

2023

Blank Space: The Legal Gray Area Created by Police Abuse of Copyright Law

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Recommended Citation

Connor Druhan, *Blank Space: The Legal Gray Area Created by Police Abuse of Copyright Law*, 55 Loy. U. Chi. L. J. 289 (2023).

Available at: <https://lawecommons.luc.edu/lucj/vol55/iss1/7>

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Blank Space: The Legal Gray Area Created by Police Abuse of Copyright Law

Connor Druhan*

Music, a universal language sung and heard around the world, is a powerful force for bringing people together. It is also afforded a great deal of protection under United States copyright law. As the way we listen to music has evolved throughout history, so too have the ways that laws protect the rights of musicians and entertainers. However, due to the changing technological landscape and our methods for protecting music, law enforcement officials have found a loophole at the intersection of copyright law, free speech, and the tools we use to enforce the rights of copyright holders. The Digital Millennium Copyright Act affords protection to social media platforms that remove copyright-infringing material on behalf of copyright holders. In order to effectively monitor for infringement, many of these platforms utilize “algorithmic takedown systems,” programs that identify infringing content and take actions specified by the copyright holder. By deliberately playing copyrighted music while being filmed, police officers are attempting to trigger algorithmic takedown systems to block videos without a chance for the videos to be manually reviewed by the copyright holder. The result of these actions is a suppression of police accountability and the reduced dissemination of ideas. This Comment will discuss how police abuse the copyright system, study the implications of their actions, and propose solutions for the future.

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* J.D. Candidate, Class of 2024, Loyola University Chicago School of Law. I am very grateful to the staff members of the *Loyola University Chicago Law Journal*—especially Andy Sutherland—for their comments, edits, and guidance. Thank you to my family and friends for their unwavering support.

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INTRODUCTION

Imagine, for a moment, that you are an activist protesting the epidemic of police brutality plaguing American cities. Due to the safety concerns of protesting police brutality, you take your cell phone out of your pocket and start recording to use the video as evidence against the rogue officers. To your surprise, the police officer you are filming says nothing; instead, they take out their own phone and begin playing a Taylor Swift song. You upload the video to your YouTube channel and think nothing of it—until the video is removed due to copyright infringement.

Recently, there have been reports of police officers who, after realizing they are being filmed, play copyrighted music at high volumes in an attempt to trigger algorithmic takedown systems embedded within popular social media sites such as YouTube and Instagram.¹ Recording the police in these situations is a recognized right protected by the First Amendment, however, police officers are limiting this right by exploiting these algorithmic takedown systems to remove the recorded videos from social media websites.² These police actions utilize the way copyright law interacts with social media platforms to stifle public discussions regarding police accountability.

This disruption of social media discussion is problematic for those trying to advocate for social justice. In today's technological landscape, ideas are routinely disseminated through online platforms like YouTube,

1. For a discussion on police officers intentionally playing copyrighted music, see *infra* Part II.

2. See *infra* Part III (noting the circuit courts recognizing an individual's First Amendment right to film the police).

Instagram, Twitter (now X), and TikTok.³ By exploiting copyright law to block potential discussion of police accountability on these platforms, advocates for social justice lose one of their main tools for raising awareness of important issues like police brutality and lack of transparency in police departments. To make matters worse, besides lengthy, and arduous appeals processes, these advocates rarely have any recourse once their videos are taken down.⁴

This Comment will analyze the loophole that police are exploiting. The right to record and upload videos of police to social media platforms is established in eight circuits, but the Supreme Court has not affirmed this right. Because of the Digital Millennium Copyright Act (DMCA), social media platforms remove videos containing copyright-infringing material in order to avoid liability. Copyright holders monitor for infringement on social media platforms by using algorithmic takedown systems, which block videos without considering whether the fair use defense applies to the videos. As a result, activists who upload videos of police that include copyrighted material are subjected to an arduous appeals process that stifles the spread of the video on social media platforms.

To address police abuse of copyright law, this Comment proposes solutions at varying scales. Police departments should enact policies to prevent police from playing copyrighted music while on-duty, and police training regarding an individual's right to record the police should be mandatory in all departments. Social media platforms should implement modifications to algorithmic takedown systems to streamline the process for reinstating blocked videos and platforms should require that copyright holders manually review infringing videos when algorithmic takedown systems flag them, rather than allowing the holders to block the videos automatically. Finally, the Supreme Court should establish a First Amendment right for people to film the police and should reverse the Ninth Circuit's holding that there is not a constitutional right to upload videos to social media.

Part I of this Comment will provide the legal and historical context necessary to understand this pressing issue. In doing so, Part I will

3. See Shelley Walsh, *The Top 10 Social Media Sites & Platforms 2022*, SEARCH ENGINE J. (May 30, 2022), <https://www.searchenginejournal.com/social-media/biggest-social-media-sites/> [https://perma.cc/446N-URZT] (describing the size and user numbers of social media platforms like YouTube); see generally *Is Social Media Replacing the Need for TV News?*, TOPPAN, <https://toppandigital.com/us/blog-usa/social-media-replacing-need-tv-news/> [https://perma.cc/H8CE-MBN4] (last visited Oct. 11, 2023).

4. See generally Engelberg Center on Innovation Law & Policy, *How Explaining Copyright Broke the YouTube Copyright System*, N.Y.U. (Jan. 15, 2020), <https://www.nyuengelberg.org/news/how-explaining-copyright-broke-the-youtube-copyright-system> [https://perma.cc/AV47-VP3W] [hereinafter *Explaining Copyright Broke the YouTube System*].

address: (1) whether citizens have a right to record the police in public, (2) survey the current context of copyright law, and (3) explain how algorithmic takedown systems on social media website's function. Utilizing this background, Part II will discuss the issue at hand: police officers are intentionally playing copyrighted music to prevent videos from being uploaded to social media platforms, which constitutes an abuse of copyright law. Part III will explore this police abuse of copyright and the intersection of the right to film police, copyright law, and algorithmic copyright takedown systems used on video and live streaming platforms to determine the legality and implications of the police's actions. Finally, Part IV will suggest proposals to solve the problem and argue that while the police usage of copyrighted material to circumvent accountability is unethical, it speaks more to significant problems: the flaws present in algorithmic takedown systems, and the distrust between law enforcement and the communities they serve.⁵

I. BACKGROUND

Throughout the past few years, news outlets have documented police abuse of copyright law multiple times. In Oakland, California, protesters gathered outside a courthouse for the pre-trial hearing of a police officer charged with the manslaughter of Steven Taylor, a Black man.⁶ A police officer began harassing protesters and began playing "Blank Space" by Taylor Swift from his phone when the protesters started filming him.⁷ The officer stated, "You can record all you want, I just know it can't be posted to YouTube."⁸ In Beverly Hills, there have been several reports of police officers playing music ranging from "Yesterday" (a song by the Beatles) to "Santeria" (a song by Sublime).⁹ In one instance, an officer

5. See Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Compensation*, 25 ALB. L.J. SCI. & TECH. 96, 114 (2015) (discussing flaws present in algorithmic takedown systems).

6. *US Officer Plays Taylor Swift Song to Try to Block Video*, BBC NEWS (July 2, 2021), <https://www.bbc.com/news/technology-57698858> [<https://perma.cc/SR5N-JFEJ>] [hereinafter *Swift Song*].

7. *Id.*; Sarah Rose Sharp, *Cop Admits to Playing Copyrighted Music to Keep Activist Recording off YouTube*, HYPERALLERGIC (July 2, 2021), <https://hyperallergic.com/660912/cop-plays-copyrighted-taylor-swift-music-to-keep-activist-recording-off-youtube> [<https://perma.cc/5LB9-PDCQ>].

8. *Swift Song*, *supra* note 6; Anti Police-Terror Project (@APTAction), TWITTER (July 1, 2021, 11:17 AM), <https://twitter.com/APTAction/status/1410633647670005760> [<https://perma.cc/LM7T-42HK>].

9. Dexter Thomas, *New Video Shows Beverly Hills Cops Playing Beatles to Trigger Instagram Copyright Filter*, VICE NEWS (Feb. 11, 2021), <https://www.vice.com/en/article/bvxa7q/new-video-shows-beverly-hills-cops-playing-beatles-to-trigger-instagram-copyright-filter> [<https://perm>

responded, “I can’t hear you,” when asked to turn down his music.¹⁰ Similarly, police officers in Santa Ana, California, opted to play popular Disney music while investigating a stolen vehicle report.¹¹ One of the officers reportedly responded to an onlooker that he was playing the copyrighted music to avoid the video of him being posted online.¹² In these situations, police officers are very aware that they are using copyrighted music as a way to prevent the videos from being uploaded and shared on social media.¹³ Their actions create questions about legality, ethics, and the interaction between copyright and social media.¹⁴

First, this Section will discuss the right to film the police. Second, it will discuss potential barriers to this right including qualified immunity and privacy laws. Third, it will cover the history and function of copyright law in the United States, including the DMCA, fair use doctrine, and public performance rights.

a.cc/LU89-F7ET]; Josh Marcus, *Beverly Hills Police are Playing Beatles Songs to Avoid Being Filmed on Instagram*, INDEPENDENT (Feb. 12, 2021, 7:54 PM), <https://www.independent.co.uk/news/world/americas/beverly-hills-police-beatles-instagram-b1801643.html> [https://perma.cc/BA5K-3JXD]; Rebecca Speare-Cole, *Cop Accused of Playing Copyrighted Music While Being Filmed to Block Video Sharing*, NEWSWEEK (Feb. 10, 2021, 10:59 AM), <https://www.newsweek.com/california-police-officer-plays-music-copyright-social-media-livestream-1568253> [https://perma.cc/ZM45-8YPL]; Rafi Schwartz, *Did this Cop Just Play “Santeria” to Dodge Being Filmed?*, MIC (Feb. 10, 2021), <https://www.mic.com/impact/did-this-cop-just-play-santeria-to-dodge-being-filmed-61674093> [https://perma.cc/KV74-A6FA].

10. *Beverly Hills Sgt. Accused Of Playing Copyrighted Music While Being Filmed To Trigger Social Media Feature That Blocks Content*, CBS NEWS (Feb. 12, 2021, 4:15 AM), <https://www.cbsnews.com/losangeles/news/instagram-licensed-music-filming-police-copyright/> [https://perma.cc/G5GC-WGWZ]; Samantha Shaps, *Cop Plays ‘Santeria’ by Sublime While Activist Tries to Request Bodycam Footage*, DAILY DOT (Feb. 10, 2021), <https://www.dailydot.com/irl/video-police-santeria-activist-live-stream/> [https://perma.cc/JL4G-6EYW].

11. Taylor Romine, *Police Play Disney Tunes to Prevent Video of Them on Patrol Being Posted Online*, CNN (Apr. 27, 2022), <https://www.cnn.com/2022/04/20/us/santa-ana-police-music-ordinance/index.html> [https://perma.cc/VV64-USK4]; Helena Wegner, *Police Blast Disney Music to Stop YouTube from Filming Them in California*, SACRAMENTO BEE (Apr. 21, 2022, 12:30 PM), <https://www.sacbee.com/news/nation-world/national/article260245605.html> [https://perma.cc/SD6T-36M9].

12. Romine, *supra* note 11 (“[T]he officer [Hernandez] engaged with told him he was playing music in the hopes that, if the video was posted online, it would be taken down because of copyright infringement.”); Jessica De Nova, *Santa Ana Police Officers Blast Disney Tunes at Scene to Avoid YouTube Video Recording*, ABC NEWS (Apr. 7, 2022), <https://abc7.com/santa-ana-police-officers-youtube-video-disney-music-during-investigation/11718827/> [https://perma.cc/6ZBR-P9HS].

13. See De Nova, *supra* note 12 (discussing how the officer at issue knowingly played copyrighted music to trigger YouTube’s algorithmic takedown system).

14. See *Swift Song*, *supra* note 6 (“[T]he idea that playing copyright music could be a tactic used by police to avoid sharing online and on social media has attracted serious attention following the removal of activist videos.”).

A. The Legality of Police Recording

The right to record the police has become increasingly more relevant and polarizing in recent years as police misconduct has skyrocketed and social media has increased exposure of these incidents.¹⁵ This problem is not new to the country—it has been an underlying issue for decades.¹⁶ Discussions around police accountability continue to grow as police misconduct is brought to the forefront of major forms—such as excessive use of force and unlawful detainment.¹⁷ While people do have legal remedies when they believe their rights were violated by law enforcement, there has been an increasing trend in recording the police to document these violations with the goal of increasing police accountability.¹⁸ Although the Supreme Court has not ruled on the issue, several courts of appeals have said the First Amendment houses a right to film on-duty police officers.¹⁹

15. Dayvon Love, *Police Accountability*, 46 HUM. RTS. MAG., no. 2, 2021, at 18 (noting that the prevalence of police brutality in the media is not indicative of increased police brutality, but is an issue that is more prevalent now due to the increase of sharing these incidents through social media); see also Carol A. Archbold, *Police Accountability in the USA: Gaining Traction or Spinning Wheels?*, 15 POLICING J. POL'Y & PRAC. 1665, 1666 (Sept. 2021) (discussing the current state of police accountability in the United States).

16. See generally George L. Kelling et al., *Police Accountability and Community Policing*, NAT'L INST. OF JUST. (Nov. 1988), <https://www.ojp.gov/pdffiles1/nij/114211.pdf> [<https://perma.cc/2ED2-P3HP>] (addressing police culture and how to better manage accountability within departments); see also Love, *supra* note 15, at 18 (“The emergence of the call to defund police is a reaction to the pattern of city governments over the past several decades to invest billions of dollars in police to curtail violence instead of investing in the community.”).

17. See Love, *supra* note 15, at 18 (noting that while killing of individuals by police officers is one notable issue of police brutality, there are larger patterns of police misconduct that include theft, verbal abuse, and assault); see also *Law Enforcement Misconduct*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/law-enforcement-misconduct> [<https://perma.cc/CHK9-2BHU>] (last updated June 7, 2023) (“The Department’s investigations [into allegations of police misconduct] most often involve alleged uses of excessive force, but also include sexual misconduct, theft, false arrest, and deliberate indifference to serious medical needs or a substantial risk of harm to a person in custody.”).

18. *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP'T OF JUSTICE (Oct. 13, 2020), <https://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> [<https://perma.cc/L99C-2L9B>]. The Department of Justice elaborates on several of the laws that it enforces related to police misconduct, including the protection of citizen rights under the U.S. Constitution and the prohibition of discrimination on the basis of race, color, national origin, sex, and religion. *Id.* See also Philip Lynn et al., *Recording Police Activity*, IACP L. ENF'T POL'Y CTR. (Dec. 2015), <https://www.theiacp.org/sites/default/files/2018-08/RecordingPolicePaper.pdf> [<https://perma.cc/MNT6-WAGK>] (“The proliferation of portable video recording capabilities in cellphones, smart phones, and similar devices has made it easy for the public to record events and activities—including the actions of police officers performing their duties in public places.”).

19. U.S. CONST. amend. I; see also Nick Sibilla, *First Amendment Protects The Right To Film Cops, Federal Court Reaffirms*, FORBES (July 24, 2022, 7:30 PM), <https://www.forbes.com/sites/n>

In *Glik v. Cunniffe*, a 2011 case out of the First Circuit, police officers arrested Simon Glik for filming them while they arrested a different man at the Boston Common.²⁰ Although Glik was merely passing by when he saw the arrest, he became concerned that the officers were using unlawful force to detain the man, thus he began filming.²¹ Police then arrested Glik and charged him with disturbing the peace, aiding in the escape of a prisoner, and violating the Massachusetts wiretap statute.²² However, all charges were eventually dropped or dismissed in Boston Municipal Court.²³

Glik subsequently filed an internal affairs complaint with the Boston Police Department, but the Department did not investigate the incident nor discipline the officers responsible.²⁴ The First Circuit addressed whether there is a constitutionally protected right to film police performing their duties in public.²⁵ The court held that a person's right to film on-duty law enforcement officers in a public space is established and protected under the First Amendment.²⁶ The court further noted that protection under the First Amendment must apply equally to professional news reports and regular people due to the blurring of lines between professional journalists and ordinary people who possess digital cameras and cell phones.²⁷ This distinction is meaningful because activists who are separate from a major news network frequently film officers.²⁸

icksibilla/2022/07/24/first-amendment-protects-the-right-to-film-cops-federal-court-reaffirms/
[<https://perma.cc/672M-HVGR>] (“The decision by the Tenth Circuit [in *Irizarry v. Yehia*] . . . marks the seventh federal appellate court ruling of its kind. Thanks to those rulings, the right to film police is now expressly recognized under the First Amendment in at least 32 states.”).

20. *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

21. *Id.* at 79–80 (“Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.”).

22. *See infra* Section I.B (explaining and discussing wiretap statutes).

23. *Glik*, 655 F.3d at 80.

24. *Id.* (“Glik filed an internal affairs complaint with the Boston Police Department following his arrest, but to no avail. The Department did not investigate his complaint or initiate disciplinary action against the arresting officers.”).

