

Thesis: “Oh Brother, the DMCA Stinks! The Influence of Copyright Law and Content Moderation on Twitch.tv’s Copyright Guidelines”

Jedszelle Baul

Chesapeake, Virginia

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ABSTRACT

This thesis explores the evolution of Twitch.tv's through the Digital Millennium Copyright Act (DMCA), spotlighting the 2020 strikes that significantly impacted content creators and the platform's moderation practices. By exploring the history and challenges of copyright before the DMCA, along with the development of content moderation systems, I show that the DMCA has prevented platforms like Twitch from being more proactive in filtering user-generated content and enforcing legislation. Combined with analyzing the experiences of streamers like Fuslie and Asmongold, it unpacks the challenges and responses to DMCA notifications, illustrating the difficult tension between copyright enforcement and creative expression. This thesis also examines the implications of the 2020 DMCA strikes, proposing a need for a nuanced approach to copyright in the digital realm that fosters innovation while protecting the rights of creators. This research contributes to the broader conversation on copyright reform and digital content creation, advocating for adjustments in copyright law and platform policies to better accommodate the complexities of live streaming and digital creativity.

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Thesis Supervisor: Dr. Kevin Driscoll
Associate Professor and Associate Chair, Department of Media Studies
Chair of the Faculty Advisory Cmte., Digital Humanities at UVA
University of Virginia

Thesis Cmte. Member: Dr. Elizabeth Ellcessor
Associate Professor and Director of Graduate Studies, Department of Media Studies
University of Virginia

Thesis Cmte. Member: Dr. Siva Vaidhyanathan
Robertson Professor of Modern Media Studies, Department of Media Studies
Director of the Center for Media and Citizenship
University of Virginia

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To whoever reads this, I hope you enjoy and learn something from it. Maybe you will find how crazy and complicated copyright really is. Maybe you will see that Twitch is more complex than just playing a game in front of a camera for potentially thousands of people to see. And maybe you will see that the intersection of both is messy, but there is a way to a better future than what we have now. And with that, welcome to the s***show that is the world of copyright and Twitch!

Sincerely,
Jed

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Introduction: Ariana Grande nearly cost Fuslie her Career

For live streamers, especially those on Twitch, being “permabanned” (permanently banned) from creating any monetized content on their home platform is the ultimate nightmare. If a streamer were caught for copyright infringement three times (strikes) on the popular live-streaming platform, Twitch, they would no longer be able to stream on the platform that has provided financial security for thousands of creators. Receiving two strikes in the same week from content produced over a year ago is both unimaginable and fear-inducing. The following tweet was Leslie ‘fuslie’ Fu’s “Hail Mary” attempt to avoid her account being permabanned on Twitch, which encapsulates the current existential crisis facing streamers on Twitch: losing their career in an instant (Fu, 2020a):

“I’ve been issued 2 copyright strikes on my channel (both from clips over a year old) in the past week and told that if they find one more violation in my clips, my twitch account will be permabanned. [Two screenshots are attached of DMCA violations from Twitch, noting the copyrighted works of DNCE’s “Cake By the Ocean” and Ariana Grande’s “7 rings.”

- Leslie ‘fuslie’ Fu (June 7, 2020, on X (formerly known as Twitter))

Despite contacting multiple Twitch workers and executives, the only solution for Fuslie seemed to be deleting most, if not all, of the over 100,000 clips on her channel (Fu, 2020b). As a result, she chose to listen to the platform’s workers by deleting her content and expressing how much fear she felt about the potential loss of her career (Fu, 2020c; 2022b). Having no choice but to delete content to prevent a third and final DMCA strike compromised her career, as many of her most viewed clips were erased. In turn, the two DMCA strikes led to Fuslie’s departure from Twitch to YouTube Gaming in September 2022, where she joined fellow streamers, friends, and even roommates Thomas ‘Sykkuno’ Williams, Rachell ‘Valkyrae’ Hofstetter and Lily ‘LilyPichu’ Ki (Fu, 2022a).

All five streamers, associated with the popular live streaming group OfflineTV and Friends, have become viral for multiple reasons. But Fu was the only streamer out of this group who received a DMCA strike in June 2020 as a way for Twitch to reinforce proper media rights usage and proper intellectual property ownership, and Twitch's actions fueled outrage by fans and other Twitch creators. Yet, Twitch has maintained archaic rules and rigid moderation systems to counter illegal usage of copyrighted content. Moreover, Twitch continues to have issues over copyright three years later, as live streamers and Twitch employees are still navigating the complex, confusing terrain of ensuring creator content does not violate any platform policies or laws.

With over 9 million unique creators broadcasting to 30 million daily active users as of 2022, Twitch has become the epicenter of video game live streaming (Iqbal, 2023). For homegrown stars like Fuslie, who accrued over 1.2 million loyal followers throughout her 7-year streaming stint on Twitch, the conditions must be exactly right to produce the "perfect storm" of becoming viral and staying visible. Additionally, there is a lot of production labor streamers who freely create content for their brand, identity, and their fans without fear of potential punishment. This policy system reflects Twitch's "DMCA-plus" enforcement approach, which often exceeds the baseline requirements of copyright law in attempting to appease music labels and rights-holders like the Recording Industry Association of America (RIAA) (Bridy, 2016). Twitch is still facing immense pressure from the music industry to ensure they are following the rules.

But for streamers who have built their livelihoods and communities on Twitch, relying extensively on real-time commentary and reaction to everything from games to music, this punitive three-strikes ban provokes deep fears of financial and professional ruin. Fuslie's case became a flashpoint exemplifying the high-stakes tensions between copyright protection,

platform governance, and creative expression facing streamers. Her overall success on Twitch, earning over \$610,000 from 2019 to 2021, spotlights both the meteoric potential of stardom on the platform, as well as how rapidly it could all disappear at the hands of rigid content moderation (*Twitch Earnings Leaderboard*, 2021). For context, the highest-paid Twitch streamer at the time, CriticalRole, made close to \$10 million in the same period, further demonstrating the legitimization of “private play into public entertainment” (*Twitch Earnings Leaderboard*, 2021; Taylor, 2018). Overall, this thesis makes an important contribution by analyzing how moderation policies shape participatory culture and emerging creative industries through the case study of live streaming.

What’s so Important about Twitch and the DMCA?

