Lately I've been pondering an interesting question. What is the legal effect of a false or fraudulent Content ID match on YouTube, as compared to a false or fraudulent DMCA notice? While the law provides a clear cause of action for filing a misrepresentative DMCA takedown notice, it is completely silent as to the legal status of private copyright enforcement systems like YouTube's Content ID that have the same basic effect as the DMCA notice-and-takedown process but none of its safeguards. I have been developing a theory that the deliberate misuse of such private copyright systems to claim content you do not own **may *itself* constitute copyright infringement.**

As I have documented extensively here , YouTube's Content ID matching system is now routinely used to falsely claim ownership of videos that the claimant has absolutely no copyright interest in. And because copyright claimants are allowed to decide whether to accept or reject disputes against their own claims, there is no effective way to dispute these claims. Some unscrupulous companies like GoDigital appear to have made a business out of claiming YouTube content they do not own and profiting from the ad revenue. Others like Rumblefish attempt to provide a legal means for YouTube users to use their members' music but appear to have insufficient safeguards to prevent mistakes like Content ID matching birdsongs to their music. What all these groups have in common is that whenever a user disputes a Content ID match on their videos, these companies will blanketly reject all disputes across the board and reinstate their claims regardless of whether they have any merit or not.

The major music labels and publishers have been quite open about the fact that their status as Content ID partners gives them the ability to censor any YouTube video they want, and have claimed that because Content ID is different than the DMCA process, they are not subject to any of the DMCA's penalties for deliberately abusing the system. As a result, Universal Music Group was able to censor the famous "Megauload Song" despite owning absolutely no copyright in it whatsoever. More recently, BMG had a campaign commercial by Mitt Romney taken down by a DMCA notice for featuring President Obama singing two lines of a copyrighted song, and then subsequently used the Content ID system to block all other copies of the original video of President Obama singing that song on YouTube--all this despite every instance of that video being clear fair use.

While it is clear Content ID is being abused, it is less clear whether such abuse has any legal consequences. In its dispute with Megaupload, UMG notoriously claimed that because the video was blocked by Content ID and not a DMCA notice, it was immune from any remedy

under the misrepresentation clause of the DMCA. This is debatable since in many cases Content ID blocks work very similar to DMCA claims and have the exact same effect. But assuming that Content ID claims are not subject to a suit for misrepresentation under the DMCA, what legal remedy is there?

One theory I have been considering for a while is that deliberate abuse of the Content ID system (i.e. reinstating a claim to a video after the claim is disputed by the user) to claim ownership of videos you do not own **may itself constitute copyright infringement.**

Consider this. Section 106 of the Copyright Act (title 17 of the US Code) grants to copyright owners the following exclusive rights:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

When a Content ID match is placed on a YouTube video, it gives the copyright claimant the ability to control several key aspects of how the video is distributed on YouTube:

1. **Whether the video is viewable on YouTube at all.**
2. **In what countries the video may be viewed.**
3. **Whether the video may be embedded on external websites or is only playable on YouTube.**
4. **Whether the video may viewed on mobile devices and Internet-enabled TVs (called "syndication" in YouTube parlance).**
5. **Whether the video is "monetized" by showing ads alongside it. If it is monetized, the copyright claimant, not the uploader, gets a share of the ad revenue.**

In other words, a Content ID match gives the copyright claimant control over most of the key settings which control how your video is viewed and allows them to profit from it by hijacking the ad revenue the uploader would otherwise be entitled to if the video was monetized. I once saw a post in the YouTube help forums by a man who made a hugely popular original viral video and was receiving tens of thousands of dollars annually in ad revenue. One day a company made a false Content ID claim to his video and subsequently reinstated that claim after he disputed it. As a result, that company was now receiving all the ad revenue from his video and he didn't get a penny. The copyright claimant's ability to block the video from being viewed in certain countries or to prevent it from being embedded on other websites or viewed on mobile devices can also substantially harm a video's ability to "go viral" and gain popularity.

All of these things seem like they could quite possibly infringe upon the uploader's exclusive right as the copyright holder in their video to distribute copies of their work how they wish. Alternatively, since online streams are considered "public performances" under copyright law, a false Content ID claim which interferes with the uploader's ability to control how their work is publicly performed (streamed) and which allows the false claimant to unjustly profit from the uploader's performance, could **infringe their public performance right.** In other contexts, if someone hosted an unauthorized public performance of a work (say a screening of a movie) for profit, they would be liable for infringement. So it seems logical that someone who places a false Content ID claim on a YouTube video and thus appropriates the ad revenue that the uploader would otherwise be entitled to, also should be liable for copyright infringement.

This means that if the YouTube video's creator registered their copyright with the US Copyright Office and then sued the false claimant for infringement**, the claimant could be liable for the full statutory damages for copyright infringement--up to $150,000**

. It is also possible that since YouTube seems to have built the Content ID system to deliberately allow this form of abuse, and has thus far refused to do anything to solve the problem despite prominent criticism in the media,
YouTube may itself be secondarily liable for inducing copyright infringement.

All of this is completely theoretical of course, and is unlikely ever to be tested in court. But it's definitely worth thinking about. Wouldn't it be ironic if the very media companies that have been inciting moral panics over "piracy" for decades suddenly found themselves liable for copyright infringement based on their own overzealous attempts to claim copyrights where they had none? Not to mention the irony in the fact that YouTube's system built to ***prevent*** copyright infringement is in fact
enabling
and encouraging copyright infringement through false copyright claims. It's certainly worth considering.