25. *Id.* at 82 (“The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public?”).

26. *Id.* (“Basic First Amendment principles, along with case law from this and other circuits, answer that question” of whether the right to videotape police is constitutionally protected “unambiguously in the affirmative”).

27. *Id.* at 84 (“Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw.”).

28. *See, e.g., Filming and Photographing the Police*, ACLU, <https://www.aclu.org/issues/free-speech/photographers-rights/filming-and-photographing-police> [<https://perma.cc/K8VG-HR57>] (last visited Oct. 12, 2023) (“The right of citizens to record the police is a critical check and balance.

The Third Circuit also ruled on the issue of whether the First Amendment grants people the right to film the police carrying out their public duties.²⁹ Police officers briefly detained Amanda Geraci after she attempted to record an arrest at a protest.³⁰ One year later, the police cited Richard Fields after he took photographs of police in the process of breaking up a house party.³¹ Both brought claims against the City of Philadelphia and the police officers responsible, alleging that the police interfered with their First Amendment right to record police activities in public.³² The legal question was whether Geraci and Fields “have a First Amendment right of access to information about how our public servants operate in public.”³³ The Third Circuit held that the right to record police officers was protected under the First Amendment.³⁴ Referencing *Glik*, the court also commended bystander recording as providing different perspectives, allowing for dissemination of these stories at a wider scale, and assisting in professional recordings by serving as additional support for broadcasts.³⁵ Further, the opinion acknowledged that every circuit court that addressed this issue had held the First Amendment included the right to record police activity in public.³⁶ To date, eight circuits have held that this right exists, including the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits.³⁷ In fact, no other circuit

It creates an independent record of what took place in a particular incident, free from accusations of bias, lying, or faulty memory.”).

29. *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

30. *Id.* at 356 (describing Geraci’s detainment in September 2012 at an anti-fracking protest in Philadelphia).

31. *Id.* (describing Fields’ detainment in September 2013 on a public sidewalk at Temple University).

32. *Id.* (“Fields and Geraci brought 42 U.S.C. § 1983 claims against the City of Philadelphia and certain police officers. They alleged that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity and violated their Fourth amendment right to be free from an unreasonable search or seizure.”).

33. *Id.* at 355. (“[This issue in this case] is whether they [Geraci and Fields] have a right of access to information about how our public servants operate in public.”).

34. *Id.* at 360 (“In sum, under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”).

35. *Id.* at 359–60 (discussing the benefits of bystander videos and their effects relative to traditional media).

36. *Id.* at 355 (“Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public.”).

37. See generally Sophia Cope & Adam Schwartz, *Fourth Circuit: Individuals Have a First Amendment Right to Livestream Their Own Traffic Stops*, ELEC. FRONTIER FOUND. (Feb. 23, 2023), <https://www.eff.org/deeplinks/2023/02/fourth-circuit-individuals-have-first-amendment-right-livestream-their-own-traffic> [https://perma.cc/9JTU-A8DT]; Grayson Clary, *Tenth Circuit Ruled That You Have a First Amendment Right to Record Police Officers Carrying Out Their*

has explicitly rejected this idea; thus although the Supreme Court has not explicitly recognized the right to record police, its recognition is persuasively implied.³⁸

B. *Qualified Immunity and Other Barriers to the Right to Film Police*

While *Glik* and *Fields* established that there is a First Amendment right to record police officers in their respective circuits, that right is not absolute.³⁹ One barrier to this right is the doctrine of qualified immunity. Specifically, qualified immunity protects government officials performing discretionary functions unless their actions clearly violate an established statutory or constitutional law.⁴⁰ The Supreme Court first introduced this doctrine in *Pierson v. Ray*, a 1967 case in which police officers arrested a group of Black and white Episcopal priests who were using segregated facilities at a bus terminal in Jackson, Mississippi.⁴¹ The priests were arrested for violating a provision of the Mississippi Code which prohibited gathering in a manner that might “breach the peace” and refusing to move when ordered by police.⁴² The priests brought claims for false arrest and imprisonment against the police officers who arrested them.⁴³ The case ultimately reached the Supreme Court, which reasoned that an officer should not “choose between being

Public Duties, REPS. COMM. (July 18, 2022), <https://www.rcfp.org/10th-circuit-right-to-record/> [https://perma.cc/L8RH-M2K2].

38. Clary, *supra* note 37 (“*Irizarry* now gives the right to record the support of a clean majority of the federal courts of appeal, with none dissenting on the other side of the ledger.”).

39. Ruth Maurice, *Recording the Police: Legal?*, NOLO, <https://www.nolo.com/legal-encyclopedia/recording-the-police-legal.html> [https://perma.cc/437K-Q6CG] (last visited Oct. 12, 2023) (“As with most constitutional rights, the right to record officers has limits.”); *see also* 5 *Things to Know Before Recording the Police*, TAKEAWAY (Apr. 16, 2015), <https://www.wnystudios.org/podcasts/takeaway/segments/5-things-you-should-know-video-recording-police> [https://perma.cc/S7T3-3BW5] [hereinafter 5 *Things to Know*] (discussing considerations relating to filming the police).

40. David L. Hudson Jr., *Qualified Immunity*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1560/qualified-immunity> [https://perma.cc/V5DZ-NX7K] (last visited Oct. 12, 2023) (“The idea behind qualified immunity is that society should not punish a government official unless that official knew or should have known what he or she was doing was unlawful.”); *see also* *Qualified Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity [https://perma.cc/7PRG-ASPN] (last visited Oct. 12, 2023) (“Qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff’s rights, only allowing suits where officials violated a “clearly established” statutory or constitutional right.”).

41. *Pierson v. Ray*, 386 U.S. 547, 548–49 (1967); *see also* *Qualified Immunity*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/qualified-immunity/> [https://perma.cc/B7L5-KTMP] (last visited Oct. 12, 2023) (detailing the history of the qualified immunity doctrine, including its introduction in 1967).

42. *Pierson*, 386 U.S. at 549.

43. *Id.* at 550.

charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”⁴⁴ Generally, qualified immunity applies when a government official does not know that what they were doing was unlawful.⁴⁵ Courts examine whether a “constitutional right was clearly established,” and therefore ask whether the officer should have been aware of it when they acted.⁴⁶

The *Harlow v. Fitzgerald* case further defined the test for whether qualified immunity applies to government officials.⁴⁷ In *Harlow*, senior white house aides were alleged to have participated in a conspiracy against a former Air Force member.⁴⁸ The aides claimed that they should be granted immunity for their actions in view of their positions as senior aides and advisers of the President.⁴⁹ The Supreme Court held that the qualified immunity doctrine applies “where an official’s duties legitimately require action in which clearly established rights are not implicated”⁵⁰

The Supreme Court provided a definition for “clearly established” in the context of the qualified immunity doctrine in *Wilson v. Layne*.⁵¹ In *Wilson*, police officers brought media representatives to the attempted arrest of a felon.⁵² The felon was not home at the time of the attempted arrest.⁵³ When the parents of the felon sued the officers for bringing members of the press into the home in violation of the parents’ Fourth Amendment rights, the officers claimed that they were protected by qualified immunity.⁵⁴ The Supreme Court, ruling on whether the right allegedly violated by respondents was “clearly established,” defined “clearly established” in the context of qualified immunity as “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁵⁵

Frasier v. Evans, a 2021 case out of the Tenth Circuit, illustrates these principles of qualified immunity as they relate to the issue of filming

44. *Id.* at 555.

45. Hudson, *supra* note 40.

46. *See id.* (discussing the current test for qualified immunity).

47. *Harlow v. Fitzgerald*, 457 U.S. 800, 800 (1982).

48. *Id.* at 802–05 (discussing the facts of the case).

49. *Id.* at 806 (“Independently of former President Nixon, petitioners invoked the collateral order doctrine and appealed the denial of their immunity defense . . .”).

50. *Id.* at 819 (“[T]he public interest may be better served by action taken ‘with independence and without fear of consequences.’” (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967))).

51. *Wilson v. Layne*, 526 U.S. 603, 614–15 (1999).

52. *Id.* at 606–07.

53. *Id.* at 607.

54. *Id.* at 608.

55. *Id.* at 614–15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

police officers.⁵⁶ Levi Frasier was confronted by police officer Christopher Evans and other members of the Denver Police Department after recording the officers using force to arrest an uncooperative suspect in public.⁵⁷ Frasier initially lied about recording the incident, but after the police pressured him, he handed over the tablet he used to film.⁵⁸ The court examined whether Frasier's right to record police was clearly established at the time of the incident in 2014, and whether the police officers involved were entitled to qualified immunity.⁵⁹ The court held that the right to record police was not clearly established law in the Tenth Circuit in 2014 and that because there was no clearly established law to make the officers' conduct unconstitutional, they were entitled to qualified immunity.⁶⁰ The plaintiff petitioned for a writ of certiorari to the Supreme Court.⁶¹

The Supreme Court denied the writ of certiorari, declining to rule on the issue of whether the First Amendment grants a right to film police carrying out their duties in public.⁶² Although the Tenth Circuit has affirmed the right to record police in line with the precedent of seven other circuits since the *Frasier* decision, the Supreme Court has still not spoken on the issue of whether qualified immunity is applicable.⁶³ Because the Supreme Court has refused to rule on this issue, there is no

56. *Frasier v. Evans*, 992 F.3d 1003, 1008, 1014–23 (10th Cir. 2021).

57. *Id.* at 1008, 1010–11 (describing the circumstances of Frasier's confrontation with police, including their surrounding him at his car).

58. *Id.* at 1008 (“Mr. Frasier at first denied having filmed the arrest but ultimately showed the officer the tablet computer on which he had video-recorded it.”).

59. *Id.* at 1013–14.

60. *Id.* at 1023. The right to record police was not established in the Tenth Circuit until 2022. *Id.* at 1024 (“[T]here was no clearly established law that the alleged object of the officers' conspiracy was actually unconstitutional under the First Amendment, and, consequently, the officers are entitled to qualified immunity for any such conspiracy.”).

61. Petition for Writ of Certiorari at 1, *Frasier v. Evans*, 142 S. Ct. 427 (2021) (No. 21-57), 2021 WL 3017381.

62. *Frasier v. Evans*, 142 S. Ct. 427 (2021) (mem.); see also *Frasier v. Evans*, SCOTUSBLOG (2021), <https://www.scotusblog.com/case-files/cases/frasier-v-evans/> [<https://perma.cc/75JD-VKLG>] (reviewing the timeline of the case including the decision to deny the petition for certiorari); see also Brief of the Rutherford Institute as Amicus Curiae in Support of Petitioner, *Frasier v. Evans*, 142 S. Ct. 427 (2021) (No. 21-57); cf. John Spisak, *Qualified Apathy: The Tenth Circuit Concedes Jurisdiction Over Constitutional Questions*, 61 WASHBURN L.J. ONLINE 83, 83 (2022) (reviewing the *Frasier* decision and concluding that the Supreme Court should have addressed the issues present).

63. *Irizarry v. Yehia*, 38 F.4th 1282, 1294 (10th Cir. 2022); see also Clary, *supra* note 37 (discussing the *Irizarry* case and its impacts).

binding authority that affirms the right to film police in every part of the United States.⁶⁴

Beyond the doctrine of qualified immunity, privacy law presents another barrier to genuinely enforcing the recognized right to record police officers.⁶⁵ There is no single comprehensive source of federal privacy law in the United States; instead, privacy law is governed by a variety of laws that vary depending on the jurisdiction.⁶⁶ When filming the police, the primary issue of privacy law frequently raised is whether citizens could record audio without the consent of all parties involved.⁶⁷

State laws can supplement federal law with additional protections regarding the audio recording of individuals.⁶⁸ Generally, states are

64. See Rachel Harmon, *Can you record the police?*, TALKS ON LAW, <https://www.talksonlaw.com/briefs/when-do-you-have-a-right-to-record-the-police> [<https://perma.cc/SK63-J2XQ>] (last visited Oct. 12, 2023) (“While the Supreme Court has not yet ruled on the issue, federal appeals courts have ruled that recording law enforcement is protected under the First Amendment.”).

65. David L. Hudson Jr., *Filming the Police*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1550/filming-the-police> [<https://perma.cc/E585-YP6M>] (last visited Oct. 12, 2023) (“Another issue that has not been fully fleshed out by the courts concerns the relationship between the right to record and various privacy laws.”); see generally Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167 (2017).

66. David Harrington, *U.S. Privacy Laws: The Complete Guide*, VARONIS (Mar. 10, 2023), <https://www.varonis.com/blog/us-privacy-laws> [<https://perma.cc/5JPA-5VKP>] (“The United States has a patchwork and ever-changing web of laws governing data privacy. While there’s no comprehensive federal privacy decree, several laws do focus on specific data types or situations regarding privacy.”); see also Judith Haydel, *Privacy*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1141/privacy> [<https://perma.cc/P7FA-SBK3>] (discussing privacy laws in the United States).

67. See Kelly Martin, *Recording the Police: Legal?*, NOLO, <https://www.nolo.com/legal-encyclopedia/recording-the-police-legal.html#4> [<https://perma.cc/59HC-APJ7>] (last visited Oct. 12, 2023) (“Most states have laws that ban wiretapping, electronic surveillance, or eavesdropping. These laws prohibit people from listening in on private conversations (with some exceptions). In some states, these privacy laws might prohibit you from audio-recording the police—as well as arrestees and bystanders—without their knowledge.”).

68. See *United States Recording Laws*, RECORDING L., <https://recordinglaw.com/united-states-recording-laws/> [<https://perma.cc/SZ7N-YZL8>] (last visited Oct. 12, 2023) (discussing United States recording laws and outlining regulations by state); see also Deborah C. England, *Can I legally record a conversation between myself and another person?*, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/resources/criminal-defense/felony-offense/can-i-record-a-conversation-between-myself-another> [<https://perma.cc/AR9F-55M8>] (last visited Oct. 12, 2023) (“[S]tate laws that afford greater privacy protection to citizens than the Wiretap Act are not preempted by the federal law and their provisions will be enforced.”).

either “one-party consent,”⁶⁹ or “all-party consent” states.⁷⁰ “One-party consent” means that an individual can record a conversation with another without the other party knowing that they are being recorded.⁷¹ In contrast, “all-party consent” states require that all parties present in a conversation consented prior to being recorded.⁷² Accordingly, recording the police could be illegal in states that require “all-party consent” because police officers likely would not consent to being recorded.⁷³

The Seventh Circuit discussed privacy law in the context of the right to record police in *American Civil Liberties Union v. Alvarez*.⁷⁴ The American Civil Liberties Union (ACLU) of Illinois brought suit against Anita Alvarez, the Cook County State’s Attorney, seeking declaratory and injunctive relief barring her from enforcing Illinois’ eavesdropping statute against the organization’s plans to record police officers openly.⁷⁵ The Seventh Circuit sought to determine whether the ACLU stated a claim for a First Amendment violation, and whether the claim was likely to succeed.⁷⁶ The district court had previously held that the ACLU had not alleged a proper injury because the First Amendment did not protect

69. See, e.g., COLO. REV. STAT. § 18-9-304 (1)(a) (2021) (“Any person not visibly present during a conversation or discussion commits eavesdropping if he . . . knowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto, or attempts do so . . .”); see also, e.g., *Colorado Recording Laws*, RECORDING L., <https://recordinglaw.com/united-states-recording-laws/one-party-consent-states/colorado-recording-laws/> [<https://perma.cc/V5PG-8SWH>] (last visited Oct. 12, 2023) (“This means that in Colorado, you are legally allowed to record a conversation you take part in.”).

70. See, e.g., 720 ILL. COMP. STAT. 5/14-2(a)(2) (2012) (“A person commits eavesdropping when he or she knowingly and intentionally . . . uses an eavesdropping device, in a surreptitious manner, for the purposes of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation . . .”); see also, e.g., CAL. PENAL CODE § 632(a) (2017) (“A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . or imprisonment . . .”).

71. *United States Recording Laws*, *supra* note 68; see also England, *supra* note 68.

72. *United States Recording Laws*, *supra* note 68; see also England, *supra* note 68.

73. See *5 Things to Know*, *supra* note 39 (noting that the legality of recording the police varies based on the state).

74. *Am. Civ. Liberties Union v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012).

75. *Id.* at 588 (“The ACLU filed this suit against Alvarez in her official capacity seeking declaratory and injunctive relief under 42 U.S.C. § 1983 barring her from enforcing the eavesdropping statute against audio recording that the organization plans to carry out in connection with its ‘police accountability program.’”); see also 720 ILL. COMP. STAT. 5/14-2(a)(2) (2012).

