The Need to Regulate DMCA-Plus Agreements: An Expansion of Sag's *Internet Safe Harbors and the Transformation of Copyright Law*

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Section 512 of the Digital Millennium Copyright Act (hereinafter, the "DMCA") exculpates online services providers from liability for the copyright infringement of their users. However, to qualify for this "safe harbor" protection, the DMCA requires online service providers to abide by prescribed notice-and-takedown procedures. In his paper, "Internet Safe Harbors and the Transformation of Copyright Law," Matthew Sag describes in detail the methods by which online service providers circumvent traditional compliance with such notice-and-takedown requirements. Chief among them is YouTube's Content ID, a software that identifies potential infringements, then, rather than taking infringements down immediately, offers rightsholders a portion of advertising revenue as an incentive to keep potentially infringing content online. This paper opines that Content ID substantially contributes to YouTube's market power, and in turn, leads to anticompetitive effects in the market for online-video sharing. As a result, authorities should regulate YouTube by imposing a compulsory licensing system in the context of online-video sharing and require YouTube to operate in accordance with a consent decree. First, this paper provides background on the DMCA's contribution to YouTube's formation, growth, and subsequent leverage in negotiating DMCA-plus agreements. Second, this paper provides a granular analysis of the market for infringement filters like YouTube's Content ID and describes practical market impacts. And third, this paper makes the case for a compulsory licensing regime in the context of online-video sharing.

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INTRODUCTION

As technology rapidly improves, so should the legal frameworks that govern subsequent uses and applications of improving technologies. However, just as laws are often written in the interest of encouraging economic activity and innovation, they are susceptible to becoming outdated. Sometimes, the very laws that aim to improve market conditions enable first-movers to appreciate dangerous market power. This becomes particularly problematic in markets where there is an imbalance in legal protections among market participants. Perhaps nothing is more illustrative of this dynamic than the ever-changing state of online media platforms and corresponding laws aimed at protecting copyrights in the digital age. Over the years, the DMCA has empowered YouTube to vigorously expand its market power. However, because the state of the law has remained stagnant, YouTube has not only retained a favorable interpretation of the DMCA, it has invented alternative methods by which it achieves more favorable outcomes than the law otherwise provides. Though this result sounds ideal in many respects, the details paint a more troubling picture. YouTube's overall efficiency in creating a sensible alternative to traditional DMCA compliance puts other platforms at a severe disadvantage and further contributes to YouTube's already substantial market share. This paper discusses implicated anti-competitive concerns, evaluates the ability of platforms to overcome obstacles presented, and offers a possible solution to the problems posed.

I. AS THE UNDISPUTED LEADER IN ONLINE-VIDEO STREAMING, YOUTUBE HAS SET THE CRITERIA FOR ALTERNATIVES TO TRADITIONAL NOTICE-AND-TAKEDOWN COMPLIANCE.

Today, it is difficult to imagine a world without YouTube. It is estimated that over 400 hours of content are uploaded to YouTube every minute, making it the world's most popular online video-sharing platform.[2] But of the various factors contributing to YouTube's overall success, its initial and most notable catalyst was the passing of the DMCA in 1998, and the included "safe harbors" that shield online service providers from liability under copyright law. Furthermore, cases decided since the DMCA's passing have interpreted statutory text in the favor of YouTube's business model, further stimulating its growth and placing it in an advantageous position over similar platforms and rightsholders alike. Although this section mentions online service providers to illustrate the DMCA's impact on the online-video market generally, it focuses on the relationship between YouTube and rightsholders to accurately describe the current state of DMCA-plus agreements.

A. The DMCA's safe harbors enabled YouTube's emergence in online video streaming and subsequent case law has further stimulated its growth.

The DMCA was passed in 1998 to bring copyright law into the digital age—a year some argue was much too early to fully understand the implications of such a law's intended purpose.[3]

[2] *How Google Fights Piracy*, GOOGLE 21 (2016) (stating that over 400 hours of video are uploaded to YouTube every day), https://drive.google.com/file/d/0BwxyRPFduTN2TmpGajJ6TnRLaDA/view.

[3] Matthew J. Sag, *Internet safe harbors and the transformation of copyright law* 81 NOTRE DAME L. REV. 187, 506 (2017) ("The DMCA was intended to shepherd copyright into the digital age, but it was drafted at a time when the full implications of digitization and the global interconnectedness of the internet could not have been fully anticipated.").

Although it employed an expansive approach to copyright enforcement online, section 512 of the DMCA was included specifically to address copyright liability as it concerned service providers of the internet.[4] Simply put, section 512 set out to shield internet and online service providers from copyright liability by barring copyright infringement claims pursuant to infringing material that existed on a system or platform. Perhaps the most controversial of section 512's "safe harbors" was and still is that described under section 512(c).[5] Section 512(c) essentially exculpates online service providers that host user-uploaded content from liability, so long as those providers comport with certain statutory requirements.[6] The operative language of this section allowed YouTube to form and flourish in the digital age without fear of exposure to the liability of its users, arguably well within the public policy objective behind the rule.[7]

Furthermore, various courts have interpreted section 512's text since its passage—largely in favor of online service providers amid claims that they acted outside of the statute's purview.[8] Perhaps most famously, in *Viacom v. YouTube*, the Second Circuit held that YouTube lacked "specific knowledge" of infringing material on its site to warrant disqualification of safe-harbor protection.[9] The court stated that, although YouTube arguably knew of possibly infringing material, it did not know of *actual* infringements, and therefore, did not possess the requisite level of knowledge needed to disqualify it from safe-harbor protection.[10]

As a result, *Viacom*—and others—set the tone for DMCA enforcement in the digital age. Specifically, these cases arguably communicated to platforms that only narrow forms of specific knowledge would risk safe-harbor protection, and that anything short of definitive knowledge of actual infringements could be enough to avoid liability under the safe harbor's requirements. However, these cases also sent a signal to copyright holders: that the then-current state of the DMCA would not afford robust protection of copyrights on such platforms, and that a failure to adapt accordingly would only further undermine the value of their content on the web.

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[4] *Id.* at 509, (Sag mentions that the law's initial motive was to appease Hollywood lobbyists by providing statutory prohibition on the circumvention of technological protection measures—now found in Section 1201); 17 U.S.C. § 512(k)(1)(A), (B) defines "service provider" as "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" and/or "a provider of online services or network access, or the operator of facilities therefor."

