



## Insight

# The Growing Tensions Between Digital Media Platforms and Copyright Enforcement

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## Executive Summary

- Copyright infringement tensions between digital “new media” platforms and traditional media are at an all-time high.
- Pressure from copyright holders combined with aggressive infringement-flagging algorithms and significant penalties under current regulations push platforms to take down content—often before infringement has been proven.
- While there are legitimate concerns regarding copyright infringement online, current regulation incentivizes over-blocking content in order to avoid fines; this tactic is alienating content creators and limiting free speech and innovation.
- Moreover, recent reform proposals aim to increase platform liability; this will make platforms even more cautious, exacerbating current problems and seriously limiting the content that has made these platforms a novel means of entertainment.

## Introduction

Digital media or “new media” platforms that host user-generated videos such as YouTube or Vimeo, and livestreams such as Twitch, YouTube Gaming, and Facebook Gaming, are gaining a bigger role in the entertainment industry. This trend accelerated during the [coronavirus pandemic](#), with viewership rates increasing to 27.9 billion hours in 2020, an all-time high. While most of the livestreaming platforms initially focused on gaming content, their offerings have expanded to include podcasters, DJs, musicians, and traditional sports. For example, Twitch is now the official [streaming partner of USA Basketball](#) and hosted the [Spain broadcast of the biggest South American soccer tournament](#).

As these platforms grow, the attention and level of scrutiny grows as well. One of the most prominent criticisms is that the platforms are failing to properly address copyright infringement on their websites. Record labels and movie studios complain that these platforms [are not doing a good enough job](#) protecting their intellectual property rights. Yet on the other side, content creators and their fans complain that overly restrictive application of copyright regulations [severely limits content](#) that should constitute “fair use” of copyrighted material.

The “fair use” doctrine and the [Digital Millennium Copyright Act \(DMCA\)](#) are at the center of this debate. The DMCA, the most important law regarding copyrighted work on the internet, aims to prevent the unauthorized access and copying of copyrighted works, which usually requires authorization by the copyright holder. The exception is “fair use,” or the reproduction of these copyrighted materials for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” Fair use is key to the development of an online entertainment industry, as it allows the content creators on these platforms to

reproduce materials to create original content such as parodies, commentary, reviews, or live reactions.

## **Copyright Enforcement Is Increasingly Burdensome for Platforms and Creators**

Platforms bear the responsibility of enforcing the fair use doctrine. Under the DMCA, they can face fines of over \$150,000 per instance of copyright infringement. According to a [public statement by Twitch](#), the number of copyright claims on its platform increased from less than 50 per year to more than 1,000 a week. This can translate into multi-million-dollar fines if platforms' moderation is deemed inadequate.

This has pushed the platforms in the direction of preemptively taking down content or sanctioning streamers once they receive a DMCA claim and letting content creators appeal their case after the sanction. It is more cost effective to review appeals carefully over a longer period, as they are not bound to respond to appeals within any specific timeline, as is the case with DMCA claims. The number of appeals will certainly be lower, and in case of a mistake, the potential revenue loss for platforms will certainly be lower than the potential fine for a DMCA violation.

Platforms have also moved toward automation as a mechanism to respond to DCMA claims in a timely and cost-effective manner. By using automated systems and algorithms, platforms forgo the need to use human systems, which tend to be costly and slower in their review process. While on-demand platforms such as YouTube have implemented algorithmic systems for around 14 years, livestreaming platforms have started to increasingly implement similar systems in order to quickly remove or mute a potentially copyright-infringing livestream.

While automation has been beneficial in terms of response time, its increased application has presented multiple issues. One of its main issues is its lack of accuracy, where fair use content or original materials can be [incorrectly flagged](#). This is a common problem, as automated systems lack comprehension of context and can be activated with as little as three seconds of audio or video being reproduced. This lack of context has also led to the sanctioning of content where [copyrighted music was played unintentionally](#), such as a video capturing loud music from a passing car or store speaker.

Another common problem with automated systems is that they are vulnerable to exploitation. For example, there are cases of law enforcement officers [playing copyrighted music](#) to prevent civilians' recordings from being uploaded to these platforms. Another example is the weaponization of DMCA claims, where a user flags content as a violation of copyright with the intention of censoring or negatively impacting a content creator, rather than as a legitimate claim over copyright infringement. In fact, it has become common for [content creators to be extorted](#) by ill-intentioned individuals who threaten a copyright claim unless they are paid a certain amount of money.

The combination of caution, automation, and preemptive takedowns reflects the rising burden of moderating copyright infringement. An example of this is the introduction of the three-strike system, where content creators are banned from posting content after receiving three copyright claims. Beyond threatening content creators, this practice threatens the platforms themselves, as they run the risk of alienating the creators that provide the content which makes them appealing to the viewers and advertisers that provide revenue for them.