76. *Alvarez*, 679 F.3d at 590. The Court also addressed the issue of whether the ACLU had standing to proceed, but this will not be reviewed in this comment.

a right to record audio.⁷⁷ The Seventh Circuit remanded the case, instructing the district court to enter a preliminary injunction preventing the State's Attorney from applying the Illinois statute against the ACLU of Illinois on the grounds that the law was likely unconstitutional.⁷⁸

According to the State's Attorney, the Illinois law was purposefully broad in order to "minimize the harm to persons whose conversations have been illegally intercepted."⁷⁹ On the other hand, according to the Seventh Circuit, the Illinois eavesdropping statute went too far and "obliterated the distinction between private and nonprivate by criminalizing *all* nonconsensual audio recording *regardless* of whether the communication was private *in any sense*."⁸⁰ Accordingly, the law was likely unconstitutional as it was not closely tailored enough to serve the government's justification of preventing the capture of private conversations when police are filmed.⁸¹ As such, in "all consent" states, citizens may not have a right to film police.

While courts have generally recognized that the First Amendment grants citizens a right to film police, the Supreme Court has not ruled that the First Amendment provides a right to post those videos to social media platforms.⁸² The Supreme Court discussed First Amendment rights in the context of private property in *Lloyd Corp. v. Tanner*, where a man sought to deliver handbills in a large shopping center owned by a private entity.⁸³ The Court ruled in favor of the shopping center, holding that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."⁸⁴ In *Lloyd Corp.*, the First Amendment did not protect that man's right to deliver handbills on private property; the Supreme Court has not ruled on whether the First

77. *Id.* at 586, 608 (describing the holding of the district court and reversing the district court).

78. *Id.* at 608 ("The district court shall . . . enter a preliminary injunction enjoining the State's Attorney from applying the Illinois eavesdropping statute against the ACLU . . .").

79. *Id.* at 606 ("The State's Attorney insists that the broad reach of the statute is necessary to 'remove[] incentives for interception of private conversations and minimize[] the harm to persons whose conversations have been illegally intercepted.'" (alterations in original)).

80. *Id.* at 608.

81. *Id.* ("If protecting privacy is the justification for this law, then the law must be more closely tailored to serve that interest in order to avoid trampling on speech and press rights.").

82. Lata Nott & Brian Peters, *Free Expression on Social Media: The Complete Guide*, FREEDOM F., <https://www.freedomforum.org/free-speech-on-social-media/> [<https://perma.cc/9LFX-HQCG>] (last visited Oct. 13, 2023) ("The First Amendment protects individuals from government censorship. Social media platforms are private companies and can censor what people post on their websites as they see fit.").

83. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552, 567 (1972).

84. *Id.* at 569.

Amendment protects a user's right to upload information to social media platforms because social media companies are private entities.⁸⁵

The Ninth Circuit ruled on the issue of whether the First Amendment protects social media uploads in *Prager University v. Google LLC*.⁸⁶ PragerU, a Conservative nonprofit educational and media organization, sued YouTube for restricting and demonetizing several of their videos.⁸⁷ PragerU brought the suit on the basis that YouTube was violating its First Amendment rights.⁸⁸ Citing *Lloyd Corp.*, the court held the First Amendment does not protect users' uploaded videos on YouTube.⁸⁹ As this Comment will discuss, the Supreme Court should overrule the Ninth Circuit and hold that the First Amendment grants a right to upload information to social media platforms.⁹⁰

Consequently, the rules regarding recording the police and uploading the videos to social media are not uniform throughout the United States. There is generally a First Amendment right to film the police with certain exceptions under qualified immunity and privacy laws, but the Supreme Court has not ruled on this issue. Further, the Ninth Circuit lacks a First Amendment right to upload or stream these videos to private entities like YouTube.

The right to record and upload videos of police to social media, however, is only half of the equation. Police are abusing copyright law to remove these videos once they are posted on social media platforms.

C. Copyright Law and Fair Use

To fully realize how the police are abusing copyright law to suppress discussion and attention to police accountability, it is important to understand how copyright law functions. Copyright is a type of legal protection over intellectual property that safeguards the work of authors and creators.⁹¹ Copyright law has developed over several centuries

85. *Id.* at 570; see also Nott & Peters, *supra* note 82.

86. *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020).

87. *Id.* at 995–96 (describing the background of the case and the basis of Prager University's complaint).

88. *Id.* at 996.

89. *Id.* at 998 (“YouTube does not perform a public function by inviting public discourse on its property. ‘The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.’” (citing *Lloyd Corp.*, 407 U.S. at 569)).

90. See *infra* Part IV.

91. *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> [<https://perma.cc/96PH-D8MC>] (last visited Oct. 13, 2023) (defining copyright in general).

through the common law of England and the United States.⁹² Originally introduced to the United States in Article I of the Constitution, it has since been revised several times to account for developments in society and technological advancements.⁹³ The most notable revision of copyright law occurred through the Copyright Act of 1976 (Title 17), which is the basis for twenty-first-century copyright law.⁹⁴ Title 17 serves as a revision of copyright law to account for technological growth within the United States.⁹⁵

Copyright protects original works of authorship that are in fixed, tangible forms.⁹⁶ A work is original if it has been “independently created by a human author” and has a “minimal degree of creativity.”⁹⁷ The Supreme Court has set the bar for creativity incredibly low, stating that “the requisite level of creativity is extremely low; even a slight amount will suffice.”⁹⁸ A work is in a “fixed” form if it is captured in a medium such that the work can be “perceived, reproduced, or communicated for more than a short time.”⁹⁹ In essence, an individual can obtain a

92. See generally *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBR., <https://www.arl.org/copyright-timeline/> [<https://perma.cc/DJB4-JKTJ>] (last visited Oct. 13, 2023) [hereinafter *Copyright Timeline*]. Passed in 1710, the Statute of Anne is recognized as the first copyright statute and granted fourteen years of protection for publishers of books. Jeremy Norman, *The Statute of Anne: The First Copyright Statute*, HIST. OF INFO., <https://www.historyofinformation.com/detail.php?entryid=3389> [<https://perma.cc/Z6YN-ZWAB>] (last visited Oct. 13, 2023). U.S. law broadens copyright protections and has changed several times since the institution of copyright law in the United States. See *Copyright Timeline*, *supra* (“Since the Statute of Anne almost 300 years ago, US law has been revised to broaden the scope of copyright, to change the term of copyright protection, and to address new technologies.”).

93. U.S. CONST. art. I, § 8, cl. 8; see also *Copyright Timeline*, *supra* note 92 (providing a history of the development of copyright law in the United States).

94. 17 U.S.C. §§ 101–1511 (2012); see also U.S. COPYRIGHT OFF., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 (1977) (discussing the Copyright Act of 1976); Geoffrey P. Hull, *Copyright Act of 1976*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1072/copyright-act-of-1976> [<https://perma.cc/7SPE-KEXA>] (“The Copyright Act of 1976 forms the basis of copyright law in the United States today. It took effect on January 1, 1978, implementing fundamental and sweeping changes in many aspects of copyright law.”).

95. See GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, *supra* note 94 (“The new law supersedes the Copyright Act of 1909, as amended, and is the first extensive revision of the 1909 law.”); Hull, *supra* note 94 (detailing the revisions present in the Copyright Act of 1976).

96. U.S. CONST. art. I, § 8, cl. 8; see also *Copyright in General*, *supra* note 91 (answering frequently asked questions about the basics of copyright law).

97. *Copyright in General*, *supra* note 91; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991) (“Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity.”).

98. *Feist*, 499 U.S. at 345.

99. *Copyright in General*, *supra* note 91; see also U.S. COPYRIGHT OFF., COPYRIGHT BASICS CIRCULAR 1 (2021) [hereinafter *COPYRIGHT BASICS*] (“A work is ‘fixed’ when it is captured (either by or under the authority of an author) in a sufficiently permanent medium such that the work can

copyright so long as they have not copied the work from someone else, have put forth at least a small amount of creativity, and have recorded the work in some tangible form.¹⁰⁰

Copyright law creates liability for those who violate the statutorily enumerated rights of a copyright holder.¹⁰¹ These rights, outlined in 17 U.S.C. § 106, include the right “to reproduce the copyrighted work,” the right “to prepare derivative works based on the copyrighted work” (like sequels or spin-offs), the right “to distribute copies or phonorecords of the copyrighted work,” the right “to perform” a copyrighted work like a musical composition or theatrical play publicly, the right “to display” a copyrighted work publicly, and in the case of a recording, the right “to perform the copyrighted work publicly by means of a digital audio transmission.”¹⁰² When police officers intentionally play copyrighted music to trigger algorithmic takedown systems, they are infringing upon the copyright holder’s right to exclude others from performing the copyrighted work.¹⁰³

Whether police may be directly liable for copyright infringement hinges in part on the doctrine of public performance.¹⁰⁴ The Copyright Act states that to perform a piece of music “publicly” means to play the music “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”¹⁰⁵ Title 17 provides no further definitions for

be perceived, reproduced, or communicated for more than a short time.”). The Circular also provides a list of copyrightable materials, including “Musical works, including any accompanying words.” *Id.*

100. COPYRIGHT BASICS, *supra* note 99.

101. 17 U.S.C. § 501; *see also* Will Kenton, *Copyright Infringement: Definition, Meaning, Example and Criteria*, INVESTOPEDIA (July 10, 2022), <https://www.investopedia.com/terms/c/copyright-infringement.asp> [<https://perma.cc/HJ4T-FSUP>] (defining copyright infringement).

102. 17 U.S.C. § 106; *see also* *Copyright in General*, *supra* note 91 (explaining the rights granted to copyright holders).

103. *Infra* Part II.

104. *See* Alessia Dunn, *Cops Chastised For Blasting Disney Music at Crime Scene*, INSIDE MAGIC (Apr. 7, 2022), <https://insidethemagic.net/2022/04/cops-disney-music-youtube-ad1/> [<https://perma.cc/7X7T-58WE>] (quoting Dr. E. Michael Harrington, professor of music and copyright at Berklee Online, who believes that the playing of copyrighted music by police is illegal because it is a public performance); *see also* *Playing Music in Public: Is it Legal*, CLOUD COVER MEDIA, <https://cloudcovermusic.com/music-licensing-guide/when-is-it-legal/> [<https://perma.cc/ZPH7-QA83>] (last visited Oct. 13, 2023) (explaining that users who play music in certain settings without securing the right license to do so can be subject to fines).

105. 17 U.S.C. § 101. The Copyright Act also provides for the performance of music asynchronously, as in the case of radio broadcasting. *Id.*; *see also* *What is A Public Performance of Music and What is the “Performing Right”?*, BMI, https://www.bmi.com/faq/entry/what_is_a_public_performance_of_music_and_what_is_the_performing_right1 [<https://perma.cc/K2GZ-Q9YT>] (last visited Oct. 13, 2023) (“A ‘public performance’ of music is defined in U.S. copyright law to

the words “public” nor “substantial.” The police playing these copyrighted songs can be directly liable for copyright infringement depending on the situation in which they played the music.

Whether the police’s actions are legal or if they constitute a public performance is debatable and is fact specific. For example, consider the Santa Ana incident where police played Disney music from a squad car loud enough to wake an entire neighborhood where a large number of people outside the officer’s typical circle of acquaintances heard the music.¹⁰⁶ Or consider the situation in Beverly Hills where an officer played “Santeria” (a song by Sublime), during an Instagram live stream; is stream that was broadcasted to thousands of people.¹⁰⁷ This situation seems ripe for linguistic conjecture surrounding what performing for a substantial number of people means. While the officer might argue that in this situation it is the person streaming the video to Instagram who is broadcasting the music to a substantial number of people, the officer was aware that he was being filmed and played the music knowing it would be heard on the stream.¹⁰⁸ Accordingly, one might argue that the officer is performing the song for the stream, not the user who streamed the video or its audience.

Other cases may not be so clear. In LaSalle County, Illinois, an officer playing music by Blake Shelton only played the music to the person filming the video.¹⁰⁹ While the video has remained on YouTube and

include any music played outside a normal circle of friends and family that occurs in any public place.”).

106. See Dunn, *supra* note 104 (detailing the Santa Ana Disney music incident); see BMI, *supra* note 105 (discussing public performance).

107. Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime’s ‘Santeria’ to Avoid Being Live-Streamed?*, VICE NEWS (Feb. 9, 2021, 12:49 PM), <https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed> [https://perma.cc/UD5E-7BDK] (describing an interaction involving a police officer playing a popular ska song to prevent the citizen from uploading a film of the interaction). Sublime is an American ska-punk band. See John Bush, *Sublime Biography*, ALLMUSIC, <https://www.allmusic.com/artist/sublime-mn0000486047> [https://perma.cc/8AK3-7EXJ] (last visited Oct. 22, 2023) (providing a biography of the ska-punk band Sublime).

108. *Id.* (“[The officer] asks how many people are watching, to which [the streamer] replies, ‘Enough.’”).

109. See Dexter Thomas, *It Sure Looks Like This Cop Played Country Music to Avoid Being Filmed*, VICE NEWS (Mar. 2, 2021, 2:31 PM), <https://www.vice.com/en/article/wx89kn/it-sure-looks-like-this-cop-played-country-music-to-avoid-being-filmed> [https://perma.cc/7GRU-4RD3] (describing the encounter when the police chief played Blake Shelton’s “Nobody But You” from his phone while a visitor to the sheriffs’ office filmed herself dropping off complaint forms). Blake Shelton is an American country music singer who has received a number of awards for his music. See Stephen Thomas Erlewine, *Blake Shelton Biography*, ALLMUSIC, <https://www.allmusic.com/artist/blake-shelton-mn0000046814/biography> [https://perma.cc/6LZK-FHNW] (last accessed Oct. 22, 2023) (providing a biography of country music star Blake Shelton).

garnered thousands of views since its posting,¹¹⁰ an officer in this position could argue that they were unaware the video would be posted and therefore claim that they never meant to perform the music to a substantial number of people. While this would likely not affect the analysis for a whether the video as a whole constitutes copyright infringement, the officer could argue that they had no intent to perform the music publicly and should not be directly liable.¹¹¹

Whether the police are legally permitted to play the music at all only makes up part of the equation and is not the major problem with these cases. The real issue is the prevention of videos being uploaded. Regardless of the liability a police officer may assume in performing copyrighted music from their personal smartphones, they have already stopped the video from reaching a wider audience and fulfilling its purpose as a means for raising awareness for social justice issues and police accountability.¹¹² They have restricted speech.

Beyond potential direct liability for copyright infringement, police exploiting copyright law may be subject to disciplinary action from their departments. None of the officer's departments have explicitly stated that playing copyrighted music goes against their internal policies. Several departments have implied that the officers will be subject to discipline, giving statements such as "This is not approved behavior."¹¹³ However, it is unclear whether the officers were subjected to serious disciplinary measures.

Taking the direct liability or disciplinary measures taken against the officers aside, they are still playing copyrighted music to create infringing videos. These videos create infringement liability for the social media platforms that host them.¹¹⁴ As copyright law developed, laws like the "Digital Millennium Copyright Act" were created for online service

110. Accountability Angel, *TYRANTS at The Sheriffs Office*, YOUTUBE (Feb. 25, 2021), <https://www.youtube.com/watch?v=pSteGkNO-ZE> [<https://perma.cc/HE65-ECWU>]. Notably, as of October 13, 2023, the video has over 19,000 views. *Id.*

111. Brianna K. Loder, *Public Performance? How Let's Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law*, 15 WASH. J.L. TECH. & ARTS 74, 107 (2020) (discussing the intent required for someone to be liable for public performance).

112. *Supra* Part II.

113. *Swift Song*, *supra* note 6 ("We have seen the video and referred it to our internal affairs bureau. This is not approved behavior. It will not happen again." (quoting San Leandro Sheriff's Department)); *see also* Thomas, *supra* note 107 ("[T]he playing of music while accepting a complaint or answering questions is not a procedure that has been recommended by Beverly Hills Police command staff.").

114. *See infra* Section I.C.1 (discussing how copyright infringing videos posted on social media platforms makes the platforms liable for the infringement).

providers to avoid this liability.¹¹⁵ Copyright law also offers a defense called “fair use” which might apply to the videos police are targeting.¹¹⁶

1. The Digital Millennium Copyright Act

The infringement created by police playing copyrighted music in videos uploaded to social media creates liability for the platforms that host the videos.¹¹⁷ As the internet proliferated toward the turn of the twenty-first century, concerns arose regarding how copyright law should interact with social media websites that are capable of hosting user-created content.¹¹⁸ In the context of the Digital Millennium Copyright Act (DMCA), these websites are referred to as “online service providers” because they provide the service of transmitting and communicating information online.¹¹⁹ Congress noted that given the ability of users to freely post content on websites, the users might post copyright-infringing material and incur liability for the online service provider.¹²⁰ Without the DMCA, online service providers (like YouTube) could be liable for copyright infringement—instead of the user who posted the video in the first place—as those providers host the infringing material to be viewed by others.¹²¹

Congress passed the DMCA to implement the World Intellectual Property Organization Copyright Treaty, which requires parties to

115. See *infra* Section I.C.1 (discussing the origin of the DMCA).

116. See *infra* Section I.C.2 (discussing the fair use defense).

117. See *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/dmca/> [<https://perma.cc/3LA8-5CBJ>] (last visited Oct. 13, 2023) (stating how the Digital Millennium Copyright Act (DMCA) was in part developed to protect online service providers from the liability that arises due to user uploaded content).