[5] *See Digital Millennium Copyright Act*, ELECTRONIC FRONTIER FOUNDATION (noting that the DMCA's safe harbors and anti-circumvention prohibitions are among the most controversial sections of the law), https://www.eff.org/issues/dmca (last visited May 10, 2018).

[6] 17 U.S.C. § 512(c), (requiring that a service provider: (1) does not have actual knowledge of infringing material, (2) is not aware of facts or circumstances from which infringing activity is apparent; or (3) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material. The law also requires that online service providers do not directly benefit financially from infringing material and to have a designated agent for notice and takedown compliance.).

[7] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) at 522-23, (stating that, according to the Senate Committee on the Judiciary Report, safe harbors were meant to "promote the development" of online service providers).

[8] *See, e.g., Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007); *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001);

[9] *See Viacom*, 676 F.3d. at 29.

[10] *Id.* at 34, (emphasis added).

B. The general inefficiencies of notice-and-takedown and continued uncertainty surrounding future litigation prompted the emergence of DMCA-plus agreements.

Although the court in *Viacom* refused to hold YouTube liable for the possible infringements on its platform, alternative claims of infringement proved burdensome and stimulated innovation. Though section 512(c) of the DMCA does bar rightsholders from pursuing monetary damages from online service providers, the same section empowers rightsholders to issue takedown notices as a form of injunctive relief.[11] Accordingly, the notice-and-takedown process described in section 512(c) became the method by which rightsholders combatted widespread infringement, as it was virtually the only viable option they had.[12] As an influential platform for online-video sharing, YouTube quickly became implicated in quarrels between rightsholders and the alleged infringers posting content on its platform, and accordingly, put measures in place to comply with the section 512(c)'s statutory requirements.

The notice-and-takedown process is not necessarily difficult to comprehend, but it is worth explaining to accurately articulate and fully comprehend some of the practical difficulties the process presents. Notably, throughout the entire process, YouTube and other online service providers serve as "middle men" of sorts, as they facilitate the flow of notifications between relevant parties. Assuming an online service provider is initially eligible for section 512 safe-harbor protection, the law requires further that providers comply with notifications of infringing material on their platforms. To begin the process, a copyright holder must notify the online service provider of specific infringing content.[13] Then, upon receiving a notification from a copyright holder, the online service provider must "expeditiously" take down the allegedly infringing content from its platform.[14] The online service provider must then notify the subscriber responsible for posting allegedly infringing content that their material was removed due to a copyright holder's complaint.[15] Finally, subscribers in question may issue a counter notification—subject to the same requirements as initial notifications—after which online service providers may repost the content in question, that is, unless a copyright holder obtains a court

[11] *See* 17 U.S.C. § 512(c).

[12] In light of decisions like *Viacom*, copyright holders were likely skeptical of their chances at obtaining a favorable court interpretation of section 512, making notice-and-takedown the only dependable mechanism by which they could enforce copyrights on platforms like YouTube.

[13] 17 U.S.C. § 512(c)(3) (requiring that a notice include: "(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (iv) information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted; (v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; (vi) a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.").

[14] 17 U.S.C. § 512(c)(1)(C) (describing expeditious removal); Sag, *supra* note 3, at 537 (noting that expeditious removal ex ante implicates due process concerns).

[15] 17 U.S.C § 512(g)(2)(A) (outlining subscriber notification process requirements).

order compelling the removal of infringing material from the platform.[16] Though section 512 offers users the option of issuing a counter notification in the event their content is removed from an online service provider's platform, the mechanism is very rarely used.[17] Though thorough, the process is inefficient and cumbersome for all parties involved, including online service providers like YouTube, who are forced to facilitate communications between parties.

In addition to the inefficient and cumbersome nature of the notice-and-takedown process, YouTube had more imminent reasons to contemplate an alternative to traditional notice-and-takedown compliance. Even though cases like *Viacom* placed YouTube and other online platforms in a favorable legal position under the DMCA, the threat of litigation still weighed heavy.[18] Certainly, litigious copyright holders kept YouTube—and other platforms empowered by section 512 safe harbors—on their toes, as the cost of defending against an infringement lawsuit is no trivial amount.[19] For platforms smaller than YouTube, the costs of defending litigation could even prove fatal.[20]

Accordingly, despite having no legal obligation to police possible infringements on its platform, YouTube lead a charge to proactively solve some of the problems its platform created for users and copyright holders.[21] In October of 2007, YouTube launched Content ID, a filtering software that identifies potentially infringing material, automatically.[22] Since its launch, Google—YouTube's owner as of 2006—claims to have spent more than $60 million in developing and improving its infringement filter.[23] Specifically, Content ID scans videos uploaded to YouTube against a database of videos uploaded by participating rightsholders.[24] Once the software identifies infringing content, participating rightsholders are notified and empowered to select one of three main options. First, rightsholders can choose to block the content, in which case the video in question is taken down.[25] Second, rightsholders can choose to track the content in question and effectively measure how many views and interactions that

[16] 17 U.S.C. § 512(g)(2)(C) (describing counter-notification protocol).

[17] Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* (Univ. of Cal. Berkeley, Public Law Research Paper No. 2755628, 2017), http://ssrn.com/ abstract=2755628 ("Second, by all accounts, the actual use of counter notices is extremely infrequent. Only one respondent among both service providers and rightsholders reported receiving more than a handful per year. Many—including some large services handling thousands of notices per year—reported receiving none.").

[18] John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1830 (2013) (stating that, for many internet companies, litigation itself can be fatal and for other internet companies, litigation can be used to push out smaller companies).

[19] *Id.* at 1830.

[20] *See Id.*

[21] Sag, *supra* note 3, at 541 ("Most obviously, YouTube's development of Content ID appears to have been spurred by the Viacom litigation that began almost as soon as Google acquired the video- sharing company in 2006.").

[22] *See History of Content Management*, GOOGLE, https://sites.google.com/a/pressatgoogle.com/YouTube5year/home/history-of-copyright, (Last visited May 10, 2018).

[23] GOOGLE, *supra* note 2, at 6 ("YouTube has invested more than $60 million in Content ID, a proprietary system of copyright and content management tools to give rightsholders control over their content on YouTube.").