## **Proposed Changes to the DMCA Will Make the Issue Worse**

Current proposals to update the DMCA and copyright enforcement regulations seek to increase platforms' legal liability, which could make this situation worse. Senator Tom Tillis has led efforts to pass legislation for more

stringent copyright enforcement, reforming both the “notice and takedown” system in the DMCA and increasing the legal consequences of copyright infringement. The Protecting Lawful Streaming Act and the Copyright Alternative Small-Claims Enforcement (CASE) Act, both included in last year’s [appropriations bill](#), introduced major tweaks to copyright enforcement. The CASE Act created a small-claims copyright tribunal, with the objective of speeding up the dispute process for copyright cases under \$30,000. On the other hand, the Protecting Lawful Streaming Act targets commercial websites designated exclusively to illegally streaming copyrighted content by making this act a felony instead of a civil infraction.

Sen. Tillis has also said he hopes to introduce legislation that would increase platform liability as moderators; this would require the platforms to establish a system that prevents the re-upload of copyrighted content previously taken down. This change would replace the current “notice and takedown,” where platforms are bound to remove content after it has been flagged as a copyright violation, with a “notice and stay-down” system. Such a system would compel platforms to take a more proactive and strict approach, in which they must review and approve content before it is posted, rather than after the fact. Advocates of this system claim it is the best mechanism to prevent the reposting of infringing content, as platforms will be forced to moderate at an earlier stage, allowing them to prevent rather than react.

Yet this approach could further stifle creativity and innovation on these platforms. Increasing platforms’ potential liability would push them to take a further precautionary approach, where they will likely [over-block content](#) in order to reduce potential legal liabilities. By placing a higher burden on platforms, platforms would have to review and approve all content before it is published. To do so, platforms would need to further rely on automatization to review content in a timely manner, so that creators are still able to post content, but platforms are able to comply with regulation. While this could potentially prevent some cases of copyright infringement, it will do at a cost to consumers, content creators, and platforms. Consumers would be further deprived of content and content creators would face further barriers to enter a booming market, potentially pushing them out of it. This would severely hinder the platforms’ value proposition and content diversity, effectively hindering their growth.

### **Better Principles for Potential DMCA Reform**

To maintain the growth of the new-media platform industry, policymakers should focus on updating and expanding the definition of fair use so that its application in these platforms is clearer. By establishing clearer fair use guidelines, creators and platforms can more easily moderate potentially infringing content. More important, the definition of fair use must be broadened to include newer uses, such as video game streaming or movie and music reviews. Adopting a broad, technology-neutral definition of fair use is vital for promoting an open internet, which hosts these novel forms of entertainment. This provides platforms with a clearer roadmap to focus on combating privacy and meaningful copyright violations.

While some platforms—such as the Facebook Gaming streaming platform—have been able to strike [licensing deals with major record labels](#) to use their music in streams, such agreements usually require the payment of hefty fees that only a few platforms can afford. Under the DMCA, copyright holders hold higher leverage in this kind of negotiations, and licensing fees would have to offset projected earnings from pursuing compensation under the DMCA.

Policymakers and regulators ought to also understand the nuances of content moderation. When formulating content moderation strategies, platforms face continuous and multiple tradeoffs: relying on human systems tends to increase accuracy but will sacrifice timeliness and increase costs. On the other hand, relying on automated systems increases timeliness and reduces costs, but at the expense of over-blocking content, and

increasing misreporting and vulnerability for exploitation. While adding a human backstop could be helpful to remedy this issue, the pressure of fines and time-to-takedown restrains push platforms to prioritize timeliness over accuracy.

These challenges are magnified in livestreaming platforms, where responding to copyright infringement should ideally happen in real-time. Yet such immediate responses require significant additional resources to detect, analyze, take down, and notify the streamer of the infringement. This can be an extremely difficult task for platforms, considering livestreams can last for multiple hours and the threshold for what is considered infringement can be as low as three seconds.

## **Conclusion**

New media platforms, or platforms that host livestreaming and video content, have shown tremendous growth as new entertainment, evolving from a niche audience to attracting mainstream users. Nonetheless, this growth might be severely hindered by the platforms' growing conflicts with current copyright regulation. Increasing pressure from copyright holders and the threats of onerous fines under the DMCA have pushed platforms to implement automated systems to take down materials flagged as infringing on copyrights. The technical limitations with algorithmic systems have generated a problem of over-blocking, where creativity and innovation are stifled, and content creators' right to fair use can be trampled, pushing them off of the platforms. Reform must be fair both for copyright holders, content creators and new media platforms. Rather than simply piling on more regulation, policymakers and regulators should strive to make fair use policies clearer and more workable, and shift the burden of proof to copyright holders claiming harm, instead of forcing content creators to prove themselves innocent.