118. See *id.* (detailing the history and purposes of the DMCA); see also Tiexin Guo, *A Brief History of the DMCA*, SEC. BOULEVARD (May 23, 2022), <https://securityboulevard.com/2022/05/a-brief-history-of-the-dmca/> [<https://perma.cc/VEV7-E3WG>] (discussing the creation of the DMCA).

119. *What is an Online Service Provider?*, COLL. OF W. IDAHO, <https://cwi.edu/faq/file-sharing/what-online-service-provider> [<https://perma.cc/P4UT-RR6>] (last visited Oct. 13, 2023) (“An online service provider (OSP) is an entity which offers the transmission, routing, or providing of connections for digital online communications.”); see also Jess Rhodes, *What is an Online Service Provider?*, EASYTECHJUNKIE, <https://www.easytechjunkie.com/what-is-an-online-service-provider.htm> [<https://perma.cc/P6RV-YVKM>] (last modified Aug. 17, 2023) (defining online service providers).

120. See *The Digital Millennium Copyright Act*, *supra* note 117 (“In the late 1990s, Congress recognized the legal uncertainty facing the nascent internet industry resulting from online service providers’ potential legal liability for copyright infringement that occurred on their services.”); see also Guo, *supra* note 118 (hypothesizing a situation in which the DMCA does not exist, therefore creating liability for a website that hosts user-posted copyright infringing content).

121. See Guo, *supra* note 118 (discussing how online service providers are held responsible for user-uploaded content); see also *The Digital Millennium Copyright Act*, *supra* note 117.

provide measures and remedies against the rise of digital copyright infringement.¹²² In general, the DMCA established a system for online service providers to avoid copyright infringement claims should one of their users post copyrighted material without the copyright holder's permission.¹²³ In exchange for working with copyright holders to remove infringing content from their platforms, online service providers are granted legal protections from liability called "safe harbors."¹²⁴

The DMCA "safe harbors" are four types of protection granted under the DMCA that limit liability for service providers engaging in activities typical of their business.¹²⁵ The safe harbors limit liability relating to "(a) transitory digital network communications, (b) system caching, (c) information residing on systems or networks at [the] direction of users, and (d) information location tools."¹²⁶ Parties must meet criteria to be eligible for DMCA safe harbors: they must be "service providers," must satisfy "certain conditions of eligibility," and provide "standard technical measures" for the protection of copyrighted works.¹²⁷

When a copyright holder believes that material posted on a social media platform infringes on their copyright, they can send a takedown notice—a request that the video be removed on the grounds that it infringes on the copyright holder's rights—to the online service provider; the online service provider then has the opportunity to remove the

122. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001) (citing WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 121, 36 I.L.M. 65 (1997)) (explaining the background of the DMCA); see also Taylar-Simone McCants, *History and Overview of the DMCA*, FINDLAW, <https://www.findlaw.com/smallbusiness/intellectual-property/history-and-overview-of-the-dmca.html> [https://perma.cc/5EUX-7BZM] (last updated June 30, 2023) (explaining that the creation of the DMCA was in response to concerns that the internet and technology allowed for transfer of copyrighted material such that copyright laws in place at the time were not adequate protection for copyright holders).

123. See Guo, *supra* note 118 (giving a description of how the DMCA functions at a broad level); see also *What is the DMCA and How Does It Work?*, LEGAL.IO (Sept. 22, 2017), <https://www.legal.io/articles/5170614/What-is-the-DMCA-and-how-does-it-work> [https://perma.cc/LEK2-2KQ2] ("The DMCA grants online service providers (such as Facebook, Twitch and YouTube) certain 'safe harbor' protections from copyright infringement liability as long as they meet certain requirements.").

124. See *The Digital Millennium Copyright Act*, *supra* note 117 (describing what safe harbors are and how they function); McCants, *supra* note 122 (same).

125. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26–27 (2d Cir. 2012) (explaining that DMCA was designed to limit liability of service providers).

126. *Id.* at 27 (alteration in original) (quotation marks omitted) (quoting 17 U.S.C. § 512 (a)-(d)).

127. *Id.* (citing 17 U.S.C. § 512).

infringing content without incurring liability for copyright infringement.¹²⁸

Takedown notices follow a series of steps that begin when a copyright owner notifies an online service provider that there is copyright-infringing material on the online service provider's platform.¹²⁹ Once a notice is received, the online service provider has a duty to remove the infringing content.¹³⁰ The online service provider must then notify the user who posted the allegedly infringing material that the material has been removed, after which that user may submit a "counter-notice"—a request that the material be reinstated.¹³¹ At this point in the process, the online service provider must reinstate the video unless the copyright holder initiates a court action against the user.¹³²

Police are preventing users from uploading videos to social media platforms by exploiting tools that are different from traditional takedown notices called "algorithmic takedown systems."¹³³ Algorithmic takedown systems like YouTube's "Content ID" system typically work by comparing uploaded media to a broader database of copyrighted

128. See *What is the DMCA and How Does It Work?*, *supra* note 123 (detailing the process for sending a takedown notice); see, e.g., *Submit a Copyright Removal Request*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807622> [<https://perma.cc/2VM3-BCGE>] (last visited Oct. 13, 2023) ("If your copyright-protected work was posted on YouTube without your authorization, you can submit a copyright removal request to request that the content be removed.").

129. See *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/512/> [<https://perma.cc/5VQ9-Z62S>] (last visited Oct. 13, 2023) (detailing the steps involved in a takedown notice); see also *What is a Copyright Claim?*, YOUTUBE HELP, <https://support.google.com/youtube/answer/7002106> [<https://perma.cc/L8Z2-VLCD>] (last visited Oct. 22, 2023) (explaining takedown requests in the context of YouTube).

130. See *Section 512 of Title 17*, *supra* note 129 (describing the takedown process); see also *What is a copyright claim?*, *supra* note 129 (same).

131. *Section 512 of Title 17*, *supra* note 129; see also *Submit a Copyright Counter Notification*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807684> [<https://perma.cc/Z7UN-ZUA2>] (last visited Oct. 13, 2023) ("This [a counter notification] is a legal request for YouTube to reinstate content that was removed due to a copyright removal request.").

132. See *Section 512 of Title 17*, *supra* note 129 ("Following receipt of a compliant counter-notice, the online service provider must restore access to the material . . . unless the original notice sender informs the service provider that it has filed a court action against the user."); see also *Respond to a Counter Notification*, YOUTUBE HELP, <https://support.google.com/youtube/answer/12497556> [<https://perma.cc/UGZ9-GUKX>] (last visited Oct. 13, 2023) (explaining this step in the takedown notice process).

133. See generally Dan L. Burk, *Algorithmic Fair Use*, 86 U. CHI. L. REV. 283, 283 (2019); see Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 506 (2017) ("[R]ightsholders and platforms with substantial resources are leaving the DMCA behind and negotiating DMCA-plus arrangements that revolve around automated copyright enforcement systems. These systems are a pragmatic response to the incredible scale of online infringement, but they also have the potential to fundamentally rewrite the balance of copyright law.").

material; if the algorithm detects matching content, it flags the content as potentially infringing and takes steps depending on the copyright holder's pre-selected settings.¹³⁴ Other algorithmic takedown systems utilized by platforms like Twitter, Instagram, and Facebook function similarly by matching uploaded content to a database of copyrighted material.¹³⁵ Unlike takedown notices, video removals via algorithmic takedown systems are not legally defined.¹³⁶ Although similar to takedown notices because they utilize an appeals process to reinstate videos, they function using rules that the social media platforms establish.¹³⁷ For example, Content ID grants users the option to dispute algorithmic takedowns.¹³⁸ Once a dispute is filed, the copyright holder has thirty days to respond.¹³⁹ If the copyright holder maintains that the video should remain blocked, the user must appeal the decision.¹⁴⁰ At any point during this process, the copyright holder may manually submit a takedown notice, which

134. See *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370> [<https://perma.cc/E9EL-9XXP>] (last visited Oct. 13, 2023) (explaining how YouTube uses content detection to identify and resolve potential copyright claims). Settings available to users who own the copyright include blocking a video, monetizing the video by allowing advertisements to play on the video, and tracking viewership statistics for the video. *Id.*; see also Geeta Dayal, *The Algorithmic Copyright Cops: Streaming Video's Robotic Overlords*, WIRED (Sept. 6, 2012, 6:00 AM), <https://www.wired.com/2012/09/streaming-videos-robotic-overlords-algorithmic-copyright-cops/> [<https://perma.cc/67LW-3WBA>] ("As live streaming video surges in popularity, so are copyright 'bots'—automated systems that match content against a database of reference files of copyrighted material.").

135. *Rights Manager*, META, <https://rightsmanager.fb.com/#matching-technology> [<https://perma.cc/4QUJ-3DP7>] (last visited Oct. 13, 2023) ("Once a rights holder uploads their reference files, Rights Manager will scan and match content uploaded to Facebook and Instagram based on the match rules set by that rights holder."); see also *Automated copyright claims for live video*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/automated-claims-policy> [<https://perma.cc/S83Q-GMJ7>] (last visited Aug. 23, 2023) (describing Twitter's automatic copyright detection process).

136. *Important Differences between a Copyright Takedown and a Content ID Claim*, PROMOLTA, <https://blog.promolta.com/important-differences-between-a-copyright-takedown-and-a-content-id-claim/> [<https://perma.cc/6BHA-JBRL>] (last visited Oct. 15, 2023); see also *Copyright Claim vs Strike On YouTube: What's the Difference?*, TRACK CLUB (Aug. 17, 2022), <https://www.trackclub.com/resources/copyright-claim-vs-strike/> [<https://perma.cc/WV5G-NF9J>] ("Copyright claims are fully automated by the Content ID program, but copyright strikes are defined by law and activated manually by the rights holder.").

137. See generally *How Content ID Works*, *supra* note 134.

138. See *Dispute a Content ID Claim*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797454> [<https://perma.cc/3EGS-G43F>] (last visited Oct. 15, 2023) (describing the dispute process).

139. *Id.* ("After you submit a dispute, the person that claimed your video (the claimant) has 30 days to respond.").

140. *Id.* ("If your dispute is rejected, the claim will remain on your video. If you're still confident the claim is invalid, you may be eligible to appeal the decision.").

initiates the process for takedown notices and counter-notices as described above.¹⁴¹

The role of algorithmic takedown systems play in monitoring for copyright violations in the current technological landscape cannot be overstated; police officers are attempting to use copyrighted music to trigger these algorithmic takedown systems so the videos cannot be streamed or uploaded to social media platforms.¹⁴²

Viacom International, Inc. v. YouTube, Inc. illustrates the functionality of the DMCA in the context of social media submissions.¹⁴³ Various film studios, television networks, music publishers, and sports leagues alleged copyright infringement based on approximately 79,000 clips of various forms of media, including sports broadcasts and music videos appearing in various YouTube videos.¹⁴⁴ The district court held that the defendants were entitled to DMCA safe harbor, concluding that the “actual knowledge” or “awareness of facts or circumstances” that disqualify a provider from safe harbor protection refers to “knowledge of specific and identifiable infringements.”¹⁴⁵ The court reasoned that the language of the DMCA itself dictates that online service providers must have knowledge or awareness of specific infringing activity—such as the upload of a copyright-protected video—that violates the rights of copyright holders.¹⁴⁶ Otherwise, “expeditious removal” of infringing material as mandated by the statute would be cumbersome.¹⁴⁷ However, the Second Circuit reversed and remanded the case, citing several

141. *Id.*

142. See Tim Cushing, *Police Are Still Playing Copyrighted Music so They Can't be Recorded*, HYPEBOT (Apr. 25, 2022), <https://www.hypebot.com/hypebot/2022/04/police-are-still-playing-copyrighted-music-so-they-cant-be-recorded.html> [<https://perma.cc/EZ83-FZAU>] (“When the citizen-deployed cameras start recording, cops play recordings of their own, hoping to trigger auto-blocking of uploads and livestreams by processes designed to recognize and prevent uploads of infringing content.”). See generally Sag, *supra* note 133, at 499; Burk, *supra* note 133, at 283; Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016).

143. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

144. *Id.* at 25–26 (describing the plaintiffs’ claim that over 79,000 “clips” appeared on YouTube in a three-year period).

145. *Id.* at 26 (citing *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523, 529 (S.D.N.Y. 2010)).

146. *Id.* at 32 (“Based on the text of § 512(c)(1)(A), as well as the limited case law on point, we affirm the District Court’s holding that actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement will disqualify a service provider from the safe harbor.”).

147. *Id.* at 30–31 (“Thus, the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove.”).

instances of YouTube personnel being aware of infringing content (e.g., acknowledging certain videos in email correspondences) and deliberately choosing to leave it on the website.¹⁴⁸

As previously stated, posting videos to social media platforms is not a constitutionally protected right because they are private entities.¹⁴⁹ Therefore, when police play copyrighted music to trigger algorithmic takedown systems on social media platforms, the platforms typically avoid liability for copyright infringement by following the copyright holder's request. This can lead to removal of the video entirely.

The nuances of DMCA safe harbor provisions extend even to cases where the infringing material is not widely shared.¹⁵⁰ In *Capitol Records, Inc. v. MP3tunes, LLC*, the defendant, MP3tunes, received several takedown notifications from Capitol Records, owners of copyrighted music, sound recordings, and album cover art, claiming that MP3tunes hosted infringing material on its website.¹⁵¹ MP3tunes removed public links to the infringing materials; however, it did not remove the infringing material from users' personal "storage lockers."¹⁵² In addition to questions regarding MP3tunes' eligibility for DMCA safe harbor provisions, the Southern District of New York held that MP3tunes did not qualify for safe harbor protection for infringing songs because it failed to remove them from user lockers.¹⁵³ To this point, the court reasoned that the takedown notices MP3tunes received provided "sufficient information for MP3tunes to locate copies of infringing songs in user lockers."¹⁵⁴ As related to filming police, this means that online service providers may remove videos containing copyright-infringing material if they are uploaded to the platform for storage.

148. *Viacom*, 676 F.3d at 33–34 (showcasing several instances of YouTube staff members discussing infringing videos via email exchanges and choosing not to remove them, stating that a reasonable juror could infer actual knowledge of infringing activity).

149. See Section I.B (describing the lack of laws or precedent that establishes a right to record police).

150. See generally *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d. 627 (S.D.N.Y. 2011).

151. *Id.* at 633–35.

152. *Id.* at 634–35 (“But, users who sideloaded the song before it was removed from the third-party source may continue to access the song through their MP3tunes lockers.”).

153. *Id.* at 646 (“MP3tunes does not qualify for safe harbor protection for songs sideloaded from links identified in EMGNA’s and EEW’s takedown notices which it failed to remove from user lockers.”).

154. *Id.* at 642–43.

2. What is Fair Use and Why is it Important?

Once a video is taken down from a social media platform, users can submit a “counter-notice” in an attempt to restore the video.¹⁵⁵ When police play copyrighted music to trigger removal of the video, the most applicable argument for the user’s counter-notice is that the video is protected by the defense of fair use.¹⁵⁶ Fair use is a doctrine of copyright law that seeks to recognize and permit the uses of copyrighted material.¹⁵⁷ From a policy perspective, fair use is meant to encourage creativity by preventing copyright law from being applied too strictly.¹⁵⁸ For example, the use of a copyright-protected picture in a school presentation is technically copyright infringement, but the fair use defense would likely allow the use of the picture to promote creativity and to promote the sharing of creative ideas.

The case widely recognized as establishing fair use in the United States is *Folsom v. Marsh*, in which an author used pieces of another writer’s work to compile a book about George Washington’s life.¹⁵⁹ In an opinion that would lay the foundation for the doctrine of fair use, Justice Story articulated several factors that must be considered when differentiating between blatant copyright infringement and “justifiable use”—now referred to as fair use.¹⁶⁰

155. For a discussion on notice-and-takedown procedures, see *supra* notes 129–132 and accompanying text.

156. See *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use/> [<https://perma.cc/KBV4-K86P>] (last updated Feb. 2023); see also *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline> [<https://perma.cc/34JZ-LR9V>] (last visited Oct. 22, 2023) (detailing the history of copyright law in the United States).

157. See *U.S. Copyright Office Fair Use Index*, *supra* note 156.

158. See *Copyright and Fair Use*, HARV. UNIV., <https://ogc.harvard.edu/pages/copyright-and-fair-use> [<https://perma.cc/JTM3-45LV>] (last visited Aug. 27, 2023) (“[Fair use] helps prevent a rigid application of copyright law that would stifle the very creativity the law is designed to foster.”); see also *U.S. Copyright Office Fair Use Index*, *supra* note 156 (“Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”).

159. See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901) (discussing the facts and background of the case); see also Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1374–77 (2011) (discussing the background of *Folsom*).

160. *Folsom*, 9 F. Cas. at 348 (“In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”); see also Sag, *supra* note 159, at 1377 (“Justice Story’s decision is often celebrated as the origin of the fair use doctrine in the United States.”).

