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BY E-MAIL

The Honorable Teresa Stanek Rea
Deputy Under Secretary of Commerce for Intellectual Property and
Deputy Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

The Honorable Lawrence E. Strickling
Assistant Secretary of Commerce for Communications and Information
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

**Re: Comments: Department of Commerce Green Paper, *Copyright Policy, Creativity, and Innovation in the Digital Economy*
Docket No. 130927852-3852-01 (October 3, 2013)**

Dear Deputy Under Secretary Rea and Assistant Secretary Strickling:

Google Inc. files these comments in response to the request for comments issued by the U.S. Patent and Trademark Office (“PTO”), arising out of the July 2013 report by Department of Commerce Internet Policy Task Force, entitled *Copyright Policy, Creativity, and Innovation in the Digital Economy* (the “Green Paper”).

A well-balanced and well-functioning copyright law system is crucial to the ability of U.S. companies of all sectors to engage in commerce and bring innovative new products and services to market. Copyright law today has become a critical component of our Nation’s innovation policy. As the Green Paper recognizes, as copyright law and policy responds to new opportunities and challenges created by the Internet, it must not only foster creative activity, but must also encourage technological innovation, economic growth, and job creation.

As we noted in our recent report, “How Google Fights Piracy,” the Internet has been a boon to creativity.¹ Today, more music, more video, and more text is being created by more people in more places than ever before. Every kind of creative endeavor, both amateur and professional, is

¹ Google Public Policy Blog, Report: How Google fights piracy (Sept. 10, 2013), available at <http://googlepublicpolicy.blogspot.com/2013/09/report-how-google-fights-piracy.html>; see also <https://docs.google.com/file/d/0BwxyRPFduTN2dVFqYml5UENUeUE/edit>.



being transformed by the new opportunities and lower costs made possible by digital tools and online distribution.

Google supports and welcomes the PTO's efforts to gather information regarding the five topics addressed in its request for comments. We look forward to reviewing the submissions that the PTO will receive, and appreciate the additional opportunity to submit post-hearing comments.

In these comments, Google responds specifically to Question 4, relating to the legal treatment of remixes, described by the Green Paper as "creative new works produced through changing and combining portions of existing works":

Can more widespread implementation of intermediary licensing, such as YouTube's Content ID system, play a constructive role? If so, how? If not, why not?

Since the question refers specifically to YouTube's Content ID system, and YouTube is a subsidiary of Google, we would like to take this opportunity to provide additional information about Content ID and the role of licensing at YouTube.

YouTube and Video Remix Culture

In order to understand the nature of the challenge that Content ID attempts to address, it is important to begin with an understanding of the enormous scale of YouTube. More than 1 billion unique users visit YouTube each month and together watch more than 6 billion hours of video. And more than 100 hours of video are uploaded to YouTube every minute, spanning every conceivable topic from politics to comedy, from daredevil sports to religion. YouTube has been a transformational force in the world of creative expression, a global video platform at a scale never imagined.

It is also important to keep in mind the central importance of "remixes" in modern video culture, and thus to YouTube. Just last month, the Pew Internet and American Life Project reported that 40% of adults who post videos to online sites post "videos that mix content and material in a creative way."² And in 2010, Pew found that among Internet users, 21% of teens and 15% of adults reported creating "remixes."³ In the past two triennial DMCA rule-makings conducted by the U.S. Copyright Office, the Register of Copyright confirmed that many kinds of video remix activity could qualify as a noninfringing fair use.⁴ Even a brief sampling of YouTube quickly

² Pew Research Center's Internet and American Life Project, Online Video 2013 (Oct. 2013) at 14, available at <http://pewinternet.org/Reports/2013/Online-video>.

³ Pew Research Center's Internet and American Life Project, Social Media & Mobile Internet Use Among Teens and Young Adults (Feb. 2010) at 23, available at <http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx>.

⁴ U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention (Oct. 12, 2012) at 126-28; U.S. Copyright Office, Recommendation of the Register in RM 2008-8, Rulemaking on Exemptions from the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (June 11, 2010) at 49-52.



makes evident the central role that remix plays among the YouTube community, both for video creators and their viewing audiences.