Building on the precarious landscape of live streaming and content moderation, this thesis delves into the intricate relationship between the Digital Millennium Copyright Act (DMCA) and the policies governing live streaming platforms, specifically focusing on Twitch. The DMCA, enacted in 1998 by Congress and signed into law by President Bill Clinton, was designed to strike a balance between protecting the rights of media holders and limiting the liability of platforms for copyright infringements. This legislation introduced the notice-and-takedown protocols, a cornerstone in the digital copyright landscape that informs platforms of when copyright holders have their work being used without permission (“The Digital Millennium Copyright Act,” 1998).

However, the application of the DMCA regarding notice-and-takedown protocols in live streaming is more complicated than the technologies being moderated at the time of the DMCA’s creation. For instance, Twitch’s stringent “three strikes” policy of permanently banning creators for copyright infringement exemplifies a “DMCA-plus” approach, as noted by Bridy (2016),

where the platform goes beyond legal requirements as a method to preemptively satisfy rights holders without further legal consequences. This approach, while legally cautious, poses significant threats to the livelihoods of creators who rely on participatory commentary, music, and gameplay.

To understand these tensions, the questions being asked are as follows: How have Twitch's copyright strike policies developed in response to DMCA frameworks over time? Do current policies reflect fair use and the realities of streamer creativity? This investigation aims to shed light on the evolution of Twitch's guidelines and their alignment or divergence from DMCA provisions. This work complements and extends existing media studies scholarship on participatory culture, platform governance, and copyright's cultural impact (Taylor, 2018; Gillespie, 2010). The ambiguous nature of certain DMCA clauses, which potentially leads to overzealous enforcement by platforms like Twitch, warrants a deeper exploration, especially considering the financial and creative precarity inherent in streaming.

Analysis of the DMCA's origins and trajectory illuminates its application to emergent media. Past regulations struggled to moderate copyright across mediums ranging from digital railroads to VCRs (Perzanowski & Schultz, 2016). Streaming introduces new complexities around live reactionary content. By foregrounding streamer experiences and Twitch policy documents, this research aims to unravel copyright law's cultural implications in an era of exploding participatory platforms. It seeks to surface tensions between creative expression, commerce, and regulation at the heart of internet communities' tumultuous relationship with intellectual property.

As user-generated live streaming grows exponentially, this research aims to bridge a gap in clarifying the rights and responsibilities for both creators and copyright holders in the digital

environment, especially on live streaming where music is a vital part of creating content. By examining how platforms like Twitch interpret and apply copyright law through their community guidelines, the responsibilities and obligations towards copyright becomes more explicit. The research illuminates where there is room for improvement in copyright and moderation approaches to better foster innovation and responsibilities for both content creators, platform workers, and the long-term longevity of the live streaming industry.

Feeling... Lukewarm about the DMCA

The focus of this thesis heavily centers around the Digital Millennium Copyright Act (DMCA) in 1998. This legislation marked a pivotal shift in the landscape of digital copyright, aiming to modernize the legal framework in an era increasingly dominated by more digital technologies, such as the Internet. As Pat Aufderheide, Aram Sinnreich, and John Graf (2018) discussed, the DMCA was originally intended to adapt copyright for the digital age while also providing some protections for fair use. However, their survey reveals that many users today still lack an understanding of the nuances of the DMCA and its exceptions, leading platforms like Twitch to have substantial leeway in interpreting takedown notices and moderating content. This aligns with James Boyle's (2010) argument that current intellectual property policies, often inadvertently, suppress creativity and freedom of expression in their effort to protect rights holders.

In the realm of live streaming, the DMCA's ambiguous boundaries have resulted in platforms adopting aggressive content removal strategies in response to copyright claims. This approach, as some critics like Aufderheide et al. (2018) suggest, can sometimes veer into overzealous territory. The case of Fuslie and her simultaneous two-strike situation exemplifies the potential consequences of broad and stringent content moderation policies derived from the

DMCA. And in recent years, Twitch has continued to grow and consistently be the most popular platform for live streaming by most hours watched. However, research specifically analyzing the intersection of the DMCA, moderation, and live streaming remains limited. This study aims to help address this gap by examining Twitch's content policies situated within the evolving copyright landscape shaped by the DMCA.

For platforms like YouTube and Twitch, the main challenge involves adapting to the complexities of the DMCA while crafting their own content moderation strategies. As media scholar Annemarie Bridy (2016) noted, the DMCA sets out specific takedown protocols, but these platforms extend beyond these legal requirements out of self-regulation. Twitch's three-strike permanent ban policy reflects this DMCA-plus approach that Bridy mentioned. However, Bridy found that the appeals process for wrongful takedowns on these platforms can be opaque and difficult for users. Echoing this claim is fellow scholar Benjamin Brown (2008), who similarly critiques the DMCA framework as too rigid, particularly for platforms that focus on user-generated content as its identity and product advertisement.

In turn, these platforms themselves play an influential role in shaping content norms and discourse through their policies from legislation like the DMCA, as copyright scholar Tarleton Gillespie (2010) explores in the case of YouTube. Although YouTube aims to appear neutral, its strategic maneuvers in responding to controversial content debates end up steering broader public discourse. Like YouTube, Twitch faces similar pressures in presenting itself as an open platform while also placating music labels and game publishers who aggressively police unauthorized uses of copyrighted material. The historical evolution of the DMCA undoubtedly informs Twitch's moderation policies and incentives as it tries to balance competing interests

with the needs of its users and need to follow laws and policies. More research is needed to unravel these complex relationships between law, platforms, and culture.

Platforms like Twitch do not merely facilitate content sharing; its architecture and algorithms shape complex user experiences and technocultures, as various researchers have illuminated. Founded in 2006 by Justin Kan and Emmett Shear, Twitch's main purpose was to stream from anywhere at any time, otherwise known as "IRL vlogging" (or in real life video blogging) (Popper, 2014). One of the issues that has become more prominent on the Amazon-owned platform through its evolution to game live streaming content is harassment using racism and misogyny. However, Twitch faces similar tensions that are current on YouTube and Reddit. Digital platform scholar Adrienne Massanari (2017) critically analyzed how Reddit, a community-based platform that allows users to create their own posts, permitted users to be racist and misogynistic. Specifically, Reddit's karma system, subreddit structure, and governance approaches enabled toxic communities like Gamergate to thrive, often drowning out marginalized voices and their viewpoints. And as Mel Stanfill (2011) notes, fans in the mainstream media are predominantly white, which only reinforces heteronormativity that is prevalent on these platforms. On YouTube, response videos and skewed recommendation algorithms inadvertently nurture networked harassment, as Lewis et al. (2021) discussed. Tarvin and Stanfill (2022) even go as far to critique platform moderation, as YouTube's handling of predatory behavior as performative activism rather than making any significant policy changes, staying on trend with YouTube's handling of its platform as being apolitical (Gillespie, 2018; 2010).