[24] *Id.*

[25] *Id.*

particular content receives.[26] Under the third option, rightsholders can choose to "monetize" infringing content.[27]

Pursuant to Content ID's monetization option, rightsholders grant YouTube permission to keep infringing content online, and in return, they receive a portion of advertising revenue generated from the content in question.[28] Perhaps unsurprisingly, rightsholders prefer the monetization option's quid pro quo over other options; well over 90% of participating rightsholders do so according to Google.[29] This figure might suggest that Content ID has struck an efficient balance in confronting the concerns of rightsholders. However, some argue that such figures only describe rightsholders' desperation to recoup a fraction of the profits lost from widespread infringement online.[30] In addition, some argue that such "options" are not really options at all, and rightsholders are effectively forced to take the bargain YouTube offers.[31]

C. YouTube's current market power gives it unique leverage in negotiating DMCA-plus agreements with copyright holders

Although Content ID is not wholly representative of DMCA-plus infringement filters, it is easily the largest and most utilized—so much can be inferred from YouTube's size alone. Today, YouTube is the world's most popular online video-sharing platform by a large margin.[32] According to recent data, Netflix—capturing 8% market share—ranks as high as second behind YouTube's whopping 78.8% market share of visits to online multimedia websites.[33] Furthermore, Vimeo, an online-video sharing platform for user-uploaded content, ranked fifth, capturing a dismal 0.8% market share in the same study.[34] Vimeo's small share of the market is indirectly suggestive of YouTube's market power; its platform is notably similar to YouTube, yet it enjoys a market share almost 100 times smaller than the industry leader.[35]

Because YouTube enjoys such substantial portion of the market for online media—in addition to aforementioned cases decided in the favor of online service providers generally—rightsholders are severely disadvantaged in negotiating DMCA-plus agreements with YouTube.

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 6 ("To date, over 8,000 rightsholders have used Content ID to manage their content on YouTube, with well over 90% choosing to monetize videos containing their copyrighted material.").

[30] Sag, *supra* note 3, at 543 ("The present scale of online infringement is such that copyright owners are virtually compelled to rely on algorithmic matching to identify the targets of takedown notices.").

[31] Ben Popper, *YouTube Will Block Videos from Artists Who Don't Sign Up for Its Paid Streaming Service*, THE VERGE (June 17, 2014), https://www.theverge.com/2014/6/17/5817408/YouTube-reportedly-block-videos-indie-artists/ (mentioning artists like Jack White and Adele could be blocked in some countries for not signing up for YouTube's paid service).

[32] *Leading Multimedia Websites in the United States in November 2016, Based on Market Share of Visits*, STATISTA (November, 2016), https://www.statista.com/statistics/266201/us-market-share-of-leading-internet-video-portals/ (noting that, as of 2016, YouTube possessed 78.8% market share of visits to multimedia websites).

[33] *Id.* (noting Netflix ranks second in visits to online multimedia websites with 8% market share).

[34] *Id.* (noting Vimeo ranks fifth in visits to online multimedia websites with 0.8% market share); Vimeo is likely the closest thing to a substitute for YouTube, as both emphasize the ability to upload user-generated content.

[35] Vimeo is similar to YouTube in the sense that they are both video-sharing platforms with an emphasis in user-generated content. As the closest thing to a substitute for YouTube, its small share of total visits to online multimedia illustrates YouTube's dominance in the market.

Specifically, rightsholders are simply unable to aggressively promote their interests in negotiating such deals because their content might legally appear on YouTube even if the parties fail to agree upon terms.[36] In the presence of such an imbalance in negotiating power, rightsholders argue that the process denies them a meaningful decision; they can either take the money on the table or leave it.[37] In short, the nature and structure of DMCA-plus agreements presents rightsholders with a Hobson's choice.[38]

Furthermore, because DMCA-plus agreements operate as private contracts, little is known about the terms of those deals and questions remain regarding the details of negotiations. Accordingly, public policy groups and consumer advocates are uninvolved with such negotiations, even though their interests are largely affected by the agreed-upon terms.[39] Some argue that the shroud of mystery surrounding DMCA-plus agreements harms consumers, but this paper takes that notion a step further.[40] In addition to potentially harming consumers in their terms, the secrecy of notable DMCA-plus agreements also affects market competition for online service providers, too, specifically platforms that emphasize user-generated content. YouTube's market power and subsequent leverage in DMCA-plus negotiations harms smaller platforms, as smaller platforms are likely unable to offer competitive terms or develop similar technology should DMCA-plus agreements become an industry expectation.

II. SMALLER PLATFORMS ARE UNLIKELY TO GERMINATE OR GROW IN A MARKET WHERE UNREGULATED DMCA-PLUS AGREEMENTS BECOME THE INDUSTRY NORM.

Though section 512 of the DMCA enabled YouTube to form, its subsequent growth and innovation in the space of DMCA-plus agreements puts smaller platforms at a disadvantage. As a practical matter, the value created by YouTube's Content ID has changed the landscape of platforms' compliance with the DMCA, leading rightsholders to expect robust compensation for arguably infringing content that exists on such platforms. Unfortunately, smaller platforms likely lack the resources to develop infringement filters in-house, and in the event there are able to do so, such software is unlikely to compete with Content ID. Similarly, platforms are unlikely to incentivize rightsholders to cooperate in ways outside of more established DMCA-plus agreements.

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[36] Todd C. Frankel, *Why Musicians Are So Angry at the World's Most Popular Music Streaming Service*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/business/economy/why-musicians-are-so-angry-at-the-worlds-most-popular-music-streaming-service/2017/07/14/bf1a6db0-67ee-11e7-8eb5cbccc2e7bfbf_story.html?utm_term=.43a7af9e28c5 [https://perma.cc/ZT38-AFW6] ("It isn't a level playing field . . . because ultimately you're negotiating with a party who is going to have your content no matter what.").

[37] *Id.* ("There's no getting around the fact that, even if YouTube doesn't have licenses, our music will still be available but not monetized at all . . .").

[38] *See* Silke von Lewinski, REMUNERATION FOR THE USE OF WORKS: EXCLUSIVITY AND OTHER APPROACHES (2015), ("There is certainly a 'value gap,' whereby digital music services invoke safe harbours, limitations on liability and shortcomings in notice-and-takedown regimes to present rights holders with a Hobson's choice: accept low rates or have no effective recourse or compensation when infringing music is repeatedly reposted.").