Content ID: A Win-Win-Win Solution

Beginning in 2007, YouTube developed and launched the most advanced content identification system in the world, called Content ID. With this system, rightsholders are able to identify user-uploaded videos that are entirely *or* partially their content, and choose, in advance, what they want to happen when those videos are found. Although not created specifically to address the copyright issues raised by remixes, YouTube's Content ID system has developed into a pragmatic, efficient, and scalable solution to many of the difficulties that previously faced remix creators, rightsholders in prior existing works, and the viewing public.

Today, more than one million partners are making money from their YouTube videos. More than 4,000 rightsholder partners use Content ID to manage their copyrights appearing within user-generated content on the site. These partners include network broadcasters, movie studios, music publishers, songwriters, and record labels, and they are collectively making hundreds of millions of dollars by using Content ID's tools to monetize these videos.

Briefly described, this is how it works: Rightsholders deliver to YouTube reference files (these can be audio-only or video) of content they own, metadata describing that content, and policies describing what they want YouTube to do when it finds a match. Rightsholders can choose between three policies when an upload matches their content: 1) make money from them (for monetized videos the majority of the revenue goes to rightsholders); 2) leave them up and track viewing statistics; or 3) block them from YouTube altogether. Content ID compares videos uploaded to the site against those reference files, automatically identifies the content, and applies the rightsholder's preferred policy. The Content ID system is made available to rightsholders at no cost – in fact, if the rightsholder opts to monetize matches, Google effectively pays them to use it! Each day on YouTube, creators are not only engaging in an interactive, two-way relationship with their fans and subscribers,⁵ but they are also developing entirely new revenue streams from viral, creative, user-generated content.⁶

Of course, while this may be simple to describe in the abstract, making it work in real-time as more than 100 hours of new video are uploaded each minute is a monumental undertaking. Content ID scans over 250 years of video every day. Development of Content ID required an

⁵ See, e.g., Gotye – Somebodies: A YouTube Orchestra (Aug. 12, 2012), available at <http://www.youtube.com/watch?v=opg4VGvyi3M>.

⁶ See THE GUARDIAN, Harlem Shake: Baauer cashes in on viral video's massive YouTube success (Feb. 19, 2013), available at <http://www.theguardian.com/technology/2013/feb/19/harlem-shake-baauer-youtube-success>.



investment of more than \$30 million and more than 50,000 engineering hours. Google continues to invest substantial resources to maintain and improve Content ID on an ongoing basis.⁷

Content ID has proven to be a pivotal technology to the success of the YouTube platform. While initially perceived by rightsholders as an antipiracy solution, today the majority of partners using Content ID choose to monetize their claims, rather than block videos from appearing on YouTube. There are more than 4,000 partners using Content ID, including major U.S. network broadcasters, movie studios, and record labels. We have more than 15 million active reference files (over 1,500,000 hours of material) in the Content ID database, which have been used to “claim” more than 200 million videos on YouTube.

Content ID has been a win-win-win solution for YouTube, copyright owners, and YouTube users. The system has created a new source of revenue for copyright owners, as well as for YouTube. In fact, today Content ID “claimed” videos account for more than one-third of all monetized YouTube views. Content ID benefits YouTube creators, as well. When copyright owners choose to monetize or track user-submitted videos, it allows creators to remix and upload a wide variety of new creations built on that existing content, without having to independently seek out licenses for it.

The Limits of Content ID and Licensing for Remixes

In evaluating the costs and benefits of intermediary licensing using automated identification systems like Content ID, Google urges the PTO to keep in mind the need for mechanisms to protect fair use remixes from being blocked or being “licensed” by rightsholders who have no proper claim on them.

While Google is proud of Content ID and the way in which it can reduce transaction costs for licensing online video (including remixes), Content ID can never address all of the copyright complexities that remix creators face. As an initial matter, Content ID will never include reference files for every copyrighted work that might be included in every remix uploaded to the site. While Content ID currently has over 15 million reference files in its database, that represents a tiny fraction of all the audio, video, and imagery that falls within the scope of copyright. In other words, no matter how comprehensive Content ID’s database of reference files may one day become, there will always be an important role for fair use when it comes to remixes on YouTube.