Despite these tensions, Twitch has proved to be a valuable space for content creators in terms of financial stability. As live streaming scholar Will Partin (2019) explores, its

monetization features like Bits transform audience engagement into quantifiable, monitored data points. As Twitch's parent company, Amazon is strategically positioned to capitalize on this surveillance ecosystem through algorithmic moderation and partnerships, especially with marginalized communities. Fellow Twitch scholar M.R. Johnson (2018) notes that Twitch has also provided economic opportunities for creators with disabilities. However, we see that this research underscores the complex interplay between platform architectures, governance, monetization, marginalization, and creativity in shaping the user experience. My analysis aims to extend this work by probing how the DMCA and copyright debates further compound these tensions facing Twitch and its diverse community of streamers.

Not only has Twitch become a place where the video games industry gains more visibility, but the meteoric rise of Twitch has transformed video game live streaming into both a vibrant form of entertainment and a promising career avenue for creators. As T.L. Taylor chronicles in her book, *Watch Me Live: Twitch and the Rise of Game Live Streaming (2018)*, Twitch enables gamers to convert their personal gameplay into public spectacles, becoming digital broadcasters and entrepreneurs in the process. Yet this also requires extensive affective labor, as Woodcock and Johnson (2019) found the need for streamer-viewer interaction is vital to cultivate engaged communities in real-time. And in turn, moderating chats and carefully curating content is paramount for both streamers and their fans who volunteer time and resources to create these relationships and communities.

Situated against this backdrop, Twitch must craft content policies that allow streamers' creativity to flourish while respecting intellectual property rights. Copyright and media scholar Siva Vaidyanathan (2017) underscores the complexities of intellectual property (IP) law, stating that overzealous copyright enforcement by platforms could stifle the vibrant remix culture that

users cultivate for themselves. This remix culture that Vaidhyanatahan addresses is one of the major aspects that makes game live streaming innovative. However, the lack of oversight that these platforms have on users utilizing copyrighted content improperly opens up any opportunity of abuse in copyright infringement. Thus, platforms like Twitch face an intricate balancing act in interpreting evolving regulations like the DMCA amidst rapidly changing streaming labor practices and community norms. This thesis aims to break down these tensions and examine how Twitch's content moderation policies reflect – or conflict with – the lived experiences of its diverse community of streamers.

The explosion of user-generated content has profoundly shaped the digital landscape, as Kate Eichhorn (2022) critically analyzed in her book *Content*. Eichhorn notes that because of how content creation has become more of a democratized process, in part to these platforms, it has enabled new voices and communities to emerge. This is a stark difference from the white geek technocultures that we see in Reddit, as Massanari (2017) presented. Yet, content creation has given rise to troubling trends like clickbait content farms and the deterioration of quality journalism by legacy media outlets due to the rise of social media platforms and other involved actors.

Moreover, as Whitney Phillips and Ryan Milner (2017) claimed, online identity expression through memes and hashtags is a double-edged sword – uniting some communities yet dividing or harassing others. These complexities permeate live streaming spaces like Twitch. Streamers rely on crafting engaging, personalized content to attract devoted communities tied together through shared identities and humor. Twitch must maintain policies that empower streamers while minimizing risks, a precarious balancing act given the ever-evolving nature of participatory cultures, noted by Jenkins (2006). My analysis aims to unravel these tensions,

probing how regulations like the DMCA shape Twitch's oversight of content as both an economic product and a social process tying creators and audiences together through playful exchanges, debate, and shared narratives.

Methodology and Chapter Overviews

This thesis will utilize two main research methods: historiography and a critical policy and textual analysis. The first method, historiography, serves to provide a holistic overview of the DMCA, intellectual property, and copyright. Given that the DMCA has been in existence for over twenty-five years, it has witnessed numerous encounters with the live streaming industry's handling and interpretation of the DMCA for their own practices and procedures. This method will enable a thorough understanding of Justin.tv and Twitch's systems and guidelines. It will also explore whether the DMCA has led to a strengthening of copyright protections, suggesting an increasingly stringent application of the DMCA to platforms like Twitch.

Following the historiography of the DMCA is the critical policy and textual analysis. I plan to systematically examine Twitch's community guidelines over time as they relate to copyright and compare against DMCA provisions. This part of the study will incorporate Twitch's DMCA guidelines, public statements by Twitch representatives regarding their approach to copyright, and case studies of streamers who have publicly shared their experiences with moderation. The triangulation of these sources is expected to reveal points of alignment, tension, and evolution in relation to the research question.

This thesis will be structured into four main chapters, each addressing a different aspect. Chapter 1 will provide historical background on copyright law before the DMCA, the DMCA itself under the political and cultural landscape that motivated its development, and an exploration of the DMCA's key provisions around copyright protections and safe harbor.

Chapter 2 will focus on the development of content moderation systems on social media platforms, the history of Twitch.tv's predecessor, Justin.tv, and its involvement in any controversies surrounding copyright. Chapter 3 will detail the rise of live streaming with the establishment of Twitch.tv, specifically tracking copyright enforcement practices that were like Justin.tv. Chapter 3 will also critically analyze Twitch's DMCA guidelines that were in effect during the 2020 strikes, determining any strengths, weaknesses, and disparities. In Chapter 4, the thesis goes on to analyze the multiple revisions of Twitch's DMCA guidelines following 2020. Chapter 4 also explores the case studies of two streamers, Leslie 'fuslie' Fu and Zack, or 'Asmongold', who were publicly vocal about their experiences on Twitch and copyright.