[39] Annemarie Bridy, *Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries*, RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW (John A. Rothchild ed., 2016) ("DMCA-plus enforcement also raises a range of normative concerns for Internet users and merchants: 'Best practices' agreements are negotiated privately, without input from the public or public interest groups.").

[40] *Id.*

A. Smaller platforms likely lack the resources needed to create a program like Content ID.

As this paper previously mentions, Google estimates that it has spent over $60 million developing its infringement filter, Content ID.[41] Importantly, YouTube began developing Content ID shortly after its acquisition by Google and the subsequent Viacom litigation.[42] The acquisition provided a then-young YouTube the financial wherewithal to develop a proactive infringement filter, likely aimed at curbing the threat of future litigation with rightsholders like Viacom.[43] However, smaller platforms likely lack the resources necessary to create an infringement software from scratch—at least not a system meaningfully comparable to Content ID.

At the time of its acquisition of YouTube in 2006, Google surpassed $10 billion in revenue by year's end, exceeding expectations and continuing a then-current trend of exponential growth.[44] Although the aforementioned $60 million figure represents YouTube's investment in Content ID across many years, the snapshot of Google's financial position back in 2006 illustrates its ability to finance worthwhile initiatives more than a decade ago.[45] Additionally, YouTube presumably enjoyed access to a large pool of capable software engineers upon the Google acquisition. This access to specialized labor was likely just as, if not more, important than financing, as it allowed YouTube to develop its algorithm entirely in-house, thereby protecting its intellectual property. To put it simply, YouTube had access to a wealth of capital—both human and financial—thanks to its affiliation with Google, and as soon as decision makers saw Content ID as a worthy project, neither financing nor access to adequate labor posed as considerable obstacles in developing the filter.

Smaller platforms specializing in user-generated content today are generally not as fortunate as YouTube was in 2006, at least in terms of access to financing and specialized labor. Smaller platforms would face substantial difficulty in creating infringement filters and most would be unable to afford the costs of developing similar software in-house.[46] To illustrate the financial disparity between YouTube and its competitors, it is useful to consider some numbers.

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[41] GOOGLE, *supra* note 2, at 6.

[42] Sag, *supra* note 3, at 541 ("Most obviously, YouTube's development of Content ID appears to have been spurred by the Viacom litigation that began almost as soon as Google acquired the video- sharing company in 2006.").

[43] *Id.*

[44] GOOGLE, INC., ANNUAL REPORT (FORM 10-K), at 36, (December 31, 2006), https://www.sec.gov/Archives/edgar/data/1288776/000119312507044494/d10k.htm#toc70021_1.1

[45] GOOGLE, *supra* note 2.

[46] Daphne Keller, *Problems with Filters in the European Commission's Platforms Proposal*, THE CENTER FOR INTERNET AND SOCIETY BLOG, STANFORD LAW SCHOOL (October 5, 2017), http://cyberlaw.stanford.edu/blog/2017/10/problems-filters-european-commissions-platforms-proposal ("Requiring similarly Herculean monitoring efforts from smaller Internet intermediaries would have foreseeable consequences. Some would go out of business. Some would never attract investment and be able to launch in the first place. Both of these results would serve to entrench incumbent companies with existing, expensive (yet still-flawed) filtering tools.").

Vimeo, arguably YouTube's greatest overall competitor, is owned by an American holding company, InterActiveCorp (IAC), which generated just over $3.139 billion in 2016.[47] Another notable competitor in online video, Flickr, is owned by Yahoo!, which generated just over $5 billion in 2016.[48] Thus, without accounting for inflation, YouTube's parent company generated 2 and 3 times more revenue in 2006 than did the parent companies of Flickr and Vimeo, respectively, in 2016. Although the disparities are not necessarily uniform across the board, these figures demonstrate the economic reality for smaller platforms: the bottom dollar associated with creating infringement filters is probably too much to bear. These comparisons also refer to smaller platforms' best case scenario—one in which a platform could rely on its parent company for financing as YouTube did with Google.

In addition, smaller platforms would likely employ a cost-benefit analysis when considering the viability of creating an infringement filter in-house. In other words, those advocating for the in-house creation of an infringement filter would need to convince decision makers of the strategy's appreciable return on investment to justify the hefty costs. In this calculus, the financial performance of each platform specifically might matter more than the resources a parent company is able to offer. Against this backdrop, Vimeo reported an operating loss of $27.7 million in 2016 and this author was unable to find figures for Flickr, as Yahoo! does not list income by product or division in its annual reports.[49] In any event, Vimeo's particularly grim financial outlook is useful in evaluating smaller platforms' ability—or lack thereof—to create infringement filtering technologies in-house. Furthermore, because filtering software operate more as a risk avoidance mechanism than a revenue generator, Vimeo and Flickr would presumably have a difficult time demonstrating an infringement filter's return on investment. However, even if these platforms were financially capable of developing infringement algorithms, it is important to question how those systems would function, and whether they would offer rightsholders meaningful alternatives to YouTube's Content ID.

B. Even if smaller platforms employ the use of infringement filters, they are unlikely to offer monetization options that rival options presented by Content ID.

Though it is the gold standard of infringement filters and constitutes the only known technology developed in-house by an online-video platform, YouTube's Content ID is not the market's only infringement filter. Notably, companies like Vimeo, SoundCloud and Twitch employ the use of a third-party software offered by Audible Magic.[50] Based on the limited

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[47] InterActiveCorp, *IAC Reports Q4 2016* 1 (2016) http://ir.iac.com/static-files/0d6dc845-9bde-4193-b1e5-2596a94dbd9e (noting for fiscal year 2016, the company generated $3.139 billion in revenue); This author is aware of— and will mention in the paper's next section—Vimeo's contractual approach to infringement filtering. Vimeo's inclusion in the above financial comparison is meant to demonstrate the difficulties smaller platform would face in creating infringement filters in-house.

[48] YAHOO!, INC., ANNUAL REPORT (FORM 10-K), at 41 (March 1, 2017), (noting that revenues in 2016 were $5.169 billion; also relevant to the analysis above is the report's indication of a net annual loss of over $640 million in 2016 as well).

[49] *See* InterActiveCorp, *supra* note 45, (noting that IAC's video group (Vimeo) notched a $27.7 million operating loss in 2014).

