

## Written Responses of Mr. Rick Beato

1. As a YouTuber and music educator, when you use someone else's music, how do you determine whether that is a fair use or whether you need to license the music?

When I use someone else's music in one of my videos, I am usually, if not always, within Youtube's guidelines of "fair use":

"In the U.S., works of commentary, criticism, research, teaching, or news reporting might be considered fair use..." However, they continue, adding the 7 word phrase "but it can depend on the situation." This is, in my view, problematic, because its ambiguity allows for too much subjective interpretation. When I use a short clip of an artist's original material, it is usually (legitimately) demonetized, but not taken down. As I said in my testimony before your committee, artists / copyright holders should be paid for their work, and when a video is demonetized, that means all the ad revenue from that video flows to the copyright holder.

However I also testified that this doesn't mean that there are not frivolous claims made against myself and other content creators.

From Wikipedia:

"Currently, there are three main abuses of the DMCA. First, fair use has been a legal gray area, and subject to opposing interpretations. This has caused inequity in the treatment of individual cases. Second, the DMCA has often been invoked overbearingly, favoring larger copyright holders over smaller ones. This has caused accidental takedowns of legitimate content, such as a record company accidentally removing a music video from their own artist. Third, the lack of consequences for perjury in claims encourages censorship. This has caused temporary takedowns of legitimate content that can be financially damaging to the legitimate copyright holder, who has no recourse for reimbursement. This has been used by businesses to censor competition."

Many times, because the musical excerpt is a small or even peripheral element of the overall educational content of a video, I believe some kind of ad-revenue sharing should be implemented, as is the case in the film industry. This would require a less ambiguous definition of Fair Use by YouTube, and also, I would argue (and this is to the point of your second question), some updates to the DMCA. These updates / clarifications would help to make this 20 year-old law more responsive and relevant to the massive technological and societal changes that have taken place, changes which led to your committee convening hearings on this issue in the first place.

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2. You mentioned that you never even bother to send counter-notifications. Are there changes that you think the DMCA needs to better account for fair uses without the need for sending a counter-notice?

Again, to your second question, the primary reason I “don’t bother” to send a counter-notice is because it is not worth it. Some of the reasons it is not worth it are as follows:

1. The definition of fair use is ambiguous and subjective.
2. The copyright holder has no disincentive to filing frivolous claims.
3. The ISP’s or social media platform has no substantial legal definition it can rely on to protect content creators legitimate fair use, and because of this they are passing the burden of proof on to the content creator, who, because of lack of resources or fear of the massively punitive and quite possibly inappropriately wielded power of the copyright holder, has to consider YouTube’s “Three Strikes” policy.
4. The “Three Strikes and you’re out” policy which would result in the removal of a content creator’s channel.

Some corresponding recommendations for these issues follow below:

1. The DMCA can help remove definitional ambiguity in platforms such as YouTube by inserting specific parameters of fair use (for example temporal, or use-oriented, etc.) that leave no room for legal interpretation.
2.
  - a. If there were a "Fair Use Registry" of sorts, then “good actors” on the content creator side would in essence be “white listed” so that they were more easily identified as such.
  - b. There could be punitive measures taken if in fact frivolous claims are a pattern (roughly analogous to the “3 strikes and you’re out” policy on the other side).
3. Implement a Fair Use Registry.
4. Disincentives for frivolous copyright claims; clarification of Fair Use definition in DMCA; Certified Fair Use Registry which would have parameters (perhaps decided on in a kind of mediated or negotiated roundtable), overseen by your Senate Committee, with representatives from many sides, not unlike the witnesses you assembled for the hearings I was invited to testify at.