The thesis will conclude with a synthesis of the findings, arguing that while the DMCA aims to balance the interests of various stakeholders, ambiguities in the law tend to privilege platforms, often leaving creators vulnerable to overly punitive enforcement. The conclusion also addresses some of the streamer practices that Twitch creators perform to avoid involvement from Twitch and copyright holders for infringement. In turn, I call for a series of policy recommendations that better empower and protect the dynamic and participatory nature of contemporary digital cultures, with particular focus on content creators and their fans. The thesis thus seeks to contribute to a deeper understanding of the complex interplay between copyright law, platform policies, and the lived experiences of content creators in the rapidly evolving landscape of live streaming.

Chapter 1: Jeff Bezo's Ignorance to Copyright Is Nothing New

Let's set the stage: it is the summer of 2020. Amid a world grappling with the COVID-19 pandemic and a heightened focus on social justice following George Floyd's murder with mass protests throughout the world, something unfolded within the U.S. government that underscored the complex interplay between technology, copyright law, and corporate governance. On July 29, 2020, the House Judiciary Committee convened a hearing with CEOs of major tech companies. A seemingly minor exchange between Rep. Kelly Armstrong (R-North Dakota) and Amazon CEO Jeff Bezos highlighted a significant issue: copyright and licensing (Levine, 2020; *On Twitch and DMCA*, 2020). Armstrong's inquiry into Twitch's compliance with the Digital Millennium Copyright Act (DMCA), following a wave of copyright strikes against creators for using copyrighted music without proper rights usage, illuminated not only the challenges of copyright enforcement on digital platforms but also the apparent disconnect between corporate leadership and how these platforms operate daily:

“Armstrong: Music can be used to drive revenue... News reports have indicated that Twitch users are receiving notice and takedown requests pursuant to the Digital Millennium Copyright Act. My understanding is that Twitch allows users to stream music but does not license the music. Is that correct?”

Bezos: I'm going to have to ask that I could get back to your office with an answer to that question. I don't know.”

- Transcript from *Heads of Facebook, Amazon, Apple & Google Testify on Antitrust Law* hearing by the House Judiciary Committee (July 29, 2020)

Bezos' inability to provide a definitive response to Armstrong's question reveals a broader issue within the digital economy: the complexities of copyright law enforcement in an era where live streaming and digital entertainment have become ubiquitous. Live streaming and digital entertainment have become synonymous through the names of platforms in which people consume their content daily. Platforms like Twitch, YouTube, and Kick, bolstered by the

burgeoning industry of professional e-sports teams and major video game companies, find themselves at the center of copyright disputes that assess the boundaries of existing legal frameworks.

But this comment by Bezos is nothing new. Copyright itself is complicated, messy, and downright uncertain. People don't exactly know much about copyright, let alone the DMCA. This chapter aims to delve into the historiography of the relevant events and history around copyright, with a particular focus on the DMCA, to understand how historical and systemic conditions have led to the current precarious situation for content creators on platforms such as Twitch. I argue that a confluence of factors, including a general lack of public awareness about copyright laws, the protective measures extended to burgeoning tech companies, and the pivotal role of judicial decisions in copyright cases, necessitated the implementation of the DMCA. However, the legislation's ambiguous provisions and stringent enforcement mechanisms have often resulted in unintended consequences for users, leading to repeated instances of copyright infringement. Through an exploration of the DMCA's legislative history, its impact on digital content creation and distribution, and the ongoing challenges faced by platforms and creators alike, this chapter seeks to provide a comprehensive understanding of copyright law's evolution in the digital age, specifically in relation to Twitch.

The Relevant History of Copyright prior to the DMCA

According to the U.S. Copyright Office, copyright is a type of intellectual property law that aims to protect *original* published and unpublished works from being used improperly without credit (*What Is Copyright?*, n.d.). Media studies and copyright scholar Siva Vaidhyathan elaborated that “copyright is the exclusive right to copy” (2017, p. 19). In other words, the creator should theoretically be the one to determine what happens to their work. At its

core, copyright's intent is to function as a check and balance between creators and audiences not solely for the creation of original content, but for reproduction, selling of original work, public performances, and more (Vaidhyanathan, 2001, pp. 20-21). However, the existence and implementation of copyright has been debated for centuries prior, as seen in conversations between the founding fathers, ranging from the protection of authors and scientists' work to including copyright law within the U.S. Constitution (Vaidhyanathan, 2001, pp. 23-24).

Prior to the Digital Millennium Copyright Act (DMCA), copyright law was constantly changing and being discussed. The first origins of copyright can be traced back all the way to 1709 with the Statute of Anne in Great Britain. Designed to mediate the tensions between authors, publishers, and the public, this first legal attempt to regulate the use of printed works acknowledged the proprietary rights of authors while promoting the dissemination of knowledge (Kaplan, 1967). By granting publishers exclusive rights for a limited period—initially 14 years with the possibility of renewal for another fourteen if the author was still alive—it struck a balance between incentivizing creative endeavors and ensuring public access to literary works (Bently and Sherman, 2018; Deazley, 2004). This legislation not only protected the interests of authors and publishers but also laid the foundation for the copyright concept of a fixed term, after which works would enter the public domain. In 1790, the United States saw its first copyright act passed by Congress, which was heavily modeled off the Statute of Anne, and only enhanced the exclusive rights of authors that were protected under Article I, Section 8 of the U.S. Constitution (*The 18th Century*, n.d.).

In turn, the Statute of Anne laid the beginning foundations of copyright law by resonating in contemporary copyright laws, emphasizing its enduring influence on the legal frameworks that govern intellectual property rights even today. Throughout the 19th century, the United States

amended the 1790 act multiple times, and the Supreme Court ruled in 1834 that authors have limited rights after publishing their works in *Wheaton v. Peters* (1900-1950, n.d.). The 20th century contained mixed results on how copyright should be implemented and reinforced as technology continued to evolve at a rapid rate, such as the introduction of motion pictures, increased use of the radio and telegraph, and advancements in printing and publishing.