[50] *About Audible Magic*, AUDIBLE MAGIC, https://www.audiblemagic.com/about/ (last visited May 10, 2018), ("Our content identification systems have been in production for years and are trusted by major customers such as. . . SoundCloud, Twitch, Vimeo and Verizon Wireless.") (SoundCloud and Twitch are markedly different from the

amount of information Audible Magic releases on the details of its terms with rightsholders, it seems to operate much like Content ID, at least with respect to the notice-and-takedown alternatives it offers.[51] However, regardless of similarities in operation, Vimeo and others are unlikely to offer rightsholders meaningful alternatives to Content ID due to a vast difference in respective audiences. Furthermore, the lack of meaningful alternatives to Content ID exposes smaller platforms to more liability under the DMCA, as they are less likely to privately contract out of traditional notice-and-takedown compliance.

As previously mentioned, over 90% of Content ID's participating rightsholders choose to monetize potentially infringing content.[52] Accordingly, YouTube estimates it has paid out over $2 billion to participating rightsholders though monetizing potentially infringing content targeted by Content ID.[53] To be more specific, choosing to monetize infringing content grants participating rightsholders a portion of the advertising revenue generated by the content in question. Accordingly, then, an infringement filter's ability to incentivize a rightsholder is likely tied to its ability to generate advertising revenue on its platform, a factor highly connected to a platform's general audience. It logically follows then, that compared to YouTube's 78.8% market share in multimedia visits online, Vimeo's 0.8% market share would generate considerably less by way of ad-generated monetization for rightsholders based on audience alone.

It is worth noting that Vimeo is not an ad-driven platform like YouTube—it generates much of its revenue through a subscription-based fee.[54] Furthermore, up until recently, SoundCloud did not generate advertising revenue on its site, and was therefore unable to offer monetization at all.[55] However, the comparisons are useful in evaluating a given platform's ability—or inability—to rival the value Content ID provides to its participating rightsholders. Based on audience alone, these smaller platforms are realistically unable to compete with the advantages of YouTube's market power and expansive audience—both of which allow YouTube to offer participating rightsholders considerable sums to keep infringing content online. In effect, smaller platforms are exposed to more liability, as rightsholders are inherently less incentivized to monetize content on their platforms. Aside from increasingly common ad-generated monetization options, smaller platforms are unlikely to incentivize rightsholders by alternative means as well.

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strict video-sharing platforms of YouTube and Vimeo. Although SoundCloud supports user-generated content, it only supports the upload of user-generated or user-modified audio. Twitch, on the other hand, is a platform primarily utilized to share videos of users playing video games. These platforms and their approaches to infringement filtering are included to demonstrate YouTube's unique niche in online video and the value offered to rightsholders by participating in Content ID.).

[51] Bridy, *supra* note 37, at 15.

[52] GOOGLE, *supra* note 25.

[53] GOOGLE, *supra* note 2, at 4 ("To date, YouTube has paid out over $3 billion to the music industry, and our Content ID system on YouTube—which identifies user-uploaded videos to help rightsholders better control their content—has generated over $2 billion for partners since it first launched."),

[54] VIMEO HELP CENTER, https://help.vimeo.com/hc/en-us/articles/224968928-Vimeo-Plus (last visited May 10, 2018) ("Vimeo never puts ads before, after, or on top of videos. However, we do have limited display advertising below the player on some vimeo.com pages. Plus members don't see display ads when logged in. PRO members do not see ads anywhere on vimeo.com, and no ads will appear on their profile or video pages. Upgrading to PRO will immediately remove all display ads from those pages.").

[55] THE SOUNDCLOUD BLOG (December 18, 2014), https://blog.soundcloud.com/tag/content-identification/ ("When we launched On SoundCloud in late August of 2014, a key part of the program was to help creators to monetize their original content.").

C. Alternatives to ad-revenue monetization are unlikely to compete with Content ID's robust model.

Because platforms with relatively modest audiences are likely unable to offer meaningful alternatives to Content ID's monetization option, it is worth pondering some other methods by which platforms could incentivize rightsholders to keep potentially infringing content online. However, in order to operate as a realistic alternative to Content ID, a particular method's structure would need to offer a considerable financial benefit to rightsholders, as that is the reward under Content ID's status quo. This portion of the paper's analysis focuses more on new platforms—"start-ups," if you will—to demonstrate Content ID's impact on the potential for future market entrants. Accordingly, and in the interest in brevity, this analysis is limited to two possible methods by which a new platform could incentivize cooperation between rightsholders and platforms under the DMCA: (1) private equity offerings; and (2) profit splits.

i. Private Equity Offerings

Theoretically, instead of developing an infringement filter in-house or contracting with a third party, a new platform could offer rightsholders equity in their company to encourage collaboration and curb infringement claims. Although undoubtedly more opaque—in the sense that it represents an inexact measure of harm and subsequent compensation compared to monetization under an infringement filter—this approach offers at least a possible alternative to the status quo. There are, however, glaring problems with this structure, convincing this author that such a bargain is unlikely to promote the interests of platforms and rightsholders simultaneously. First, although YouTube proactively developed Content ID without any legal obligation, it did so immediately following the Viacom litigation.[56] Absent such a real threat of litigation, one must question whether a platform—let alone a start-up platform—would be eager to solve prospective problems without the operative nudge to do so. Furthermore, many tech companies are financed by venture capital funding, especially in the early stages. Venture capital firms that choose to invest in a start-up platform would almost certainly object to the idea of establishment rightsholders receiving a portion of the company, as it would jeopardize earlier investors' return on investment.[57] Therefore, a private equity approach does not make much economic sense as a form of cooperation between rightsholders and start-up platforms.

ii. Profit Split

Another alternative to traditional DMCA-plus agreements might involve a structure wherein start-up platforms—in exchange for a partner's waiver of claims asserting copyright infringement—share profits with rightsholders. In a sense, this design would be similar to that of a more traditional licensing scheme, only instead of paying for licenses ex ante, payment would occur ex post because of a platform's scarce resources. Furthermore, this structure might allow a platform to offer more content without having to worry about rightsholders' claims, in turn, helping them acquire larger audiences. This structure might be more attractive than an agreement involving private equity offering because it could set a schedule for payments rather than a

[56] *Sag*, *supra* note 19.

