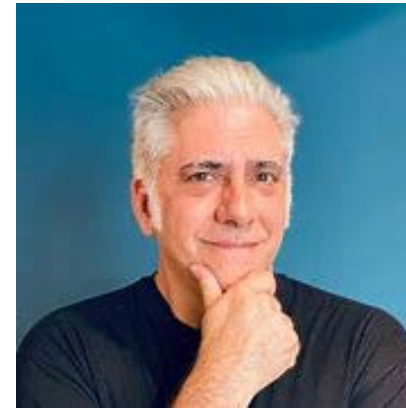
- If the use includes a large portion of the copyrighted work, Fair Use is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part – or the “heart” - of the work.
- Courts evaluate Fair Use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry.

Fair Use in YouTube

- The following may be a few acceptable uses under the Fair Use doctrine.
 - **Criticism:** Reviewing a movie or some form of music makes it acceptable to use copyrighted material without permission, for example, short clips on the work you critique.
 - **Commentary:** If the copyrighted material is used just enough to illustrate your point, it is acceptable. For instance, gamers on YouTube often record themselves playing a new video game and offer observations.
 - **Academic:** If you are creating educational content, it is considered fair to use to reference other works in certain situations.

Issues

- Despite the fair use doctrine, some CR holders of Guns N' Roses, AC/DC, Eagles, Jimi Hendrix constantly block their copy righted material uploaded on YouTube.
- Rick Beato, a YouTuber who had been a session musician, university lecturer, songwriter, studio engineer, mixer, record producer, lectured in the University of Alabama and Berklee College of Music, testified his experience as a YouTuber before a US Senate on the Judiciary.



Rick Beato

- Beato's channel is under his own name, although he introduces every video with the title "Everything Music". One series in the channel is called *What Makes This Song Great?*, in which Beato deconstructs and discusses the elements of popular songs. The videos in the series regularly get over one million views.
- Beato built an international audience of 1.7 million subscribers and his channel has over 200 million views. He has created over 750 videos on topics ranging from music theory, ear training and improvisation, to film scoring, production of copyright, interviews, and a series of over 92 videos entitled "What Makes This Song Great?"
- Beato creates these videos to introduce classic songs to new audiences, and reinvigorate these same songs.

Rick Beato (Cont'd)

- Beato has never sought to claim Fair Use for any of his videos, even though a case could be made that he was providing education through commentary, criticism, research and teaching based on the Fair Use policy.
- Beato's alleges that the CR holders are entitled to all the money they deserve, but, at the same time, need to respect Fair Use (not blocking use of copyrighted material) as long as the use is within the Fair Use policy.
- When Beato negotiates with the CR holders, he indicates that he plans to issue a video about the negotiation. The video invite thousands of comments against the CR holders from the viewers, which, in some cases, lead to the block being lifted (public pressure).

Rick Beato (Cont'd)

- However, several of Beato's YouTube videos, including those about Radiohead and Fleetwood Mac, were issued take-down notices because of CR claims.



- In July 2020, Beato testified about his experiences on YouTube before a US Senate Committee on the Judiciary reviewing the Digital Millennium Copyright Act (DMCA) and considering limitations and exceptions like fair use.

Digital Millennium Copyright Act (DMCA)

- In 1998, Congress passed DMCA, which amended U.S. CR law to address important parts of the relationship between CR and the internet. The three main updates were:
 - (1) establishing protections for online service providers in certain situations if their users engage in CR infringement, including by creating the notice-and-takedown system, which allows CR owners to inform online service providers about infringing material so it can be taken down;
 - (2) encouraging CR owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works; and

Digital Millennium Copyright Act (DMCA) (Cont'd)

- (3) making it unlawful to provide false CR management information (for example, names of authors and copyright owners, titles of works(or to remove or alter that type of information in certain circumstances.

Beato Testimony

- Two elements of Fair Use that cover teaching videos have to do with the amount of the copyrighted material used and whether or not it harms the CR holder's ability to profit from their original work.
- If a video is using brief excerpts of music to demonstrate a compositional technique, it should be covered under the Fair Use guidelines.
- The rules governing the application and interpretation of Fair Use should be shouldered by all parties and not only the content creator.
- The concept of Fair Use is meaningless when frivolous or random interpretations allow a team of searchers, typically employed by a major label, harass creators for content that falls under the legal definition of Fair Use.

Beato Testimony

- The music theory video called “The Mixolydian Mode” was manually claimed by Sony ATV because it played ten seconds of a Beatles song on his acoustic guitar to demonstrate how the melody is derived from this scale. This is an obvious example of Fair Use.
- In response, Beato made a video entitled “The Music Industry SCAM to Rip-off YouTubers.” The video received over 500,000 views within 24 hours and the claim was then released by Sony without Beato filing a dispute. It is likely that the claim was released because he has a channel with over 1.5 million subscribers and have a platform to air these grievances.

Beato Testimony

- As possible solutions to the problems, Beat proposes:
 - In the case of Fair Use, content creators should be protected from frivolous demonetizations (i.e., CR holders gets all the money).
 - A Fair Use Registry, where one could get a certification as a good actor similar to Twitter's blue checkmark. When a video is posted, it can be checked against the database of Certified Fair Users.
 - The content creator would then be whitelisted for use. YouTube already sets benchmarks for channel monetization. The Fair Use Registry work along the same lines.

Conclusion

- Some CR holders are unwilling to grant license to YouTubers who wish to upload copyrighted contents allowed under the Fair Use doctrine because they believe they lose millions of dollars if illegal uploads continue.
- Congress, YouTube, CR holders, and YouTubers need to find a way to allow YouTubers to upload copyrighted contents while preventing CR holders lose money for the illegal use of their contents.
- As Beato states, the uploaded videos and music will introduce classic songs to new audiences, and reinvigorate these same songs. This may eventually profit CR holders.

Thank you!

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