Today, courts utilize four factors as outlined in Section 107 of the Copyright Act to determine whether the use of a copyrighted work falls under the category of fair use.¹⁶¹ The factors include:

- (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁶²

Courts apply these factors on a case-by-case basis which means that although situations in which a police officer plays copyrighted music are similar, whether the videos at issue are protected by fair use can turn on variables specific to each case.¹⁶³

The Ninth Circuit addressed the issue of whether a party must consider fair use prior to submitting a takedown notification to YouTube in *Lenz v. Universal Music Corp.*, colloquially referred to as the “Dancing Baby Case.”¹⁶⁴ In *Lenz*, a mother uploaded a video of her children dancing to “Let’s Go Crazy” (a song by Prince).¹⁶⁵ The defendant, Universal Music Corp., Prince’s publishing administrator, was responsible for protecting his copyrights at the time of the video’s upload and accordingly assigned a legal assistant to monitor YouTube for infringement.¹⁶⁶ The assistant compiled lists of infringing videos based on whether Prince’s music was the primary focus of the video, as is the case in *Lenz*’s dancing baby video.¹⁶⁷ However, while the notice included a “good faith belief

161. See *Fair Use*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2021), <https://www.dmlp.org/legal-guide/fair-use> [<https://perma.cc/JF5Z-ZQE4>] (outlining and discussing the basics of fair use).

162. 17 U.S.C. § 107; see also *Fair Use on YouTube*, YOUTUBE HELP, <https://support.google.com/youtube/answer/9783148?hl=en> [<https://perma.cc/JF5Z-ZQE4>] (last visited Oct. 15, 2023) (describing the four factors of fair use in the United States).

163. See *U.S. Copyright Office Fair Use Index*, *supra* note 156 (“Courts evaluate fair use claims on a case-by[-]case basis, and the outcome of any given case depends on a fact-specific inquiry.”).

164. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2016); see also Sag, *supra* note 133, at 527–34 (“The ‘dancing baby video’ is utterly unremarkable except for the eight years . . . of litigation that it provoked.”). Professor Sag further discusses the effects of the case as they relate to DMCA copyright law. *Id.* at 528.

165. *Lenz*, 815 F.3d at 1149; see also Stephanie Lenz, “Let’s Go Crazy” #1, YOUTUBE (Feb. 7, 2007), <https://www.youtube.com/watch?v=N1KfJHFWlhQ> [<https://perma.cc/986E-3X37>] (providing the dancing baby video at issue in *Lenz*).

166. *Lenz*, 815 F.3d at 1149 (“[The assistant designated by Universal] searched YouTube for Prince’s songs and reviewed the video postings returned by his online search query.”).

167. *Id.* (“When reviewing such videos, [the assistant] evaluated whether they ‘embodied a Prince composition’ by making ‘significant use of . . . the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video.’”).

statement” that the material infringed on Prince’s copyright, Universal Music did not review videos with the doctrine of fair use in mind.¹⁶⁸ Lenz submitted counter notifications for a month before YouTube reinstated the video.¹⁶⁹ Here, where the video at issue is of a dancing baby and holds relatively low social weight, the delay in the video’s reinstatement could be considered a nuisance and inconvenience. However, delays in a video’s reinstatement are highly problematic for videos that bring attention to police accountability issues, given that public attention to news stories does not last very long.¹⁷⁰

The *Lenz* court squarely addressed the issue of whether copyright holders must consider fair use before issuing takedown notifications.¹⁷¹ The court held that a copyright holder must consider fair use; it reasoned that fair use is not an affirmative defense and that even if it were, “fair use is uniquely situated in copyright law so as to be treated differently than traditional affirmative defenses.”¹⁷² The court concluded: “Copyright holders cannot shirk their duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use, a use which the DMCA plainly contemplates as authorized by the law.”¹⁷³

The requirement that copyright holders consider the defense of good faith is important, given that the videos police are targeting are all arguably protected under fair use.¹⁷⁴ This means that in theory, copyright holders should be manually reviewing videos featuring police playing copyrighted music before issuing a takedown. However, the copyright holders are not issuing takedown notices manually; they are using algorithmic takedown systems to block the videos automatically. The

168. *Id.* (“None of the video evaluation guidelines [that Johnson used for reviewing videos including Prince’s music] explicitly include consideration of the fair use doctrine.”).

169. *Id.* at 1150 (describing *Lenz*’s experience with YouTube and the DMCA counter-notification process).

170. See Jake O’Neill, *How Long Does a News Story Last?*, VUELIO BLOG (Feb. 19, 2019), <https://www.vuelio.com/uk/blog/how-long-does-a-news-story-last/> [https://perma.cc/9MFK-LLTG] (“Research from Google Trends, in partnership with Schema and Axios, has found that the average ‘big’ news story lasts for around seven days before the public moves on to the next crisis.”); see also *The Lifespan of News Stories*, SCHEMA DESIGN (2019), <https://newslifespan.com/> [https://perma.cc/KN5B-Y8YK] (discussing and displaying graphs related to how the public interacts with news stories).

171. See *Lenz*, 815 F.3d at 1151 (“We must first determine whether 17 U.S.C. § 512(c)(3)(A)(v) requires copyright holders to consider whether the potentially infringing material is a fair use of a copyright under 17 U.S.C. § 107 before issuing a takedown notification.”).

172. *Id.* at 1153 (“We conclude that because 17 U.S.C. § 107 created a type of non-infringing use, fair use is ‘authorized by the law’ and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).”).

173. *Id.* at 1157.

174. See *infra* Section III.C (evaluating fair use as it pertains to video copyrights).

user who uploaded the video is then forced to dispute the claim, subjecting them to a delay before the video can be reinstated. Further, if the copyright holder maintains that the video should be removed, any defense of fair use must be resolved before a court. Social media platforms are unable to adjudicate whether the fair use defense applies to potentially infringing material.

Overall, the rules of recording and uploading videos of police to social media are inconsistent and not uniform. There is a First Amendment right to record police who are carrying out their duties in several circuits and no circuits have explicitly denied this right, but the Supreme Court has not ruled on the issue. Because there is no Supreme Court ruling regarding the First Amendment right to record police, the doctrine of qualified immunity might allow police officers to prevent bystander recording. The Supreme Court has also not ruled on whether there is a Constitutional right to upload videos of police to social media platforms. Although copyright law sometimes requires that videos of police containing copyrighted music be removed, whether the DMCA requires their takedown or if fair use permits the upload is fact-dependent and implicates an arduous, lengthy appeals process.

II. DISCUSSION

This Part will review instances of police abuse of copyright, noting that in many instances, police are deliberately attempting to trigger algorithmic takedown systems. This Part also notes that scholars were aware that the exploitation of algorithmic takedown systems might be possible based on the systems' blocking of videos recorded at protests featuring copyrighted music.

Today, when citizens record the police pursuant to their persuasively implied First Amendment rights, police intentionally play copyrighted music to prevent users from uploading their videos onto social media.¹⁷⁵ Thus, the police aim to suppress the dissemination of these videos and therefore stifle discussions regarding police accountability.¹⁷⁶ The police know what they are doing.¹⁷⁷ In Oakland, California, an officer who played Taylor Swift in response to being filmed stated, "I'm playing music so that you can't post on YouTube."¹⁷⁸ The users recording the

175. Thomas, *supra* note 9.

176. *Id.*

177. *Swift Song*, *supra* note 6 ("In the video, the officer says: 'You can record all you want, I just know it can't be posted to YouTube.'"); *see also* De Nova, *supra* note 12 (discussing how the police utilized copyright law to prevent being recorded).

178. *Swift Song*, *supra* note 6.

officer were members of the Anti-Police-Terror Project (APTP), a group working to raise issues of police accountability in communities of color.¹⁷⁹ Users filmed the video outside the courthouse of a pre-trial hearing where a police officer had been charged with manslaughter of a Black man.¹⁸⁰ When the APTP asked the officer if playing music was standard department procedure, the officer said, “It’s not specifically outlined.”¹⁸¹ The Oakland Police Department subsequently condemned the action, calling it “not approved behavior” and assuring that it would not happen again.¹⁸² Fortunately, the video at issue was not taken down and garnered over 180,000 views.¹⁸³

Elsewhere in California, when a Santa Ana officer was asked why he was blaring Disney music from his patrol car, he responded that he was playing the music “because they get [sic] copyright infringement.”¹⁸⁴ The user who uploaded the video was another advocate of police accountability; in the video posted to YouTube, the user states that the officer was playing copyrighted music because “he knows I have a YouTube channel.”¹⁸⁵ The channel in question features videos of Santa Ana police officers performing their duties in public, typically engaged in arguments with the owner of the channel.¹⁸⁶ The Santa Ana police chief released a statement stating that he expects “that all police department employees perform their duties with dignity and respect in the community we are hired to serve.”¹⁸⁷ Much of that same community who witnessed the incident, however, did not feel comfortable commenting for ABC News reporters.¹⁸⁸ Notably, residents of the neighborhood stated that they had seen police activity like this before.¹⁸⁹

Police accountability activist Sennett Devermont has had several interactions of this nature with Beverly Hills police officers.¹⁹⁰ In one

179. *Id.*

180. *See id.* (“Some of them [the APTP] were protesting outside the courthouse at the pre-trial hearing of a San Leandro officer charged with the manslaughter of a black man.”).

181. *Id.*

182. *Id.*

183. *See id.* (“The video, which was posted on 1 July, has had more than 180,000 views and remains online.”).

184. De Nova, *supra* note 12.

185. *Id.*

186. *Id.*; Santa Ana Audits (@santaanaaudits8189), YOUTUBE, <https://www.youtube.com/@santaanaaudits8189> [<https://perma.cc/K2WP-J6SX>] (last visited Oct. 15, 2023).

187. De Nova, *supra* note 12.

188. *See id.* (“ABC7 reached out to others who witnessed the incident, but they didn’t feel comfortable going on the record, saying they feared retaliation.”).

189. *Id.*

190. Thomas, *supra* note 9.

video posted to Devermont's Instagram page, a police officer began playing "Yesterday" (a song by the Beatles).¹⁹¹ When Devermont attempted to speak to the officer, the officer held his cell phone up toward Devermont's camera.¹⁹² When Devermont approached a different officer, the officer remarked, "There's too much pressure when you're here."¹⁹³ The officer, after asking how many viewers Devermont had on his Instagram live stream, commented that the number of viewers seemed low and that he had seen "bigger crowds" from Devermont's streams before.¹⁹⁴

Less than a month later, that same officer played "Santeria" (a song by Sublime) when being filmed by Devermont.¹⁹⁵ The Beverly Hills Police Department, however, did not acknowledge that this behavior was against department policy, stating that "the playing of music while accepting a complaint or answering questions is not a procedure that has been recommended by Beverly Hills Police command staff."¹⁹⁶

This issue is not limited to California police either. In Ottawa, Illinois, a police accountability YouTuber named "Accountability Angel" (Angel) attempted to enter the LaSalle County Sheriff's Office to deliver forms alleging police misconduct.¹⁹⁷ Angel was told at the office's front desk that she could not enter the building with her camera.¹⁹⁸ When she asked what had changed since her last visit where she was allowed to bring her camera inside, a security officer entered Angel's video and began playing "Nobody But You" (a song by Blake Shelton).¹⁹⁹ Angel continued asking questions as to why she was being turned away; she even called out the tactic being used by the officer, saying "Oh guys, you know what they're doing, they're trying to get me kicked off of YouTube for the copyright thing."²⁰⁰ The LaSalle County Sheriff's Office refused to comment on whether playing music in this instance was standard department procedure.²⁰¹ However, the officer at issue wrote in an

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* ("That's kinda [sic] weak . . . I've seen bigger crowds for you . . . you've done better." (quoting Beverly Hills Police Sergeant, Billy Fair)).

195. Schwartz, *supra* note 9.

196. *Id.*

197. See Thomas, *supra* note 109 (discussing the event).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

incident report, “As I was recently advised, I then turned on some music.”²⁰²

In each of these instances, police are exploiting algorithmic takedown systems to prevent videos from being uploaded to social media platforms. The police are deliberately playing copyrighted music, hoping that the algorithmic takedown systems will recognize the songs and block the videos without manual review from the copyright holder.²⁰³

In 2020, scholars predicted that this tactic might be possible after algorithmic takedown systems blocked videos filmed at protests featuring copyrighted music in the background.²⁰⁴ The scholars suggested that there was “the possibility of deliberately leveraging these flaws in the [algorithmic takedown] system.”²⁰⁵ Roughly a year later, the scholars’ prediction came true in the form of police exploitation of copyright law to prevent discussions of police accountability.

III. ANALYSIS

Police use of these copyrighted songs creates a unique interaction with free speech rights. Ultimately, the police officers are not preventing the *recording* of their misconduct; they are preventing the *uploading of the video* to social media platforms.²⁰⁶ This, of course, creates major issues in the context of filming police officers in order to increase accountability for their actions. A major reason for recording law enforcement while on the job is to spread awareness of civil rights issues and to make the public aware of police misconduct on a large scale.²⁰⁷ This abuse of algorithmic copyright takedown systems removes the ability to advocate for social justice on social media platforms, which are hugely impactful for

202. Matthew Gault, *Cop was Instructed to Use Music to Disrupt Filming*, VICE NEWS (Sept. 9, 2021, 8:39 AM), <https://www.vice.com/en/article/93y77y/cop-was-instructed-to-use-music-to-disrupt-filming> [<https://perma.cc/3AQA-NGPW>].

203. *Swift Song*, *supra* note 6.

204. See generally Nick Simmons & Adam Holland, *Algorithmic Copyright Management: Background Audio, False Positives and De facto Censorship*, LUMEN (July 21, 2020), https://www.lumendatabase.org/blog_entries/background-audio-takedowns [<https://perma.cc/6JPK-CLYS>].

205. *Id.*

206. *Swift Song*, *supra* note 6 (“You can record all you want, I just know it can’t be posted to YouTube . . . I’m playing music so that you can’t post on YouTube.”).

207. See *Filming and Photographing the Police*, *supra* note 28 (explaining the purposes of filming police to raise accountability for civil rights issues); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 414 (2016) (discussing how organized groups monitor police activity to raise awareness regarding police misconduct).

spreading information due to their widely adopted use.²⁰⁸ While there are other avenues for those who film the police to share their recordings, like private forums or more specialized websites, there is no substitute for the unbelievable reach social media platforms afford.²⁰⁹ Social media offers such a powerful platform to police accountability activists because these videos could reach users who are not specifically looking for content about this issue.²¹⁰ Uploading a video to YouTube or Twitter allows for the clip to go “viral,” reaching large groups of people quickly with the goal of stirring outrage and action regarding police accountability.²¹¹

Limiting the dissemination of these videos has a significant impact on police accountability. Because of social media’s ubiquity and general adoption at a large scale, it plays a key role in how the public holds police officers accountable for their actions.²¹² Some scholars go as far as to say that the use of social media in this context plays a larger role than body cameras.²¹³ Social media has become an integral part of many

208. See, e.g., Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2022)*, BUS. OF APPS, <https://www.businessofapps.com/data/youtube-statistics/> [<https://perma.cc/FL2D-NNSP>] (last updated Aug. 2, 2023).

209. Private forums or smaller websites are unlikely to have the financial means to support algorithmic takedown systems like YouTube or Instagram, which means that police would be unable to exploit these systems by having videos removed. See Walsh, *The Top 10 Social Media Sites & Platforms 2022*, *supra* note 3 (“The original video social media platform, YouTube maintains dominance in that market. It is currently the second most used platform with 2.2 billion monthly active users.”).

210. See *What are Media Content Recommendations & Why are They Important?*, ALGOLIA (Mar. 9, 2022), <https://www.algolia.com/blog/product/what-are-media-content-recommendations-and-why-are-they-important/> [<https://perma.cc/EHT3-R2YF>] (“If a particular piece of content (e.g. an article or video) is gaining traction, it will be offered up to other users.”).

211. *Swift Song*, *supra* note 6 (“However, the officer’s efforts were in vain as the clip of the encounter in Oakland, California promptly went viral.”).

212. See Corinthia A. Carter, *Police Brutality, the Law & Today’s Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 546 (2017) (“Social media is the mechanism that has allowed the world to gain some insight into the violence that Blacks encounter on a daily basis and to see that what Blacks endure is not merely perception but rather an unrelenting reality.”); see also Temitayo I. Odeyemi & A. Sat Obiyan, *Digital Policing Technologies and Democratic Policing: Will the Internet, Social Media and Mobile Phone Enhance Police Accountability and Police-citizen Relations in Nigeria?*, 20 INT. J. POLICE SCI. & MGMT. 97, 105 (2018) (“Gaps in police-citizen relationships and accountability can be alleviated by collective action and whistleblowing roles involving civil society, leveraging on the low cost of digital technology in serving as partners rather than consumers in policing efforts.”).