[57] *See* Bob Zider, *How Venture Capital Works*, HARVARD BUSINESS REVIEW (November, 1998), https://hbr.org/1998/11/how-venture-capital-works (outlining the general expectations held by and placed upon venture capital firms).

portion of the company. Although this alternative is arguably more palatable than a private equity offering, it still presents difficult problems. Similar to one of the problems presented by private equity offerings, early investors would likely object to this design, too, as it possesses attributes of a debt instrument. To the extent investors wish to see capital apportioned to revenue-generating activity rather than risk-mitigating activity, they might feel the structure is an unnecessary expense, again, especially in light of safe-harbor protection. Though more likely than private equity offerings, cooperation between rightsholders and platforms whereby rightsholders enjoy a portion of a platform's profits is unlikely to emerge in lieu of DMCA-plus agreements.

III. BECAUSE CONTENT ID CONTRIBUTES TO YOUTUBE'S MARKET POWER AND CROWDS OUT SMALLER PLATFORMS, IT IS NECESSARY TO REGULATE DMCA-PLUS AGREEMENTS TO ENSURE HEALTHY MARKET COMPETITION.

As this paper's previous sections describe, current trends suggest that DMCA-plus agreements are likely to continue as cost-effective solutions to traditional notice-and-takedown compliance. However, because these agreements emerge between private parties and are entirely unregulated, there exists a real possibility of further abuse and anticompetitive effects in a market that already lacks meaningful competition. YouTube's position in the market for online-video sharing—and Content ID's potential to further harm market competiveness—should be met with a regulatory response. This portion of the paper offers an in-depth analysis of what such regulation might look like, addresses the arguments for and against such a regulatory response, and ultimately explains why its proffered solution is more desirable than the status quo.

A. For context: compulsory licensing systems for musical compositions

Fractured and complicated relationships between rightsholders and media platforms are far from new—likewise, so are some of the anticompetitive concerns that arise as a result of such relationships, especially in markets populated by monopolistic or oligopolistic entities. A very similar problem presented itself in the world of musical-composition licensing throughout the 20th century and subsequent solutions remain intact today. In the early 1900s, upon noticing that public venues often played their works without purchasing a license for underlying musical compositions, notable musicians and rightsholders formed the American Society of Composers, Authors, and Publishers (hereinafter known as "ASCAP").[58] The group operated as a non-profit organization charged with representing authors, musicians, and rightsholders in their pursuit of monetary compensation for the public performance of their copyrights.[59]

Specifically, ASCAP contracted with intermediaries like radio stations for a "blanket license," which allowed the intermediary to legally "perform" any of the songs in ASCAP's repertoire.[60] In return, ASCAP collected an annual fee from venues and radio stations and

[58] Richard B. Ergo, Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, DUKE L. J., 1959, 258, 259 ("ASCAP's beginning can be traced to a night in 1913 in a New York restaurant, when composer Victor Herbert heard an unlicensed performance of the music from one of his musical shows then playing on Broadway.").
[59] *Id.*
[60] *Id.* at 261.

distributed profits to its members.[61] Over the years, ASCAP grew considerably in the number of rightsholders it represented; as a result, ASCAP raised its rates, creating uproar amongst contractual partners.[62] This tension also contributed to the formation of a smaller but similar group called Broadcast Music, Inc. (hereinafter known as "BMI"), which offered a less valuable repertoire, but had direct connections to the radio-industry stakeholders.[63] However, ASCAP's—and eventually, BMI's—monopolistic characteristics did not go unnoticed, and it agreed to a consent decree in 1941 in the wake of legal action pursued by the U.S. Department of Justice.[64] Both ASCAP and BMI operate under amended consent decrees today.

The respective consent decrees place certain restrictions on ASCAP and BMI to combat their inherently anticompetitive business models.[65] In sum, the consent decrees require each licensing entity to offer blanket licenses for the entire catalog of its members' musical compositions to any party that seeks such a license for a "reasonable rate."[66] Furthermore, they designate the Southern District of New York as a "rate court" to readily settle rate disputes should they arise.[67] Although some stakeholders have expressed dissatisfaction with constraints imposed by such consent decrees, based on recent statements, the U.S. Department of Justice appears committed to combatting the anticompetitive tendencies of groups like ASCAP and BMI, upholding both consent decrees after investigating proposed modifications.[68]

B. The case for a similar compulsory licensing regime in online-video sharing

As a matter of public policy, the consent decrees to which both ASCAP and BMI are legally bound address many of the anticompetitive concerns that exist today in the market for online-video sharing.[69] Likewise, a possible method by which the U.S. government could regulate DMCA-plus agreements would be to design a compulsory licensing scheme in which rightsholders contract with YouTube through representative groups subject to the stipulations of a consent decree. Such a design would arguably solve some of the problems that exist or have yet to surface in a world where DMCA-plus agreements remain entirely unregulated.

First, a compulsory licensing scheme would help even the scales in negotiations between rightsholders and YouTube. Negotiating power between the two is undeniably imbalanced under

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[61] *Id.*

[62] *Id.* at 262 (stating that even prior to the consent decree, ASCAP controlled the licensing for approximately 85 to 90% of popular and classical music in the United States).

[63] *Id.*

[64] Ergo, *supra* at 263.

[65] *See Fact Sheet: ASCAP - BMI Consent Decrees*, FUTURE OF MUSIC COALITION (Oct. 3, 2014), https://www.futureofmusic.org/article/fact-sheet/ascap-bmi-consent-decrees.

[66] *Id.*; In light of recent developments, ASCAP and BMI can now offer "fractionalized" licenses. For the full story, *see* Ed Christman, *Court of Appeals Sides with Songwriters, Publishers on Fractionalized Licensing: 'This is a Massive Victory'*, BILLBOARD (December 17, 2017), https://www.billboard.com/articles/business/8071046/court-appeals-fractionalized-licensing-songwriters-publishers-reactions.

[67] *Id*.

[68] *Justice Department Completes Review of ASCAP and BMI Consent Decrees, Proposing No Modifications at This Time*, U.S. DEPARTMENT OF JUSTICE (August 4, 2016), https://www.justice.gov/opa/pr/justice-department-completes-review-ascap-and-bmi-consent-decrees-proposing-no-modifications.