The Copyright Act of 1909 marked a pivotal response to these challenges, emphasizing publication as the criterion for copyright protection—a significant departure from previous legislation that prioritized the act of creation. Legal scholars Jessica Littman (1987) and Robert Gorman (1978) hinted at this melting pot of policy stances due to the constant balancing and negotiating of interests from creators, publishing companies, politicians, and other relevant parties (Littman, p. 861). Seventy years later, the 1976 Copyright Act further refined the legal landscape, simplifying copyright law to better protect creators across all aspects of their work's lifecycle, including creation, display, sale, and reproduction, while accommodating modern technologies (Gorman, 1977, pp. 882-883). This act introduced the legal codification of “fair use,” a doctrine allowing the use of copyrighted content under specific conditions—commercial or non-profit educational reasons, amount and substantiality, the nature of the copyrighted content, and its potential market value effect—thus establishing a legal framework that aligns with modern practices of copyright enforcement (1950-2000, n.d.; Vaidhyathan, 2001 pp. 79-80).

The enactment of the 1976 law underscored the balance between protecting copyright holders' rights and fostering an environment conducive to creative freedom and expression, granting judges the discretion to make equitable decisions in copyright disputes, thereby setting a precedent for fair and reasonable copyright practices. What is even more important to note is the

United States' common-law tradition plays a crucial role in shaping copyright law, where judicial decisions often carry the weight of legislation. This judicial approach allows for the adaptation of legal principles to contemporary challenges, including those arising in the realm of copyright like in *Wheaton*. A notable application of this principle is the creation of equitable exceptions, where copyright law is deemed inapplicable under certain circumstances, reflecting the legal system's flexibility in addressing unique cases (Sag, 2012, pp. 84-86). In other words, judges had full discretion surrounding any copyright cases.

Following the principles established by common law, the Supreme Court continued to play a pivotal role in adapting copyright law to the evolving landscape of technology and media. One landmark decision that exemplifies this adaptability is *Sony Corp. of America v. Universal City Studios, Inc.* (1984), commonly referred to as the “Betamax case.” This case confronted the issue of whether the use of Betamax recorders by consumers to record television broadcasts for later viewing constituted an infringement of copyright (*Sony Corporation of America v. Universal City Studios, Inc.*, n.d.). In a 5-4 majority decision, the Supreme Court underscored the doctrine of fair use in a technological context, ruling that making individual recordings of copyrighted television shows for personal use fell within the bounds of fair use. Justice John Paul Stevens wrote:

“[t]he sale of the VTR's to the general public does not constitute contributory infringement of [Universal's] copyrights ... [t]he sale of copying equipment...does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial noninfringing uses.”

- Majority opinion in *Sony Corp. of America v. Universal City Studios, Inc.* (January 17, 1984)

This judgment set a key precedent by affirming the legality of modern technologies that allow individuals to interact with copyrighted content in non-commercial, private settings. By

doing so, the Court recognized the importance of balancing copyright holders' rights with the public's interest in accessing and engaging with cultural works. Moreover, *Sony* highlighted the necessity for copyright law to accommodate technological advancements that facilitate the public's ability to record, use, and enjoy copyrighted material in ways not previously possible. The implications extend beyond the realm of private copying to influence broader discussions on copyright law's interaction with digital technologies. It paved the way for later debates and rulings concerning digital copying, and the internet and (eventually) streaming services, emphasizing the need for a copyright system that supports both the protection of creators' rights and the promotion of innovation and public access to creative works. As such, the *Sony* case remains a cornerstone in the narrative of copyright law, illustrating the ongoing negotiation between copyright protection and technological progress—a theme that continues to resonate in the digital era.

Another major court ruling on copyright that highlights the tradition of common law was *Campbell v. Acuff-Rose Music (1994)*. A Black rap group, 2 Live Crew, made a commercial parody song titled “Pretty Woman”, based off Roy Orbison’s “Oh, Pretty Woman (*Campbell v. Acuff-Rose Music, Inc.*, n.d.).” Orbison’s record label, Acuff-Rose Music, Inc., sued the rap group for infringing upon the copyright of Orbison’s song. Despite the Sixth Circuit Court of Appeals decision to decry parodies as unfair, 2 Live Crew appealed to the Supreme Court, where all nine judges unanimously sided with the rap group by determining that parodying was not the same as copying. Led in an opinion by Justice David H. Souter, the “Pretty Woman” parody qualified as fair use under the 1976 act. Copyright scholar Gary Myers (1996) further noted that the Court saw parodies as a vehicle for social commentary, going all the way back to English precedent with the Statue of Anne and clauses in the U.S. Constitution pertaining to copyright

and patents (p. 186). Parodies, as a result, do not hurt the market or are not intentionally made for profits, per the Copyright Act of 1976 (Myers, 1996, pp. 188-189).

Not only did the Supreme Court maintain judges' discretion in determining cases surrounding copyright, but it furthered the tradition of common law as an institutional practice by the courts (Babiskin, 1994, p. 222). In the world of Twitch (and YouTube) today, content creation that is deemed humorous or satirical by fans and critics is a byproduct of fair use from the *Campbell* decision. Additionally, the other main takeaway from *Campbell* is the idea of transformative use and value, as legal analyst Roxana Badin (1995) called the case "copyright law's entry into the postmodern era" (p. 1653). Four years prior to *Campbell*, copyright law scholar Pierre Leval (1990) created the theory of transformative fair use, defined as any use of a work that is used for different purposes beyond its original conception and meaning (p. 1111). Leval's concept was the basis of Souter's opinion, which has now facilitated a more expansive interpretation of copyright law, encouraging the creation of new, original works that contribute to public culture and dialogue. (1994, pp. 22, 25-26). With Leval and others deeming *Campbell* a major win for copyright, the decision paved the way for all creators to make new, original creative works to further public culture (Courtney, Searle, and Roche). In tandem with the Internet and the rise of big tech companies, *Campbell* allowed for creators to have some security in their works being protected under federal law and court rulings.

To this point, the *Sony* and *Campbell* rulings have not only reshaped copyright law's theoretical framework but have also profoundly influenced its application in the contemporary digital realm. Platforms like Twitch and YouTube vividly illustrate the thriving ecosystem of parody and transformative content, underscoring the critical balance between copyright enforcement and creative freedom. This balance ensures that creators' digital contributions can

harmoniously coexist with copyright protections, highlighting the essential role of fair use in today's digital era. The evolution of copyright law, necessitated by technological advancements and the changing landscape of cultural production has continued to trend in the direction of constantly amending and updating previous existing legislation to adapt to modern technologies and exceptional cases.