213. See Simonson, *supra* note 207, at 414 (“Although copwatching [the filming of police by organized groups] shares some deterrent effects with police-worn cameras, copwatching has the potential to be a more powerful deterrent than police-worn cameras because the cameras and footage remain in the control of civilians rather than the state.”); see generally Christopher Schneider, *Social Media Has Done More for Transparency and Accountability Than Police Body-*

peoples' lives and has altered how they interact with their communities.²¹⁴ For some, social media is their primary news source rather than traditional outlets like newspapers or television.²¹⁵ Because so much of the conversation regarding police accountability takes place in the online sphere, when police officers abuse copyright law, they dramatically restrict the progress these videos can have in forming stronger relationships between law enforcement and the people they protect.²¹⁶

However, uploading videos to social media platforms may not be an established First Amendment right because the majority of social media platforms are private entities.²¹⁷ There are arguments that, because social media platforms are so large, they should be considered public entities and thus, subject to the First Amendment; however, the Supreme Court has yet to consider making First Amendment exceptions for social media platforms.²¹⁸ This means that, in the Ninth Circuit, social media platforms are private entities that are not subject to free speech protection granted by the First Amendment, at least for now.²¹⁹ The private nature

worn Cameras, CANADIAN DIMENSION (Apr. 14, 2021), <https://canadiandimension.com/articles/view/social-media-has-done-more-for-accountability-than-police-body-worn-cameras> [<https://perma.cc/HPL4-2AE6>].

214. See generally Anatoliy Gruzd & Caroline Haythornthwaite, *Enabling Community Through Social Media*, 15 J. MED. INTERNET RSCH. 2 (2013); Monika Ilieva, *Building A Community On Social Media*, FORBES (Dec. 9, 2022), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/12/09/building-a-community-on-social-media/> [<https://perma.cc/9ZVY-C9RM>].

215. See *Social Media News Outlets vs. Traditional News*, MUSHROOM NETWORKS, <https://www.mushroomnetworks.com/infographics/social-media-news-outlets-vs-traditional-news-infographic/> [<https://perma.cc/U8LF-LDE2>] (last visited Oct. 15, 2023) (comparing social media news with traditional news outlets by platform); see generally Mike Vorhaus, *People Increasingly Turn To Social Media For News*, FORBES (June 24, 2020), <https://www.forbes.com/sites/mikevorhaus/2020/06/24/people-increasingly-turn-to-social-media-for-news/> [<https://perma.cc/YHT6-FN7M>].

216. See Simonson, *supra* note 207, at 393 (“Rather than seek consensus with police officers, copwatching groups take an adversarial stance toward the police: they point their cameras at officers, ask them questions about the officers’ practices and policies, and critique those practices and policies on social media and in court.”).

217. See *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020); see also *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (“Nor does property lose its private character merely because the public is generally invited to use it for designated purposes.”); see also James Kachmar, *YouTube And The First Amendment*, IP LAW BLOG (Mar. 6, 2020), <https://www.theiplawblog.com/2020/03/articles/ip/youtube-and-the-first-amendment/> [<https://perma.cc/CV3E-8A4A>] (discussing the Ninth Circuit holding in *Prager*).

218. See generally David L. Hudson Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, 43 HUM. RTS. MAG., no. 4, 2018, at 2; see also Brett M. Pinkus, *The Limits of Free Speech in Social Media*, ACCESSIBLE LAW, no. 9, Spring 2021, at 2 (discussing how social media interacts with the First Amendment).

219. See generally *Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020).

of social media platforms like YouTube or Twitter has benefits and drawbacks. On one hand, sites like Facebook and Twitter are able to monitor the spread of misinformation and warn users accordingly.²²⁰ On the other, this technology may lead to improper censorship given that the owners of these platforms may lean toward certain political ideologies.²²¹ In the context of police abuse of copyright, pseudo-censorship by private entities could compound free speech issues and take away from the broader ideals of sharing information.

Ultimately, there is a “legal gray area” surrounding the intersection between the abuse of copyright law and the right to film the police. The users filming the police in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits can film the police as they are protected by the First Amendment.²²² However, if they upload videos with copyrighted material to social media, there is a risk that algorithmic takedown systems would remove the video because it infringes a copyright holder’s work.²²³ If the videos are taken down, users are allowed to appeal the decision—however, they are then subjected to the DMCA’s arduous appeals process.²²⁴ Further, the Supreme Court has not ruled on whether there is a constitutional right to upload videos to social media platforms.

To analyze this legal gray area, Section III.A will first review how the right to film and upload videos of police interacts with copyright law and algorithmic takedown systems. When a video is blocked by algorithmic takedown systems, police disrupt discussion about police accountability and leave the activists who uploaded the video with little recourse besides a taxing appeals process. This exploitation of algorithmic takedown systems is possible, in part, due to oversensitivity inherent to the systems, which contributes to the confusion and lack of awareness of what to do

220. See generally Filipo Sharevski et. al., *Misinformation Warnings: Twitter’s Soft Moderation Effects on COVID-19 Vaccine Belief Echoes*, 114 COMPUT. & SEC. 1 (2022) (discussing moderation on Twitter and other social media platforms to prevent the spread of misinformation).

221. Vivek Ramaswamy & Jed Rubenfeld, Opinion, *Twitter Becomes a Tool of Government Censorship*, WALL ST. J. (Aug. 17, 2022, 1:47 PM), <https://www.wsj.com/articles/twitter-becomes-a-tool-of-government-censors-alex-berenson-twitter-facebook-ban-covid-misinformation-first-amendment-psaki-murthy-section-230-antitrust-11660732095> [https://perma.cc/T9B6-9XMK] (arguing that the Biden administration is using social media to silence critics and that in doing so, is engaging in censorship); see also Gopal Ratnam, *Rise of Right-Wing Apps Seen Worsening Midterm Disinformation*, ROLL CALL (Jan. 18, 2022, 6:30 AM), <https://rollcall.com/2022/01/18/rise-of-right-wing-apps-seen-worsening-midterm-disinformation/> [https://perma.cc/Q9Z7-KFT4] (“What began in the past few years as fringe and sparsely populated alternatives to established social media platforms like Facebook, Twitter and YouTube has become a torrent.”).

222. *Supra* Section I.A.

223. *Supra* Section I.C.

224. *Supra* Section I.C.1.

when a video is blocked. A mock evaluation of the fair use factors for a video targeted by police shows that the blocked videos would likely be reinstated were a court to rule on the fair use defense. However, many users do not reach this stage due to the complicated nature of the appeals process.

A. The Intersection of the Right to Film Police and Copyright Law

Police exploitation of algorithmic takedown systems stifles discourse regarding police accountability while leaving activists with little recourse. If a video containing copyrighted music is removed, the user who posted it likely did not suffer any constitutional violation because the Supreme Court has not ruled on the right to film police or the right to upload videos to social media. Individuals in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits can film the police pursuant to their First Amendment rights, but people in the Ninth Circuit do not have a constitutional right to upload the video to private entities, namely social media platforms.²²⁵ Because removal from social media does not constitute a First Amendment violation, the user's available recourse is the appeals process that corresponds to the algorithmic takedown system which blocked their video or the DMCA counter-notification process, both of which result in a longer wait for the video to be reinstated and a lower likelihood that the video will receive major attention due to the short span of public attention.²²⁶

However, attempts by police to remove these videos speak to a broader issue—that police do not want to be filmed in the first place.²²⁷ Filming of police has increased in the past several decades, in some instances rising to the level of “copwatching,” which involves organized groups of civilians who band together to film police in local areas and upload their results to the internet.²²⁸

Researchers have conducted studies regarding the effects of filming law enforcement on police accountability in the context of police body-

225. See *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020) (holding that private entities like YouTube are not subject to the First Amendment).

226. See O'Neill, *supra* note 170 (discussing the average length of news stories in the public eye).

227. See Simonson, *supra* note 207, at 427 (“Police officers often resist being filmed by civilians, whether those civilians are casual bystanders or organized copwatchers.”).

228. *Id.* at 408 (“Copwatching . . . does not simply refer to the spontaneous recording of police offers in public by civilians but rather to organized groups of local residents who patrol their neighborhoods, monitor police conduct, and create videos of what they see.”).

worn cameras.²²⁹ Results of the “Rialto Study,” a well-known study conducted in Southern California, indicate that the use of force is reduced 250 percent when body cameras are worn.²³⁰ Moreover, body-worn cameras lead to greater transparency between law enforcement and people and reduced frequency of altercations between police and communities.²³¹

Similarly, filming and uploading videos of police misconduct to social media also has profound effects as an accountability tool.²³² Filming by citizens—and the corresponding threat posed when the video is uploaded to social media—seems to function as a particularly effective deterrent for police misconduct.²³³ This is in part because social media allows for the large-scale dissemination of videos capturing police misconduct which otherwise may not rise to the level of litigation.²³⁴ Personal filming allows users to quickly upload videos, whereas body-worn camera footage may be unreleased to the public, difficult to obtain, or

229. See generally *Developments in the Law—Considering Police Body Cameras*, 128 HARV. L. REV. 1794 (2015) (discussing the effects of police body cameras) [hereinafter *Considering Police Body Cameras*]; see also MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING EVIDENCE (2014), https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/diagnostic_center_policeofficerbody-worncameras.pdf [<https://perma.cc/4ZGJ-YNRBJ>] (reviewing the results of several studies conducted regarding police body cameras).

230. *Considering Police Body Cameras*, *supra* note 229, at 1800 (citing BARAK ARIEL & TONY FARRAR, POLICE FOUND., SELF-AWARENESS TO BEING WATCHED AND SOCIALLY-DESIRABLE BEHAVIOR: A FIELD EXPERIMENT ON THE EFFECT OF BODY-WORN CAMERAS ON POLICE USE-OF FORCE 8 (2013)); see also WHITE, *supra* note 229, at 20 (“The Rialto evaluation reported that, following implementation of the body-worn camera program, citizen complaints against police declined by 88 percent . . .”).

231. WHITE, *supra* note 229, at 13 (“The perceived yet widely touted benefits of the camera technology range from improved citizen and police behavior (e.g., civilizing effect) to reduced use of force, citizen complaints, and lawsuits.”); see also *Police Use Body Worn Video, A Brief History*, AM. POLICE OFFICERS ALL. (Jan. 2, 2018), <https://americanpoliceofficersalliance.com/police-use-body-worn-video-brief-history/> [<https://perma.cc/UNQ9-LPBG>] (discussing the purpose and history of police body-worn cameras and noting that the technology has led to fewer violent engagements between police officers and communities).

232. See Simonson, *supra* note 207, at 414 (“The vast majority of copwatching organizations post videos on their websites or Facebook pages, and many of them maintain YouTube feeds as well.”); see also Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 347 (2011) (“Just as public surveillance cameras are said to reduce crime, the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation.”).

233. See Simonson, *supra* note 207, at 414 (“[T]he observation of copwatchers is backed up by the implicit threat that any video captured can be used in the future, not only in formal legal proceedings . . . but also in the ‘wild’ (i.e., unregulated) public sphere.”).

234. See *id.* at 415 (“Moreover, the ‘misconduct’ that copwatchers prevent is not only the constitutional misconduct that is the traditional subject of litigation, but also what the copwatchers perceive as misconduct . . . and might therefore submit to social media as such.”).

subject to regulations limiting how the data can be shared.²³⁵ Furthermore, social media allows these individual instances of misconduct, ordinarily not large enough in scale to be covered by major news outlets, to be widely spread in a short amount of time.²³⁶

Nevertheless, as is the case with body cameras, there is police aversion to being filmed.²³⁷ Some police are concerned for their safety, fearing they will be targeted if their identities are posted on social media.²³⁸ Others treat the recording—and media criticism generally—as a form of disrespect to their position as public officials.²³⁹ Whatever the reason for the aversion may be, it has resulted in the above-described instances of abuse of copyright law to prevent the dissemination of videos addressing police accountability.

Put simply, this activity by police is an abuse of an unrefined system meant to protect copyright holders. First, algorithmic takedown systems are unable to assess cases of fair use and can block videos without any manual review. Second, copyright holders do not always properly assess whether content constitutes fair use before issuing manual takedown notifications. Third, the counter-notification process inherent to DMCA takedown regimes is cumbersome and unsuited for situations where news needs to be shared quickly. Finally, fair use is difficult to assess where police play copyrighted music because, by nature, the music played in the videos is meant to dominate the recording.

235. See generally *Police Body Camera Policies: Retention and Release*, BRENNAN CTR. FOR JUST. (Aug. 3, 2016), <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-retention-and-release> [<https://perma.cc/UMH2-FF3T>] (discussing policies and regulations regarding the retention of police body camera footage in different states).

236. See Simonson, *supra* note 207, at 420 (“Through social media, copwatching organizations have the power to convert individual police encounters into public events.”); see also Glen Black, *Social Media Is Now More Important Than Ever to Hold Police Accountable*, PHOENIX MEDIA CO-OP (April 15, 2021, 3:28 PM), <https://phoenix.coop/2021/04/social-media-is-now-more-important-than-ever-to-hold-police-accountable/> [<https://perma.cc/N2MM-NUJG>] (“Social media has become an essential tool for otherwise ‘voiceless’ members of the public to hold those with power accountable.”).

237. See Simonson, *supra* note 207, at 427 (“Police officers often resist being filmed by civilians, whether those civilians are casual bystanders or organized copwatchers.”); cf. Kreimer, *supra* note 232, at 357 (“Police, like many civilians, are often camera-shy.”).

238. See Simonson, *supra* note 207, at 430 (“Some may be concerned about safety.”); cf. Kreimer, *supra* note 232, at 357 (“Officers dislike being recorded in embarrassing situations and may be concerned that dissemination of their images may put them at risk of retaliation.”).

239. See Simonson, *supra* note 207, at 430 (“Beyond a concern with officer safety, officers may resist copwatching because they experience it as a form of disrespect.”); see generally Betsy Brantner Smith, *The Disrespect is Getting Dangerous*, NAT’L POLICE ASS’N, <https://nationalpolice.org/the-disrespect-is-getting-dangerous/> [<https://perma.cc/8RNN-DM84>] (last visited Oct. 15, 2023).

B. Concerns of Oversensitivity

Some scholars believe that algorithmic takedown systems are oversensitive, which might explain why police are able to trigger the systems so easily.²⁴⁰ Some content producers have received DMCA takedown notices due to music playing in the background of their videos or live streams, even if they chose not to play the music themselves (e.g., music playing in a retail store).²⁴¹ Suppose takedown systems are sensitive enough to detect music playing faintly in the background of a video. In that case, the odds are much higher that they will detect the audio of a song being played as deliberately being the video's focus. In other instances, users are sent "false takedown notices"—takedown notices alleging copyright infringement where there is none—in an attempt to have the video removed.²⁴² These false takedown notices nonetheless require the owner of the removed video to file a counter-notice to YouTube.²⁴³ Although police officers appear to be using copyrighted music to trigger algorithmic takedown systems, they could

240. See Perel & Elkin-Koren, *supra* note 142 (discussing YouTube takedown algorithms and why automation leads to a lack of accountability in videos that are removed); see also Jessica Vogele, *Where's the Fair Use? The Takedown of Let's Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform*, 33 *TOURO L. REV.* 589 (2017); see also Ludwig Ahgren (@MogulMail), *I Got Banned...*, YOUTUBE (Dec. 2, 2021), <https://www.youtube.com/watch?v=sDPKQb86Qw0> [<https://perma.cc/67TL-XYZX>] ("I thought what would happen is because of YouTube's robust Content ID system, they would hear me play copyrighted stuff; they would then flag it; they would take the monetization from the live stream . . . but [it] doesn't work like that, they just immediately take you down.").

241. Mark Hamilton, Jr., *Managing the Risks of DMCA Takedowns in IRL Streams*, QUILES L. (June 17, 2021), <https://www.esports.law/blog/managing-the-risks-of-dmca-takedowns-in-irl-streams4855962> [<https://perma.cc/49H8-XNSN>] (discussing DMCA takedown notifications as they relate to content creation by live-streamers in public spaces); see also Michael Gwilliam, *Twitch's DMCA Rules Are Completely Ruining IRL Streams*, DEXERTO (Nov. 16, 2020), <https://www.dexerto.com/entertainment/twitchs-dmca-rules-are-completely-ruining-irl-streams-1455482/> [<https://perma.cc/X8XH-2X8D>] (discussing how music playing in supermarkets and other public spaces interfere with live content creation on streaming platforms due to DMCA takedown notifications).

242. See Ashley King, *YouTube False Copyright Claim Report Reveals 4.4 Million 'Incorrect' Claims a Year*, DIGIT. MUSIC NEWS (Dec. 7, 2021), <https://www.digitalmusicnews.com/2021/12/07/youtube-false-copyright-claim-report/> [<https://perma.cc/DW2K-UTQP>] (defining false takedown notices).