Fortunately, Content ID is a supplement to, not a substitute for, fair use. Content ID cannot categorically separate remixes that qualify as fair uses (and thus require no licensing) from remixes that are infringing in the absence of a license. As the Green Paper recognized, “[u]nder current U.S. law, some remixes may qualify as a fair use of the copyrighted material they draw

⁷ For example, in 2012 YouTube announced improvements to making matching more precise. YouTube Official Blog, Improving Content ID (Oct. 3, 2012), available at <http://youtube-global.blogspot.com/2012/10/improving-content-id.html>.

on.”⁸ While Content ID is quite adept at identifying the *inclusion* in an uploaded video of pre-existing material for which it has a reference file, it cannot apply the case-by-case, four factor legal analysis that is required to determine whether that inclusion constitutes a fair use.

This can potentially create two kinds of difficulties for noninfringing remixes. First, the Content ID match may result in the blocking of the video (if the rightsholder in the pre-existing content has elected to block). Second, it may result in the video being monetized in favor of someone who has no entitlement to license fees (if the rightsholder in the pre-existing content has elected to monetize). The second case can be particularly galling to a remix creator whose fair use video is intended as a criticism or parody of the rightsholder or work in question.

In order to address this problem, the Content ID system permits the uploader to challenge a Content ID “claim” on her video by sending a “dispute” to the rightsholder via YouTube’s system.⁹ This is accomplished through a simple web form, where the uploader is asked to provide basic information and explain why she believes that the Content ID “claim” should be released.¹⁰ YouTube has systems in place to prevent abuse of this process by users and rightsholders alike: An invalid Content ID dispute can result in a copyright removal and strike applied to the user’s account. Misuse by rightsholders can result in denial of access to specific functionality or even to Content ID itself. This process serves as an important safety valve that protects noninfringing remix videos from being nevertheless blocked or “licensed” by the Content ID system.

In addition to the dispute mechanism described above, there may be a role here for voluntary “best practices” on the part of rightsholders to help guide the use of identification systems like Content ID. While no automated identification system can accurately distinguish fair use remixes from infringing remixes, those systems can provide rightsholders with tools that can be adjusted to reduce the risk of over-claiming.

For example, Content ID can be set by rightsholders to distinguish between videos that have matching audio and video tracks, and those where the audio track is not the one that originally accompanied the video. Where the audio and video tracks are not from the same work, this is a tell-tale sign that a remix may be involved. In addition, the system can also be instructed to overlook matches below a certain duration or to apply different policies to matches depending on the duration of the match. Where, for example, a match is only for a short duration, and where the match represents a small proportion of the video, these are also tell-tale signs that a remix

⁸ Green Paper at 28.

⁹ For further details, see YouTube Copyright Center, Content ID Claim Basics, available at <http://youtube.com/yt/copyright/content-id-disputes.html>.

¹⁰ In some special cases, where a claiming rightsholder rejects a dispute, the uploader may be asked to file an appeal in order to get her video restored. In the face of an appeal, the rightsholder may allow the video to be restored, or may file a formal DMCA takedown notice, at which point the DMCA procedures take over. YouTube Official Blog, Improving Content ID (Oct. 3, 2012), available at <http://youtube-global.blogspot.com/2012/10/improving-content-id.html>.

may be involved. These features can be used by different kinds of rightsholders in different ways, with an eye toward minimizing the claiming of noninfringing remix videos. Further dialogue among rightsholders may yield “best practices” that can provide guidance to other rightsholders in adjusting these thresholds.

In summary, the lesson that we have drawn from our experience with Content ID is that intermediary licensing can be a pragmatic, efficient, scalable solution to *some* of the legal uncertainties facing *some* remix creators with respect to *some* copyrighted works. These kinds of content identification and licensing systems should be viewed as a supplement to other mechanisms, such as fair use and “best practices” efforts among creators and rightsholders alike to agree on and facilitate noninfringing forms of remix creativity.¹¹

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Google appreciates this opportunity to provide details about YouTube’s Content ID system in response to the PTO’s request for comment and commends its efforts to explore how copyright law can be improved to meet the needs of the digital economy.

Sincerely,



Pablo L. Chavez
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Google Inc.

¹¹ See, e.g., Center for Media & Social Impact, Code of Best Practices in Fair Use for Online Video (June 2008), available at <http://www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>.