This journey through copyright law's historical evolution, from the Statute of Anne to pivotal court decisions, underscores a trajectory defined by continuous adaptation to the interplay of technology, culture, and legality. This narrative arc brings us to the threshold of understanding the history prior to the Digital Millennium Copyright Act (DMCA)'s creation. As the next section explores the DMCA's historical development from 1993 to 1998, it is crucial to consider the backdrop against which this legislation was crafted. The forthcoming section delves into a detailed policy analysis of the DMCA's creation, emphasizing the dialogue between copyright protection and the need to foster innovation and cultural exchange. Through insights from lawmakers, tech industry leaders, and the public discourse surrounding the DMCA's formulation and enactment, we'll explore how this legislation sought to address the challenges and opportunities presented by the burgeoning digital age.

Speaking of Internet and Big Tech, Enter the DMCA

In the mid-1990s, as the Internet began to reshape the fabric of global communication, the U.S. government recognized the urgent need to adapt copyright law to the realities of the digital age. Following President Clinton's inauguration in 1993, the administration prioritized the development of a National Information Infrastructure to harness the burgeoning potential of the Internet and other digital infrastructures (Perritt Jr., 1993). This led to the creation of a task force aimed at evaluating the impact of digital technologies under U.S. copyright law. By September

1995, after extensive research, public comment, and hearings—coupled with the judiciary's affirmation of artists' rights in cases like *Campbell*—Assistant Secretary of Commerce and Commissioner of Trademarks and Patents Bruce Lehman, who chaired this task force, released a white paper (*Primer on the Digital Millennium*, n.d.). This document underscored the necessity of updating copyright law to address the challenges posed by digital technologies, recommending significant expansions of copyright owners' rights, and introducing measures to protect copyrighted content online. Some of these recommendations included: expanding copyright owners' rights to include transmission; allowing libraries to make three copies, either digital or facsimile; restrictions on any product or service that aims to infringe on copyright owners' rights, and new rules to help those who are blind (*Primer on the Digital Millennium*, n.d.).

Immediate reaction to Brown and Lehman's paper was heavily mixed. However, Senators Patrick Leahy (D-VT) and former Senator Orrin Hatch (R-UT) introduced these recommendations as the NII Copyright Protection Act of 1995 as a bipartisan attempt to keep the U.S. ahead in the technology industry while also promoting protection of intellectual property (*Statements on Introduced Bills*, 1995). Though the act did not move further than introduction in both chambers, it was a significant move by U.S. officials to take copyright, and in turn, big tech, seriously:

“Protecting the property rights of the owners of intellectual property not only induces them to make their products available, it also encourages the creation of new products. Our copyright laws are based on the conviction that creativity increases when authors can reap benefits of their creative activity ... The fully commercial information superhighway is not yet here, and we must resign ourselves to a period of experimentation. We want to be on the cutting edge, not the bleeding edge of new technology...”

- Sen. Hatch on the NII Copyright Protection Act of 1995 (*Congressional Record*, September 28, 1995)

Hatch's uncertainty was also balanced in optimism, as trying to be at the forefront of the technology industry also meant taking risks to be the global leader and protecting creators.

Leahy's testimony, on the other hand, was more hopeful than Hatch's speech, yet had more urgency regarding the buildup of the nation's information infrastructure:

“Computer networks will increasingly become the means of transmitting copyrighted works in the years ahead. This presents great opportunities but also poses significant risks to authors and our copyright industries. I believe that we can legislate in ways that promote the use of the Internet, both by content providers and users... The future growth of computer networks like the Internet and of digital, electronic communications requires it.”

- Sen. Leahy on the NII Copyright Protection Act of 1995 (*Congressional Record*, September 28, 1995)

Outside of the United States, the World Intellectual Property Organization (WIPO) was trying to make its own inroads into contributing to the protection of creators in all industries. Created in 1967 by the United Nations, WIPO was made as a specialized agency to protect and promote intellectual property internationally. In December 1996, over a year after Lehman's white paper was released, a conference was held in Geneva, Switzerland, where diplomats from across the globe debated three treaties regarding copyright in digital spaces, protections for performers and phonograms, and database protection in Europe and the United States. The first two of the three treaties were adopted: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

The WCT, an evolution of the foundational principles established by the Berne Convention (1988), specifically addresses the challenges and opportunities presented by digital technology to authors' rights. It extends copyright protection to encompass not only traditional mediums but also computer programs and databases, marking a significant adaptation of copyright law to the digital age. This treaty reaffirms the rights related to distribution and

communication to the public in a digital context, recognizing the transformed nature of content creation, dissemination, and consumption with new technologies. The WCT's emphasis on providing authors with rights to control and benefit from their works in the digital environment underscores the need for copyright laws that are both robust and flexible, allowing for the protection of creators while fostering innovation and access to digital content (*Summary of the WIPO Copyright Treaty*, n.d.).

Conversely, the WPPT focuses on the rights of performers and phonogram producers, highlighting not only economic rights but also the introduction of moral rights in contexts such as broadcasting and fixation. This broadening of protections under the WPPT is pivotal for ensuring that performers and producers are adequately safeguarded in the digital landscape. The treaty's provisions on moral rights resonate with the principles of transformative fair use and the acknowledgment of creators' and performers' rights as highlighted in landmark decisions like *Campbell*. By establishing a framework that protects the interests of performers and phonogram producers, the WPPT contributes to a balanced copyright system that respects the rights of all stakeholders in the digital age (*Summary of the WIPO Performances*, n.d.).