243. See *id.* (detailing reports of false DMCA takedown notices and arguing that the YouTube counter notice appeal process is "long and drawn out"); see also The YouTube Team, *Access for All: A Balanced Ecosystem & Powerful Tools*, YOUTUBE OFF. BLOG (Dec. 6, 2021), <https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/> [<https://perma.cc/T23H-TAM3>] (giving a report on YouTube's Copyright enforcement systems and noting instances of false reporting); Sag, *supra* note 133, at 522–26 (discussing erroneous DMCA takedowns).

also theoretically play copyrighted music and submit takedown notifications manually.²⁴⁴

When a user receives a takedown notification undeservingly, their recourse is limited to the lengthy counter-notice process. Some scholars argue that YouTube creators, and their videos, generally fall within the protection of fair use when analyzing their creations against the doctrine's factors because many videos are highly creative in nature, favoring the "purpose and character of the use" factor.²⁴⁵ Therefore, videos in which police officers played copyrighted music might be considered protected by the fair use defense, in which case they should remain unblocked. However, police officers are exploiting algorithmic takedown systems, which do not consider fair use before blocking a video.

Further, there are arguments that YouTube's takedown procedures impede fair use because copyright owners do not always review instances of use to determine their fairness before issuing manual takedown notices.²⁴⁶ Uncertainty can arise because creators do not always understand the components of fair use and, specifically, how YouTube classifies fair use.²⁴⁷

A paradigmatic and somewhat ironic example of this confusion occurred in 2019 when the New York University School of Law (NYU) uploaded a video of a debate panel discussing musical copyright infringement.²⁴⁸ The panel featured two musicologists from the "Blurred

244. See Matt Chambers, *Fighting YouTube Copyright Claims from Trolls and Scammers*, SPENGLER & AGANS (Feb. 29, 2019), <https://www.sab.law/news-and-insights/blog/fight-youtube-copyright-claims-trolls-and-scammers-legal-fair-use> [<https://perma.cc/RNS4-U3EB>] ("Sometimes referred to as a copyright troll, someone can claim to own audio and visual clips with little to no verification from YouTube.").

245. See generally Kurt Hunt, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197, 221 (2007); Alyaman Amen & Adnan Obissi, *Reaction Videos and Fair Use*, JDSUPRA (Dec. 4, 2017), <https://www.jdsupra.com/legalnews/reaction-videos-and-fair-use-29395/#> [<https://perma.cc/3XXY-XWGZ>] (reviewing several cases in which fair use analysis was applied to reaction videos).

246. See, e.g., Voegelé, *supra* note 240, at 589; Perel & Elkin-Koren, *supra* note 142, at 509 ("[T]arget users cannot sue copyright owners for improper content restrictions, as copyright owners play no active role in detecting copyright infringement under voluntary regimes."); see also Sag, *supra* note 133, at 531. Professor Sag addresses that following the Ninth Circuit's decision in *Lenz*, there remains the question of whether a copyright holder can rely on an algorithmic takedown system like Content ID to determine whether a video is fair use or not. *Id.*

247. Voegelé, *supra* note 240, at 627–28; see also Claudia Perez, *How Fair is Fair Use for Online Content Creators?*, N.C. J.L. & TECH. (Jan. 6, 2022), <https://ncjolt.org/blogs/how-fair-is-fair-use-for-online-content-creators/> [<https://perma.cc/K8S9-2J4H>] (discussing the implications of fair use laws at an international scale and proposing a fair use exception for social media platforms like YouTube).

248. See generally *Explaining Copyright Broke the YouTube System*, *supra* note 4; see also Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates*

Lines” copyright infringement case, *Williams v. Bridgeport Music, Inc.*, who explained their process for analyzing the similarities between the songs in the case.²⁴⁹ NYU uploaded the video of the panel, which featured clips of the song at issue for analysis purposes; they believed that the clips were covered by fair use.²⁵⁰ However, YouTube’s algorithmic takedown system “Content ID” flagged the video—and when NYU disputed the claim, the copyright holder rejected the dispute, meaning that the video would remain blocked unless NYU continued through the arduous Content ID appeals process.²⁵¹ NYU stated that despite reaching out to YouTube via private channels and researching the counter-notice process, they still did not have answers to all of their questions.²⁵² NYU states that this dispute showcases the challenges of navigating the Content ID system for average users, the “imperfect nature of automated content screening,” and how algorithmic takedown systems might create more issues in the future.²⁵³ NYU wrote:

The Engelberg Center is home to some of the top technology and intellectual property scholars in the world, as well as people who have actually operated the notice and takedown processes for large online platforms. We had legal confidence in our position that would cost an average user tens of thousands of dollars (if not more) to obtain. Even all of those advantages were not enough to allow us to effectively resolve this dispute. Instead, we had to also rely on our personal networks to trigger a process - one that is still unclear - that resulted in

What We See Online, ELEC. FRONTIER FOUND. (Dec. 10, 2020), <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> [https://perma.cc/9PVJ-EN74] (calling the Content ID process confusing, referencing the NYU School of Law Video, and discussing Content ID generally).

249. See *Explaining Copyright Broke the YouTube System*, *supra* note 4 (“The panel . . . featured presentations and discussions by . . . the musicologist experts for the opposing parties in the high profile Blurred Lines copyright infringement case. In that case the estate of Marvin Gaye accused Robin Thicke and Pharrell Williams of infringing on Gaye’s song ‘Got to Give it Up’ when they wrote the hit song ‘Blurred Lines.’”); see generally *Williams v. Bridgeport Music, Inc.*, 2014 WL 7877773 (C.D. Cal. 2014), *aff’d in part, rev’d in part sub nom. Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).

250. See *Explaining Copyright Broke the YouTube System*, *supra* note 4 (“The video used clips of the songs in question to illustrate specific points about how they were analyzed in the context of copyright infringement litigation. As such, we were confident that our use of the songs were covered by fair use . . .”).

251. *Id.*

252. *Id.*; see also Trendacosta, *supra* note 248 (“They [NYU] could not figure out whether or not challenging Content ID to the end and losing would result in the channel being deleted. And while it eventually restored the video, YouTube never explained why it was taken down in the first place.”).

253. See generally *Explaining Copyright Broke the YouTube System*, *supra* note 4.

the accusations being removed. This is not a reasonable expectation to place on average users.²⁵⁴

Regardless of whether police who abuse copyright law are aware of the legal intricacies behind algorithmic takedown systems, the result is often the same: videos are blocked, and users are subjected to a confusing appeals process in order to reinstate them.

C. *Evaluation of the Four Factors of Fair Use for a Video*

In addition to the convoluted nature of how and why takedown systems remove videos, fair use can be problematic in the context of algorithmic takedowns. Content ID, for example, is unable to detect whether copyrighted material in a video is protected under fair use because a court must decide fair use—in fact, social media platforms like YouTube do not evaluate fair use.²⁵⁵ Ultimately, YouTube videos must be viewed holistically because the algorithmic takedown system does not differentiate between police abuse of the copyrighted music and the posted video.²⁵⁶ Unlike a case of copyright infringement where the user is purposefully posting infringing material, activists filming police misconduct do not make this choice. However, those posts are still subject to the fair use analysis. Analysis of whether these videos constitute fair use must take the entire video into account.²⁵⁷ Given that the users who upload these videos are not choosing to include the copyrighted music at issue, this is unfair and highlights the loophole that the police are exploiting. Although every case of fair use analysis is

254. *Id.*

255. *See Frequently Asked Questions About Fair Use*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6396261> [<https://perma.cc/CR3S-ZNEG>] (last visited Oct. 15, 2023) (“Automated systems like Content ID can’t decide fair use because it’s a subjective, case-by-case decision that only courts can make.”); *see also* Katharine Trendacosta & Corynne McSherry, *What Really Does and Doesn’t Work for Fair Use in the DMCA*, ELEC. FRONTIER FOUND. (July 31, 2020), <https://www.eff.org/deeplinks/2020/07/what-really-does-and-doesnt-work-fair-use-dmca> [<https://perma.cc/YXD8-9CUD>] (noting that automated takedown systems don’t take fair use into account); *Measuring Fair Use: The Four Factors*, STAN. LIBR., <https://fairuse.stanford.edu/overview/fair-use/four-factors/> [<https://perma.cc/HVE6-SZGV>] (last visited Oct. 15, 2023) (“Unfortunately, the only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in federal court.”).

256. *How Content ID Works*, *supra* note 134; *see also* *YouTube Content ID: How It Works*, AIR BLOG (June 15, 2021), <https://air.io/en/academy/youtube-content-id-how-it-works> [<https://perma.cc/JFR9-HB5R>] (summarizing how YouTube Content ID functions); *see also* Burk, *supra* note 133, at 290–94 (discussing the automation of fair use analysis); *see also* Sag, *supra* note 133, at 531 (“Identifying fair use is a hard problem for any automated system. Audio and video remixes and the use of samples or brief illustrative excerpts have become staple features of user-generated content.”).

257. *See Fair Use on YouTube*, *supra* note 162 (“Ultimately, courts decide fair use cases according to the facts of each unique case.”); *see generally* 17 U.S.C. § 107.

different, conducting a mock evaluation of the fair use factors for one of the videos at issue contains common themes.

The first fair use factor examines the “purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.”²⁵⁸ In these cases, videos are typically posted to draw attention to issues of police accountability.²⁵⁹ Because the use of the copyrighted material is noncommercial in nature and the video is not meant to feature the music to begin with, this factor would weigh heavily in favor of the video being protected by fair use.

Second, a court would assess the nature of the copyrighted work.²⁶⁰ The copyrighted works at issue are songs registered in YouTube’s Content ID database such that the system identifies them automatically.²⁶¹ Because the copyrighted materials are highly creative musical works, this factor would likely weigh against the videos being fair use.²⁶² Even though police are likely choosing music to play based on the fame and recognizability of the works, their choice of highly creative works increases the odds that the videos will not be protected under fair use.

The third factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²⁶³ While the music is obviously not meant to be the “substantial portion” of the video, the officers deliberately play it at a high enough volume to dominate the

258. 17 U.S.C. § 107(1).

259. *Filming and Photographing the Police*, *supra* note 28 (“The right of citizens to record the police is a critical check and balance. It creates an independent record of what took place in a particular incident, free from accusations of bias, lying, or faulty memory.”); *see also* Benjamin Taylor, Opinion, *Filming Police Holds Them Accountable: Why Would We Restrict That Right?*, USA TODAY (Sept. 22, 2022, 6:00 AM), <https://www.azcentral.com/story/opinion/op-ed/2022/09/22/arizona-police-filming-ban-assault-our-civil-rights/8065984001/> [<https://perma.cc/5MHB-PN-C8>] (“In recent years, cellphones have proven to be an indispensable tool of the reinvigorated civil rights movement.”).

260. 17 U.S.C. § 107(2); *see also* U.S. Copyright Office *Fair Use Index*, *supra* note 156 (“This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item).”).

261. *See* Kristofer Erickson & Martin Kretschmer, “*This Video is Unavailable*”: Analyzing Copyright Takedown of User-Generated Content on YouTube, 9 J. INTELL. PROP. INFO. TECH. & E-COM. L. 75, 79 (2018) (explaining technology YouTube has developed to match newly-uploaded content to existing files); *see generally* *How Content ID Works*, *supra* note 134.

262. *See* U.S. Copyright *Fair Use Index*, *supra* note 156 (“[U]sing a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item).”).

263. 17 U.S.C. § 107(3).

entire recording.²⁶⁴ Meaning that while the user uploading the video does not wish for the music to be present in the first place, the music can become the focal point and therefore the “substantial portion” of the video. In cases where the police play the music with sufficient volume and clarity, this factor could weigh against the videos being protected by fair use.

Fourth and finally, a court would review “the effect of the use upon the potential market for or value of the copyrighted work.”²⁶⁵ Put simply, a fan of Taylor Swift or the Beatles would not listen to their favorite songs through the medium of a recorded police altercation. Copyright-infringing live streams or social media uploads can have a negative impact on the market for the music they perform.²⁶⁶ However, uploaders in the case of police copyright abuse do not wish for the music to be played at all. This factor weighs heavily in favor of fair use, as the playing of the music in this context does not affect music sales.

While it is impossible to determine how a court would rule in a specific case using these factors, it is likely that the videos at issue would be protected by fair use given the nature of the recordings and the role the copyrighted material plays in each video. Although the copyrighted songs are highly creative in nature and are sometimes the focal point of the videos, the recordings are not made for commercial purposes and the use of the music in this context will not impact the market value of the copyrighted works.²⁶⁷

This mock evaluation highlights that many of the videos targeted by police likely fall within the protection of fair use. However, police exploitation of algorithmic takedown systems denies users this protection because algorithmic takedown systems do not consider the fair use defense before blocking a video.

The sum of this Comment’s analysis is that police are abusing algorithmic takedown systems. Ordinarily, a copyright holder would need to consider the fair use defense before deciding to manually send a takedown notice to the video. However, algorithmic takedown systems cannot evaluate videos to determine fair use and may block videos without review. Because the Supreme Court has not recognized a

264. See generally Shaps, *supra* note 10; Wegner, *supra* note 11.

265. 17 U.S.C § 107(4).

266. Irene Calboli, *Legal Perspectives on the Streaming Industry: The United States*, 70 AM. J. OF COMPARATIVE L. 220, 236 (2022) (“[I]llegal streaming has been an issue of concern for the entertainment industry since streaming became a relevant mean of distribution for entertainment media over a decade ago.”).

267. See, e.g., *Red Label Music Publ’g, Inc. v. Chila Prod.*, 388 F.Supp.3d 975, 984 (N.D. Ill. 2019) (discussing that the fair use defense applies where a song is used in a film but does not serve the work’s original purpose).

constitutional right to upload videos to social media platforms, users are left with little recourse if a video is blocked. Once the video is blocked, users who seek to reinstate the video are subject to an arduous appeals process. Many users do not even reach this appeals process due to the complicated nature of attempting to have a video reinstated. To stop police from exploiting this loophole and harming discourse about police accountability, changes should be made at a variety of levels.

IV. PROPOSAL

This issue of police using copyrighted music to stop discussions of law enforcement accountability is multifaceted and reveals problems in both police regulatory schemes and algorithmic takedown algorithms. Accordingly, solutions to these problems range in scope. In the short term, police departments should implement policies to prevent police officers from using copyrighted music to interfere with being recorded. Likewise, police should receive a higher level of training and prior notice that they are likely to be recorded while conducting their duties in public.

On a broader scale, social media websites should reassess their internal procedures for DMCA takedowns and algorithmic takedown systems to reduce the number of frivolous or fraudulent copyright takedowns.²⁶⁸ Moreover, they should also institute new measures regarding takedown systems to account for instances of fair use.

The biggest problem of all, and the problem that could take the longest to solve, is that the state of distrust between law enforcement and the public has grown to such levels that issues like these have arisen in the first place. The best solution in the long-term is greater communication and empathy between law enforcement officials and the public.

A. Accountability in Law Enforcement

Steps should be taken in the short term to alleviate police use of copyrighted music to prevent the uploading of recordings. First, there must be greater emphasis on training police officers to handle the stresses inherent to being a police officer in the digital age—especially given the possibility that they may be filmed while carrying out their public duties.²⁶⁹ While there should be empathy for law enforcement who

268. In 2021, YouTube revealed that 2.2 million “incorrect claims” were filed between January and June of that year. Mia Sato, *YouTube Reveals Millions of Incorrect Copyright Claims in Six Months*, VERGE (Dec. 6, 2021), <https://www.theverge.com/2021/12/6/22820318/youtube-copyright-claims-transparency-report> [<https://perma.cc/AG4B-VABE>].

269. See Lynn et al., *supra* note 18 (“As technology advances, recording of police actions is likely to increase.”).

dutifully protect our communities, social media has exposed egregious police misconduct and brutality in ways that produce distrust and apprehension.²⁷⁰ Regardless of the steps we take to build a healthy dialogue between police departments and the neighborhoods they serve, police should be trained to anticipate distrust, given their positions of power and authority.²⁷¹ These trainings already exist in the context of police recording.²⁷² For example, the International Association of Chiefs of Police has developed a “training toolkit” that discusses the public’s right to record and offers strategies for handling these stressful situations.²⁷³ Information like this toolkit should be widely disseminated and incorporated into mandatory training for law enforcement departments to promote general knowledge regarding these issues.

Adopting this proposal might spur change in the long-term, including healthier relations between law enforcement and the public. Although it is broad enough to effect change regarding police being filmed, it also is reasonably specific to the issue of police abuse of copyright law. However, because this issue does not address copyright abuse alone, it might not have an immediate impact on police abuse of copyright law. Furthermore, although this is a reasonably specific shift that directly addresses the issue of police abuse of copyright law, the actual change this proposal would affect could take longer should police officers resist education and potential reform.²⁷⁴ This proposal might take longer to make a difference because it relies on the change of human disposition and attitude rather than change at a structural or statutory level.

Police officers could also be trained on the specific issue of playing copyrighted music while being recorded. Although specific to this situation, such training would serve as a more immediate solution to their abuse of copyright law. The benefit of this proposal lies in its specificity;

270. See generally Martin Kaste, *Police Are Learning To Accept Civilian Oversight: But Distrust Lingers*, NAT’L PUB. RADIO (Feb. 21, 2015, 10:18 AM), <https://www.npr.org/2015/02/21/387770044/> [<https://perma.cc/J8ML-JLJJ>].