[69] *Supra* note 28 (YouTube's 78.8% market share in visits multimedia websites is comparable to ASCAP's estimated 85 to 90% of licensing rights for musical compositions in the early 1900s. As such, YouTube's position in the market in online-video sharing is arguably monopolistic and should be met with regulatory action.)

the status quo; rightsholders are essentially forced to agree to the terms YouTube offers, because even in the absence of an agreement, rightsholders' content might legally appear on YouTube anyway.[70] Under the suggested structure, rightsholders would be empowered not only to disagree with a given offer, but to challenge an offered royalty by pursuing adjudication in a designated rate court. The current legal landscape of DMCA-plus agreements fails to provide robust enforcement mechanisms to the parties involved and remains too reliant on voluntary agreements and stakeholder-cooperation.[71]

Second, because licensing fees would presumably be based on a market rate, the proffered approach would stimulate competition in the market for online video, as YouTube would no longer crowd out smaller platforms with respect to its more favorable DMCA-plus offerings. In this sense, such a design would reign in YouTube's influence in online video monetization and give smaller platforms a chance to grow their repertoire of content. Such a result—while admittedly bad for parties enjoying considerable market share like YouTube—would be good for market competitiveness and could potentially spark innovation, which was, after all, a major policy objective behind the DMCA's initial passage.[72]

Another benefit of a structure in which licensing fees are based on objective information like a market rate is that it could combat the opaque nature of DMCA-plus agreements. This would serve as a step in the right direction for YouTube's average user, especially amid complaints of Content ID's censoring effects.[73] While likely a peripheral benefit of implementing a compulsory licensing scheme in this context, the relationship between Content ID and YouTube's average user is a complicated issue and likely warrants a paper of its own.

i. Key details and subsequent impacts on implementation

With the very basics established, it is necessary to take a deeper look at the differences between traditional compulsory licensing systems in copyright and the one this paper offers as a potential solution to the anticompetitive concerns surrounding DCMA-plus agreements.

In the cases of both BMI and ASCAP, rigthsholder-side representatives were the entities displaying anticompetitive behavior and the consent decrees aimed at combatting the harmful effects associated with both groups.[74] Here, however, YouTube is the arguably anticompetitive

[70] *Supra* note 32.

[71] *See, e.g.*, 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUAL REPORT ON INTELLECTUAL PROPERTY ENFORCEMENT (March, 2012), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/ipec_annual_2011_report-new.pdf ("The IPEC continues to facilitate and encourage dialogue among different private sector entities that make the Internet function. As an Administration, we have adopted the approach of encouraging the private sector (including ISPs, credit card companies, and online advertisers) to reach cooperative voluntary agreements to reduce infringement that are practical, effective, and consistent with our commitment to principles of due process, free speech, fair use, and privacy.").

[72] *See supra* note 7; Sag, *supra* note 3, at 520 ("The generally unfiltered nature of platforms operating within the DMCA safe harbors have sparked tremendous creativity and innovation. It has made the internet a vehicle for free expression with no historical precedent, and yet, these gains are not without cost.").

[73] *See generally* Fred Von Lohmann, *YouTube's Content ID (C)ensorship Problem Illustrated*, ELECTRONIC FRONTIER FOUNDATION (March 2, 2010), https://www.eff.org/deeplinks/2010/03/youtubes-content-id-c-ensorship-problem.

[74] *See supra* note 60.

entity, and a compulsory licensing system would need to target the *platform's* market influence to create any meaningful change. This difference may seem significant, and to some extent it is, but the deviation would not drastically alter the approach by which a compulsory licensing could function in the context of online-video sharing. Accordingly, a group similar to BMI or ASCAP would need to recruit a large catalog of licenses from music publishers and motion picture rightsholders. A group called SoundExchange already maintains a large catalog of content and the rights to license their members' sound recordings.[75] In the interest of efficiency, it might be best to designate SoundExchange as something of a "natural monopoly" to operate similar to ASCAP or BMI, only in the space of online video copyright licensing.[76]

Another key difference between the regulation proffered here and that which applies to ASCAP and BMI is the actually licenses themselves. ASCAP and BMI were formed to address the issue of songs being played in public spaces without licenses for their members' musical compositions.[77] Here, such a licensing regime would likely need to address public performance licenses for both sound recordings and underlying musical compositions; when ASCAP's and BMI's consent decrees were executed, copyrights for sound recordings did not exist.[78] This is to say that in the event a compulsory licensing scheme were implemented in the context of online-video sharing, it would not make much sense to require YouTube to obtain a license for the sound recording but not the underlying musical composition, or vice versa.

Despite the differences, however, a compulsory licensing system in the context of online-video sharing would aim to closely resemble those applied to ASCAP and BMI, primarily in the sense that licensing would be subject to a consent decree. Furthermore, this paper suggests that the consent decree largely mirror those which apply to ASCAP and BMI, in the that it would establish a rate court to handle rate disputes, require uniform rates for all licenses, and prevent independent negotiations between rightsholders and platforms. Consent decrees often constitute a heavy form of regulation, and the one this paper suggests would indeed exhibit signs of heavy regulation. However, it is important to keep in mind the market harms often prevented by consent decrees.[79] Nonetheless, pushback to the proffered approach is expected and addressed accordingly.

[75] *About SoundExchange*, SOUNDEXCHANGE, https://www.soundexchange.com/advocacy/ (last visited May 3, 2018), ("The organization collects and distributes digital performance royalties on behalf of more than 155,000 recording artists and master rights owners accounts and administers direct agreements on behalf of rights owners and licensees. To date, SoundExchange has paid out more than $5 billion in royalties.").

[76] Michael F. Martin, *Natural Monopolies in Antitrust, Patent, and Copyright Law: The Essential Facilities, Reverse Doctrine of Equivalents, and Originality Doctrines as Triggers for a Compulsory Licensing Remedy*, INTELLECTUAL PROPERTY AND ANTITRUST SEMINAR (January 27, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123575 ("The phenomenon of natural monopoly often (but does not always) exist for a firm that incurs large fixed but very low variable costs for production over the range of supply.").

[77] *See supra* notes 53 and 54.

[78] Sandra Enimil, *Copyright Duration for Musical Compositions and Sound* Recordings, THE OHIO STATE UNIVERSITY: COPYRIGHT CORNER (May 15, 2013), ("Sound recordings were not granted federal copyright protection until the passage of the Sound Recording Act of 1971."), https://library.osu.edu/blogs/copyright/2013/05/15/198/.