Following the Geneva conference, Congress focused on copyright as one of the main policy issues. Over the course of 1997 and 1998, committee hearings and floor debates centered around online service providers and prevention of circumventing any protections of copyright owners. It became certain that the two WIPO treaties would be part of a new copyright law, named the Digital Millennium Copyright Act. Beyond combining the WCT and WPPT into the DMCA, there were two key provisions that were integrated into the DMCA's language to bolster the modernization of copyright law for the digital era:

- 1. Anti-Circumvention Measures:** The anti-circumvention measures under Section 1201 of the DMCA address the growing concern of copyright infringement facilitated by the circumvention of technological protection measures (TPMs) (*Section 1201 / U.S. Copyright Office*, n.d.). These measures were revolutionary at the time of the DMCA's enactment, foreseeing the digital age's complexities. They are not merely legal barriers but essential tools that enable copyright owners to enforce their rights in a landscape where digital content can be easily accessed, copied, and distributed. The provision's significance lies in its attempt to protect the integrity of digital copyrights, ensuring creators and rights holders can benefit from their works in the digital marketplace. However, this provision has sparked debates on its implications for fair use, research, and innovation, leading to calls for reform to balance copyright protection with the public's right to access and use copyrighted materials for legitimate purposes.
- 2. Safe Harbor Provisions:** Under Title 17 in the DMCA, Section 512's safe harbor provisions represent a pivotal aspect of the DMCA, acknowledging the role of online service providers (OSPs) in the digital ecosystem (*Section 512 of Title 17*, n.d.). The main purpose of Section 512 is to take everything out of court regarding complaints about copyright infringement, where the service provider becomes judge, jury, and executioner after notifications and counter-notifications are filed, as filing suits are expensive and require time, energy, and resources. The operational guidelines, including responding to notices of alleged infringement and terminating repeat infringers' accounts, aim to create a balanced approach that respects copyright holders' rights while recognizing the

technical and practical challenges OSPs face in monitoring and regulating online content. Through this, copyright is defended and enforced by the OSP without facing a judge.

The DMCA's alignment with the principles of the WCT and WPPT underscores the United States' commitment to harmonizing its copyright law with international standards. This alignment reflects a global consensus on the need to adapt copyright protections to the digital age's demands, ensuring that copyright law remains relevant and effective in promoting creativity, innovation, and access to digital content across borders (Goldstein, 2003). The ongoing debates surrounding the DMCA's provisions, particularly those related to anti-circumvention, safe harbor, and exceptions for educational and research purposes, highlight the complex challenges of balancing copyright protection with the need for digital innovation and access in a rapidly evolving technological landscape.

Amid creating the DMCA, multiple parties outside of Capitol Hill appeared to have mixed reactions to any legislation involving copyright law. There was active participation from various groups, ranging from libraries to the growing tech industry, each bringing forward their perspectives on how copyright law should evolve to address the realities of the Internet age. Robin Frost, a *Wall Street Journal* staff reporter, wrote about David Johnson's quest to determine how the Internet should be governed (1996). Johnson, then co-founder and co-director of the Cyberspace Law Institute noted that countries and local authorities can only do so much, so being cognizant of the Internet's abilities is important for Congress to figure out:

“Take the Net seriously as a separate place. 'Then you can ask yourself: To what degree should this local authority be able to impose a burden which actually interferes with the natural, valuable and nonpredatory operation of that place?’”

Johnson's words rang true, as copyright sparked huge debate within Congress for years without any significant movement. Though introducing the first big proposal and update to U.S. copyright law with the NII Copyright Protection Act of 1995, there was concern from former Senator Hatch regarding Lehman's task force recommendations (1996). Specifically, the idea of making legislation based off international treaties did not resonate with members of Congress. In the letter, Hatch made clear that bipartisan support was rocky, to say the least:

“American interests will be best served if we can get domestic legislation and international agreements that work together for the protection of American interests. We should avoid an international scene governed by treaties negotiated but not adopted by the United States and which are inconsistent with U.S. domestic law... I urge you to consider the effect that the lack of domestic consensus on certain important issues may have on their ratification.”

- Letter from Hatch to Asst. Secretary Bruce Lehman (September 3, 1996)

Others also questioned how far-reaching the DMCA could go to rein in the Internet and other aspects of public life, such as libraries (Harvey, 1997). Adam Eisgrau, former legislative counsel for the American Library Association, asserted that because of these pushes for change in U.S. copyright law would have drastic ramifications for library access:

“What constitutes intellectual property? How inviolate should the protection afforded intellectual property be for the private sector and -- critically -- for public access to information through schools and libraries ... The Founding Fathers put the power to grant copyrights in the Constitution for a much broader purpose: 'promote progress in science and the useful arts.' ... This is easy to state and hard to do in copyright law.”

- Eisgrau on IP in practice, *Wall Street Journal* (February 7, 1997)

However, the tides quickly began to change as everyone wanted Congress to pass some sort of change with copyright law before its session ended. At the time, Internet service providers (ISPs) and telephone companies saw the potential responsibility and blame of copyright infringement shift to them (Ritter, 1997a). On the other hand, the movie and music industry saw that current laws at the time were able to withstand any sort of issues with copyright, even as the

potential loss of \$20 billion per year due to piracy was a significant risk (Ritter, 1997a).

However, the music and recording industries, along with software companies, heavily supported the two WIPO treaties that were adopted by diplomats but were not ratified by Congress (Ritter, 1997b; Ho, 1998).

The culmination of the Digital Millennium Copyright Act (DMCA) in October 1998, amid the tumult of the Clinton-Lewinsky scandal and extensive legislative debates, marked a pivotal moment in copyright law's adaptation to the digital age. Amidst a complex backdrop of political scandal and intense legislative negotiation, the DMCA emerged as a crucial response to the digital era's challenges, embodying the collective effort to strike a balance between protecting intellectual property and fostering digital freedom. By integrating the WCT and WPPT's principles, the DMCA endeavored to align U.S. copyright standards with the global digital landscape, signaling a commitment to evolving copyright law alongside technological advancements.

In the last section of Chapter 1, my focus shifts to assessing the DMCA's impact—both immediate and enduring—on digital rights management, fair use, and copyright delineation. This analysis seeks to illuminate the nuanced effects of the DMCA, exploring its role in shaping the digital domain's legal and creative contours. By examining the law's reception and its adaptability to the digital age's complexities, we gain insights into the ongoing discourse on copyright's future trajectory and its capacity to harmonize the diverse needs of creators, consumers, and intermediaries in a rapidly evolving digital world.

The DMCA was Supposed to Solve Everything, but the Music Industry Played Spoiler

So far, the history surrounding the Digital Millennium Copyright Act (DMCA) of 1998 and its implications for copyright law, digital content creation, and sharing is both rich and

multifaceted. At the heart of this discussion is the assertion that copyright has been instrumental in safeguarding creators' rights and facilitating the expression of identity through various mediums. The enactment of the DMCA, marked by years of concerted efforts, positioned U.S. copyright law on a competitive global stage, aligning it closely with international standards. This legislative milestone, coupled with the United States' common law tradition of recognizing copyright and transformative fair use as delineated in *Campbell*, suggested a robust framework capable of withstanding the challenges posed by the digital era's rapid evolution. However, the assumption that copyright issues had been effectively addressed was quickly challenged, specifically by music record labels.