271. See A.W. Ohlheiser, *The Tactics Police Are Using to Prevent Bystander Video*, MIT TECH. REV. (Apr. 30, 2021), <https://www.technologyreview.com/2021/04/30/1024325/police-video-filming-prevention-tactics/> [<https://perma.cc/A6MF-FHQY>] (quoting Lieutenant Raul Jovel, a spokesperson for the Los Angeles Police Department, who acknowledges that being recorded is part of a police officer’s duty as a public servant).

272. *Public Recording of Police*, IACP, <https://www.theiacp.org/prop> [<https://perma.cc/NTV3-3ZZG>] (last visited Oct. 15, 2023) (providing training for police officers regarding the public’s right to record).

273. *Id.* According to the International Association of Chiefs of Police, the training “focuses on the public’s First Amendment right to record, limitations of this right, common police responses to recording individuals, strategies for diffusing and deflecting police-civilian confrontations, and how and when video equipment or recordings can be seized.” *Id.*

274. See Simonson, *supra* note 207, at 430 (discussing how some police feel that being recorded is a form of personal disrespect).

training police not to play copyrighted music while recorded would likely solve this issue if it were adopted at a wide enough scale. However, this solution's specificity also restricts its broader impact. Although this Comment speaks primarily toward police abuse of copyright law in this context, distrust between the public and police officers is a much broader issue. Police could simply find other means to avoid being recorded if they were determined to do so.

B. Adjustments to Algorithmic Takedown Systems

While changes to police regulations and enhanced training protocols for law enforcement can help resolve this issue in the short term, there should also be a technical rework and procedural adjustment to algorithmic takedown systems. First, there should be higher accountability for owners of copyrighted materials before issuing strikes. Copyright holders should not be able to completely block videos en masse without directly reviewing each instance of potential infringement. As the system functions now, YouTube's Content ID gives copyright holders several options—one of which is the complete blocking of the videos at issue.²⁷⁵ This choice to block infringing material entirely is valid in some cases; for example, a video comprised entirely of a copyrighted song with no other material added deserves to be removed as it seeks to profit from another creator's art. The ability for copyright holders to automatically remove videos, however, is too broad given the current technical limitations of algorithmic takedown systems.²⁷⁶ Because the algorithm is unable to differentiate between instances of music in isolation (i.e., music that is played without any other material) and the playing of music in the background of another video (e.g., the filming of police), copyright holders should not have the authority to block the viewing of videos without further discretion.²⁷⁷

A straightforward solution is modifying algorithmic takedown systems: copyright holders should not be allowed to automatically block videos flagged by algorithmic takedown systems.²⁷⁸ Instead, users who wish for the content to be blocked could receive notifications from the algorithmic takedown system in a way that would allow the copyright holder to quickly assess whether the material infringes or not. For

275. *How Content ID Works*, *supra* note 134 (stating that copyright holders are able to choose settings that take effect when copyrighted material is detected, including monetization of the video, tracking of the viewership statistics for the video, and blockage of the video entirely).

276. Section III.B.

277. See Hamilton, *supra* note 241 (discussing how live streamers are unable to control what music is played in their environment, exposing them to the risk of DMCA takedowns).

278. See Boroughf, *supra* note 5, at 114 ("YouTube should change Content ID so that it no longer automatically claims and then blocks or monetizes all videos.").

example, the algorithmic takedown system might provide a brief portion of the video for copyright holders to assess whether the material infringes or not quickly. This solution would remedy the problem of videos being subjected to algorithmic takedowns without any manual review from the copyright holder. However, this solution is highly unlikely to be implemented as manual review would be impractical for copyright holders who deal with a high volume of infringement.

This proposal would likely remedy the issue of police abuse of copyright as copyright holders would need to manually review each video to determine whether the music is being used in accordance with the four fair use factors or not.²⁷⁹ This solution is also broad enough that it would remedy egregious algorithmic takedowns in other fields unrelated to police accountability, like educational videos or entertainment generally.²⁸⁰ Further, because this would be such a dramatic change to algorithmic takedown systems, it would draw massive attention to copyright law in the context of uploaded videos and might help to encourage copyright holders to be more responsible with enforcing their copyrights.²⁸¹ The downside of this proposal is that it would take a long time to properly implement because it would be such a technical reworking of algorithmic takedown systems as they currently exist. Even if the proposal were implemented in a functional manner, it could lead to further issues and appeals should users not grasp concepts of copyright law properly. As previously stated, it would also place a great burden on copyright holders with large volumes of potentially infringing material to review.²⁸² However, copyright holders with large volumes of infringing material to review would likely be people or entities with the means to manually review the videos. For example, a copyright holder like Taylor Swift almost certainly has the resources to staff teams to review alerts by an algorithmic takedown system.

Furthermore, the appeal process for reinstating a video blocked by algorithmic takedown systems should be streamlined to account for

279. *Id.* at 118 (“[B]y removing the automatic blocking or monetization policies for non-egregious uses and requiring the claimant to review the uploaded content before seeking to block or monetize, Content ID will be less susceptible to false positives and a YouTuber’s choice of how to use a work will not be limited by the copyright holder’s pre-rendered decision.”).

280. *See id.* (discussing potential changes to the YouTube Copyright ID system at a broad scale, including groups like musicians and video game content creators).

281. *Id.* at 119 (“Furthermore, this proposal encourages claimants to not abuse the system and takes advantage of YouTubers because the publicly accessible site will act as a form of public shaming.”).

282. *Id.* at 125 (“[S]ome copyright holders may be reluctant to accept the new proposal because it requires them to manually review each video before submitting a block or monetization request, thus increasing their transaction and review costs.”).

egregious takedowns.²⁸³ A major part of this issue is the delay inherent to the appeals process.²⁸⁴ The appeals system works properly to overturn takedowns in which videos are used under fair use, but the delay often discourages users from appealing at all.²⁸⁵ YouTube offers the solution of “using other music” to avoid receiving copyright takedown notices.²⁸⁶ This, of course, is not feasible in cases where the police are playing the music against the wishes of the people recording. Arguably, the sound is not necessary in the uploaded videos; users might upload the videos without audio at all.²⁸⁷ However, this solution is not applicable to live streamers whose videos are taken down in real time. Further, this is an unnecessary burden for users who film the videos and upload them later—why should they be forced to take extra measures to avoid copyright infringement when they are not the ones playing the copyrighted music to begin with? While the solution of removing the audio is a simple remedy to ensure that the video can be uploaded, it does not account for the fact that police are abusing copyright law.

Perhaps a first step toward streamlining the appeals process could come in the form of a revised counter-notice procedure. Currently, those who feel that their videos have been unfairly removed must submit a counter-notification in which they articulate their reasoning as to why the use of the copyrighted material should not warrant a Content ID strike.²⁸⁸ Counter notifications already require the user to explain why they believe their video was removed unfairly.²⁸⁹ YouTube refers to “mistakes or misidentification,” which “includes exceptions to copyright, such as

283. See generally Vogeles, *supra* note 240; Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J.L. SCI. & TECH. 387, 405 (2009).

284. See Sag, *supra* note 133, at 503–04. Professor Sag details an instance of the McCain presidential campaign in which commercials were removed from YouTube based on improper copyright claims but were only restored after the appeals process had “run its course.” *Id.* at 504. He continues to state that “very few internet users take advantage of the DMCA counternotification procedure. In most cases, content that is taken down after a copyright notice stays down.” *Id.*

285. See Trendacosta & McSherry, *supra* note 255 (noting that there is evidence of YouTube creators not disputing copyright takedowns because the appeals process is too inconvenient).

286. See *Frequently Asked Questions About Fair Use*, *supra* note 255 (“The easiest way to deal with Content ID claims is to avoid them in the first place. Don’t use copyrighted material unless it’s essential to your video.”).

287. *Id.* (“If you get a Content ID claim for music that isn’t essential to your video, try removing it . . .”).

288. See *Submit a Copyright Removal Request*, *supra* note 128 (“If your content was removed due to a copyright request and you believe it’s because of a mistake or misidentification, you can submit a counter notification.”).

289. *Id.* (“Clearly and concisely explain why you believe the removal of your content qualifies as a mistake or misidentification.”).

cases of fair use or fair dealing.”²⁹⁰ Counter notifications could, in a streamlined system, be filtered according to the reasoning each user provides; in a case where a user believes their upload is protected under fair use, this counter-notification could be addressed sooner or by a different department than the ones that assess counter notifications for other reasons. Counter notifications predicated on fair use could be reevaluated to predict the likelihood of a successful fair use defense, then sorted according to the prediction of success or failure.²⁹¹ For example, the Content ID system could evaluate the clarity of the copyrighted audio at issue or whether there is other audio from the video that is not copyrighted material. Companies in this scenario would not be determining whether a video is protected by fair use; instead, they would be addressing counter notifications at different rates, prioritizing their review according to the likelihood that the videos are protected by fair use. Assuming algorithmic takedown systems could be developed to assess the likelihood of a fair use defense, staffing, and time restraints would be relatively light for the companies who use them. The algorithmic takedown systems would do most of the work to evaluate videos as DMCA appeals are made, and it would only require a small team to maintain the software. The greatest challenge to the likelihood of this proposal’s acceptance, then, would likely be the theoretical nature of whether artificial intelligence will be able to analyze videos for fair use factors.

Implementing artificial intelligence systems to analyze whether videos are fair use, even at a cursory level, would be revolutionary for copyright law and change the landscape of content service providers like YouTube or Twitter. Such a change would carry important implications regarding how the DMCA functions and would likely require adjustments to the law. If implemented correctly, it would be an incredibly efficient way for copyright holders to moderate their works and could help to relieve the backlog of takedown notices and counter-notices.²⁹²

However, this change is so theoretical in nature that practicality may not be feasible in the near future; some scholars believe that technology is a long way from being able to adequately grapple with fair use issues,

290. *Id.*

291. See Sag, *supra* note 133, at 532 (“Advances in machine learning suggest that a system like Content ID could improve its ability to automatically identify potential fair uses by analyzing data from disputes within the system.”).

292. See Peter K. Yu, *Can Algorithms Promote Fair Use?*, 14 FIU L. REV. 330, 342–43 (2020) (“With the incorporation of big data analytics and machine learning capabilities . . . automated fair use systems will not only function more efficiently and effectively, but their decisions will also bear stronger resemblances to those made by real-life judges.”).

if it will ever reach such a point at all.²⁹³ This solution is also far removed from the immediate issue of police abuse of copyright that any effects it would have on law enforcement officials would be incidental to the broader change created.

In addition to adjustments made to algorithmic takedown systems, greater education regarding fair use and copyright law should be emphasized by social media companies to its users. For example, users who upload to YouTube could be offered a brief summary of fair use prior to uploading a video or when issued a takedown notice. Even if all users do not try to read these summaries or to familiarize themselves with these ideas, reducing the steps needed for users to educate themselves might help alleviate some of the issues in the system. Although ensuring the retention of copyright law concepts is practically impossible, providing greater access to this information would not be a bad thing. Given the massive shift away from cable television to streaming platforms and applications accessible via mobile devices,²⁹⁴ the intersection of user-generated content and copyrighted works is bound to continue at greater and greater scales.

Greater copyright education for social media users is the most practical solution so far and is relatively straightforward and simple to implement. Research has already been conducted on the ways that content creators interact with copyright law in the context of uploading videos to social media like YouTube.²⁹⁵ A broader understanding of copyright law for video uploaders and the public could also help to draw more attention to future instances of police abuse of copyright law. However, beyond alleviating some confusion surrounding copyright law and algorithmic takedown systems, this solution would not provide a remedy to video uploaders subject to police abuse of copyright. Although they would understand the issues more clearly, this solution would not do anything to reduce the prolonged counter-notice and appeal process.

293. *Id.* at 331–38 (discussing potential shortcomings of automated fair use algorithms, including the disparity between judge reasoning and machines, shifts in creative output in response to algorithms, and further technological limitations).

294. See *Streaming Claims Largest Piece of TV Viewing Pie in July*, NIELSEN (Aug. 18, 2022), <https://www.nielsen.com/insights/2022/streaming-claims-largest-piece-of-tv-viewing-pie-in-july/> [https://perma.cc/FZ96-43JH] (showing statistics regarding the prominence of streaming services relative to cable television); see generally Daniel Arkin, *Streaming Viewership Overtakes Cable TV for the First Time*, NBC NEWS (Aug. 18, 2022, 9:42 AM), <https://www.nbcnews.com/business/consumer/streaming-viewership-overtakes-cable-tv-first-time-rcna43704> [https://perma.cc/RE8W-CRZR].

295. See generally D. Bondy Valdovinos Kaye & Joanne E. Gray, *Copyright Gossip: Exploring Copyright Opinions, Theories, and Strategies on YouTube*, 7 SOC. MEDIA + SOC'Y 1, 1 (2021).

The status of these platforms as private entities raises further issues for the concepts of open discussion and the dissemination of ideas. At this point, service providers like Twitter and YouTube are so ubiquitous that extra measures need to be taken to assess how users from broad political backgrounds voice their opinions. While social media platforms should not be able to censor users according to the beliefs of the platform, there must be some middle ground where these entities can allow for the sharing of ideas while monitoring for the dissemination of hateful rhetoric and false information. Further determinations could be made in each platform's terms of service regarding ideas that users might consider "harmful." For example, Twitter already informs users of potential misinformation or removes it entirely if the information is "confirmed to be false by external, subject-matter experts"²⁹⁶ This determination of what constitutes false information is helpful for large platforms like Twitter or YouTube that deal with a high volume of postings; strict guidelines help maintain an objective stance when dealing with concerns of free speech. While political inclinations are unavoidable, great care should be taken when handling such influential platforms to address these issues and to promote open debate.

For the above reasons, the Supreme Court should reverse the Ninth Circuit and hold that uploading videos to social media platforms is a constitutionally protected right. Social media platforms operate on such a large scale that they should be viewed in the same light as other traditional sources of information, rather than as private entities.²⁹⁷ Affirmation of this right would grant much-needed recourse to individuals whose videos have been unfairly subjected to police abuse of algorithmic takedown systems.

Finally, the Supreme Court should affirm the constitutional right to record police officers conducting their duties in public. Affirmation of a constitutional right to record the police conducting their duties in public would be a tremendous step in the right direction for police accountability. The Supreme Court's affirming this right would also resolve the issue of whether qualified immunity applies to police who interfere with recording. Given that this right has been affirmed by the

296. *How We Address Misinformation on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/resources/addressing-misleading-info> [<https://perma.cc/EVR8-YJY3>] (last visited Oct. 22, 2023).

297. See Hudson, *supra* note 218, at 2 ("A society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities that have ushered in a revolution in terms of communication capabilities.").

eight circuits and has not been explicitly rejected by any of the remaining four circuits, the Supreme Court's ruling would solidify this right and improve police accountability.

While the issue of police usage of copyrighted music has layers of nuance and legal considerations, the actions of police in these situations speak to a much larger problem of growing distrust between law enforcement and citizens.²⁹⁸ After all, a restructuring of police department procedures to account for the use of copyrighted material will amount to nothing if tensions between law enforcement and the public lead to other methods of avoiding recording.²⁹⁹

Although a complete discussion of how to improve the relations between law enforcement and the public are beyond the scope of this Comment, a key element in resolving the systemic distrust facing our country is transparency.³⁰⁰ This transparency is not possible while police take advantage of unrefined algorithmic takedown systems to stifle discussions about free speech.

CONCLUSION

Police abuse of copyright to prevent the uploading of videos to social media platforms raises issues from a broad range of fields, some of which can be addressed in the short term but all of which ultimately point to more significant systemic issues present in society. Recording the police who are performing their duties in public spaces is a First Amendment right in the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, but police officers are using loopholes through the DMCA and algorithmic takedown systems to limit that right. At its core, police abuse of copyright law to stifle discussions of police accountability stems from police aversion to being recorded. However, the result of their actions is an exploitation of the copyright system which provides little remedy for the people it affects.

Steps must be taken to remedy police officers deliberately playing copyrighted material to prevent video uploading; training and education would be a good start, and larger restructurings of algorithmic takedown system procedures and police department regulations pertaining to being filmed would prevent incidents like this from occurring.

298. See generally Alex Nicoll, *Do Police Cover Badges to Mourn, or Hide Misconduct?*, INSIDER NEWS (June 4, 2020, 1:24 AM), <https://www.insider.com/do-police-cover-badges-to-mourn-or-to-hide-violence-2020-6> [<https://perma.cc/A943-KYAU>].

299. See generally Ohlheiser, *supra* note 271 (discussing police avoidance to being recorded).

300. CMTY. REL. SERV. TOOLKIT FOR POLICING, IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING, U.S. DEP'T OF JUSTICE (2015), <https://www.justice.gov/file/1437336/download> [<https://perma.cc/FEB7-Z9ZV>].

After all, police avoidance of recording will not simply go away overnight; neither will the deep-seated distrust between law enforcement and the public. What is needed ultimately is greater communication, understanding, empathy, and compassion to further the society we build together.



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