[79] *See generally*, *ASCAP and BMI Consent Decrees Remain Necessary to Promote Fair and Efficient Music Licensing*, NATIONAL ASSOCIATION OF BROADCASTERS (August 6, 2014),

C. The counter-arguments to a compulsory licensing regime in online-video sharing

Although implementing a compulsory licensing system in the context of online-video sharing could potentially solve a number of the problems posed by DMCA-plus agreements, there are valid counter-arguments to the solution this paper proffers.

For instance, there may be broad criticism of the suggestion that a consent decree is the proper method of regulation in this space—even if only due to general discontent among parties subjected to consent decrees. Surely, ASCAP and BMI have been and continue to be vocal about their objections to being legally bound by one.[80] Furthermore, this sort of general dissatisfaction with consent decrees might lead to higher transaction costs associated with government oversight and monitoring legal challenges to relevant interpretations and applications—such challenges have indeed been common in the consent decrees applying to BMI and ASCAP.[81]

Although the proffered solution is meant to operate as a balancing mechanism through which rightsholders and platforms are placed in similar positions of power, rightsholders are likely to have objections, too. Over the course of its tenure, YouTube—through Content ID—has payed rightsholders something to the tune of $2 billion by way of monetizing infringing content.[82] Because those rigthsholders who choose to monetize potentially infringing content receive a portion of advertising revenue, the more popular a video is, the more money a rigthsholder receives.[83] This model serves as a predictable and logical way to compensate rightsholders for what might otherwise infringe their copyrights. Under the proffered compulsory licensing regime, licensing fees would not fluctuate based on content popularity; rather, fees would reflect whatever is deemed to be the market rate. To the extent rightsholders prefer a more volatile method of receiving compensation, they may prefer Content ID to the solution this paper offers.

Moreover, skeptics might argue that implementing a compulsory licensing in this context will actually discourage innovation. YouTube invested over $60 million in developing Content ID without any legal obligation to do so; some might feel that imposing a consent decree as a response to Content ID's effectiveness will disincentivize the market from proactively solving some of the legal implications of emerging technologies.[84] At the very least, such a licensing regime would likely disincentivize YouTube from taking voluntary measures to solve problems

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http://www.nab.org/documents/newsroom/pressRelease.asp?id=3474 (describing the positive impacts resulting from the consent decrees applying to ASCAP and BMI).

[80] *ASCAP Submits Comments to Department of Justice for Consent Decree Review*, ASCAP (August 7, 2014), https://www.ascap.com/press/2014/0806-ascap-doj-comments.aspx; Ed Christman, *BMI, Department of Justice Square Off in Appeals Court Over Latest Consent Decree Ruling*, BILLBOARD (December 1, 2017), https://www.billboard.com/articles/business/8054924/bmi-department-justice-appeals-court-consent-decree-licensing.

[81] Nate Rau, *ASCAP, BMI Dig in for Battle with DOJ over Licensing Rules*, TENNESSEAN. (August 4, 2016), https://www.tennessean.com/story/money/2016/08/04/justice-department-finding-upsets-nashville-songwriters-publishers/88067152/.

[82] *See supra* note 49.

[83] *See supra* note 25.

[84] *See supra* note 20.

in the future. Overall, the potential effects on market incentives might be enough to dissuade skeptics from supporting a compulsory licensing system in online video.

A related—but separate—criticism might concern a compulsory licensing system's effect on YouTube's qualification for protection under section 512 of the DMCA. In other words, would the proffered approach operatively disqualify YouTube from section 512's safe harbor? The answer to this question is nuanced. Forcing YouTube to enter into a consent decree with representative groups would not technically bar it from safe-harbor protection; it would, however, place additional requirements on YouTube, requirements that other online service providers need not satisfy. Subjecting YouTube to a consent decree would operate as a wholly independent legal mechanism under which YouTube would be obligated to acquire licenses, meanwhile, it would remain eligible for safe-harbor protection under the DMCA. Any failures to acquire licenses on YouTube's part would require legal recourse under the proffered consent decree, not under the DMCA. Furthermore, YouTube could continue deploying Content ID as an infringement identifier; however, it would be barred from offering monetization as an incentive to keep infringing content up on its platform. In the event YouTube decided not to monitor any content on its platform, doing so would subject YouTube to the same sort of liability it faced before Content ID's deployment.[85] This said, the complicated interplay between prospective and already existing legal regimes might be enough to dissuade skeptics of the proffered solution's practicability.

D. In defense of a compulsory licensing regime in online-video sharing

The anticipated counter-arguments to a compulsory licensing regime in online-video sharing raise valid concerns with the proffered approach's practical impact on YouTube and the market more generally. However, it is important to consider these concerns against the problems present in the status quo—namely, YouTube's overwhelming leverage in negotiating DMCA-plus agreements and subsequent harm to market competition. Although there are key differences, these issues are not unlike the anti-competitive behaviors ASCAP and BMI displayed in their earlier years. Furthermore, though ASCAP and BMI voice dissatisfaction with their respective consent decrees, the Department of Justice remains committed to keeping them in place. General dissatisfaction among parties being regulated should not alone trump the need to reign in anti-competitive entities. Moreover, fears that a compulsory licensing system might stifle innovation should not alone dissuade skeptics from the proffered approach. Indeed, markets wherein a small number of firms enjoy substantial market share are among the most vulnerable to stagnant innovation, making the status quo problematic in terms of potential innovation. Therefore, while the counter-argument raise valid points, they do not obviate the need to regulate DMCA-plus agreements in accordance with the proffered solutions. Implementing a compulsory licensing scheme in the context of online-video sharing, wherein YouTube and rightsholders—through their representative groups—are subjected to a consent decree is a method by which YouTube's anti-competitive effects could be reduced.

CONCLUSION

[85] *See supra*, note 16.

Under the DMCA's current framework and alternatives to strict compliance therewith, troubling imbalances exist among participants in the market for online-video sharing. Rightsholders lack meaningful options in licensing their content and YouTube's competitors are unable to offer reasonable alternatives to Content ID. Imposing a compulsory licensing regime in the context of online video and subjecting YouTube to a consent decree represents a robust method through which to curb anti-competitive tendencies and stimulate the growth of smaller platforms. Though this is not the only possible approach to combatting YouTube's disconcerting dominance in online-video sharing, it is likely among the strongest and quickest of such responses. Absent regulation, it is likely that YouTube will continue to gain market share and worsen market conditions further. Therefore, it is appropriate for regulatory authorities to address the anti-competitive issues presented in the paper, and the proffered approach constitutes a potential method by which authorities could take action.