Weeks after the DMCA was signed, *New York Times* writer Rachel Lehmann-Haupt briefly addressed the law's impact regarding the music industry and online radio:

“But personalized programming has made many record labels and the Recording Industry Association of America worry that Web radio will threaten CD sales. The Digital Millennium Copyright Act, which was recently signed into law, further secures copyright protection on line. While all Web radio stations are required to pay fees to artists through ASCAP (American Society of Composers, Authors, and Publishers) and BMI (Broadcast Music, Inc.), this new legislation will force Web radio stations to pay a licensing fee to record labels as well.”

- Lehmann-Haupt on the MP3's impact on the music industry (November 5, 1998)

Lehmann-Haupt's critique following the DMCA's signing revealed the initial concerns from the music industry about big tech, setting the stage for a deeper exploration of the DMCA's consequences on digital content sharing and copyright enforcement. By highlighting the apprehensions that web radio's personalized programming might undercut CD sales, a fear exacerbated by the DMCA's reinforcement of copyright protections online. Though, ASCAP's president, Marilyn Bergman, wrote a letter explaining the net positive of these “unlimited web jukeboxes” and that music is about “the information, not the plastic (1998).”

However, a prime example of the rapid change coming to ahead is the merging of Polygram Records to be under Universal Music Group (UMG) to become the biggest music records company at the time to combat the downloads of free legal and bootlegged songs off the Internet, such as MP3.com (Strauss, 1998). One of UMG's artists, Chuck D from rap group Public Enemy, released a song on the site but was forced to take it down because "the execs, lawyers and accountants who lately have made most of the money in the music biz are now running scared from the technology that evens out the creative field (Strauss, 1998)." In the courts, famous composer Andrew Lloyd Webber had to testify in a copyright suit that he did not steal any parts of Ray Repp's song to create the central theme and score for "Phantom of the Opera (McKinley, 1998)."

These two cases showed a small, but significant part of how copyright has blurred the lines of protecting ownership and freedom of public access and use of music. As a result, most of 1999 involved the music industry trying to continue building off the DMCA while responding to threats of piracy. Sony proposed a method of creating two systems that would protect music files from being downloaded illegally or through MP3 files (Markoff, 1999). Despite this, multiple musicians like Chuck D were already uploading their own music onto the Internet, knowing their rights surrounding performances due to the DMCA and *Campbell*. And because MP3 files were deemed as a legal format for any information, tracking the proper buying and usage of these files proved to be the biggest challenge (Kushner, 1999).

This tension between the DMCA's legislative intentions and the music industry's apprehensions sets the stage for a deeper exploration of the Act's implications, guided by the insights of leading scholars. Vaidhyanathan (2017) posits that intellectual property (IP) transcends legal protection, serving as a pivotal mechanism for controlling and commercializing

knowledge and data across diverse sectors. This perspective is essential for understanding the DMCA's wide-reaching impact, suggesting that the Act's influence extends well beyond the music industry, affecting big tech, medicine, and the intricate web of corporate branding and identity through trademarks and domain names.

Moreover, Aram Sinnreich (2019) delves into the historical and political underpinnings of copyright laws, emphasizing the critical role of political processes and negotiations in shaping these legal frameworks. The battle over copyright infringement, Sinnreich notes, has expanded into digital realms, challenging traditional enforcement methods, and necessitating a harmonization that benefits both creators and users globally. The concept of copyleft, introduced in the context of the General Public License (GPL), emerges as a counterpoint to conventional copyright paradigms, advocating for open access and the sharing of creative works. This alternative approach ignites a significant debate within the IP community, highlighting a fundamental shift towards more inclusive and accessible copyright frameworks.

The narrative becomes even richer with the contributions of Lessig (2003) and Boyle (2008), who offer critical examinations of the DMCA's impact on creativity and innovation. Lessig's dissection of the copyright landscape reveals the ambiguous nature of copyright infringement and critiques the disproportionate influence of media conglomerates on copyright legislation. Boyle's analysis extends this critique, arguing that current IP policies, driven by fear and misunderstanding, severely restrict cultural, educational, and innovative growth. Both scholars underscore the urgent need for copyright law to evolve, fostering an environment that supports creativity and innovation while respecting creators' rights.

Overall, it is quite clear that the DMCA laid a foundational framework for copyright in the digital era, its rigid application often clashed with the realities of technological innovation

and cultural shifts. The music industry's initial reactions to the DMCA underscored a broader tension between copyright enforcement and the burgeoning digital landscape, a tension that was not unique to music but extended to other domains such as video games and online platforms. However, the DMCA continued to be amended over the years with its anti-circumvention exemptions, as mentioned earlier. According to the DMCA, the Librarian of Congress determines which exemption proposals are issued, though they must be resubmitted for approval once expired after three years.

There are four key exemptions that are relevant to this discourse surrounding the DMCA Twitch, and video games to a lesser extent. The first exemption was one for video games in 2015 (and was later reemphasized in 2018), which was a significant development for fans and video game archivists (Hall, 2018). This exemption allowed for the modification of video games for personal use, particularly in cases where the original servers are no longer available (Orphanides, 2015). For video game preservationists and gamers who wish to keep playing older games no longer supported by their publishers, this exemption provided a much-needed legal safeguard, which underscored the recognition of video games as cultural artifacts worth preserving. Regarding Twitch, which did not exist until 2006 (as Justin.tv), this exemption has implications for streamers who display retro games, ensuring they can legally share and comment on older titles with their audience, such as Twitch Plays Pokemon. This connection between preserving gaming history and enabling content creators to engage with these games on modern platforms further reflects the need to critically balance copyright protection and cultural preservation.

Kendra Albert, a former legal intern with the Electronic Frontier Foundation (EFF), was one of the main parties who argued for this video game exception deemed this exemption not just “a major victory,” but was frustrated that this rule only applied to local and personal use of

consoles and computers, as well as libraries, archives, and museums. However, online multiplayer was not able to be part of this exemption due to insufficient evidence that this was harmful:

“The decision to exclude multiplayer play from the exemption cannot have been motivated by a lack of evidence that multiplayer shutdowns harm communities and consumers. The Register could find that the countervailing harms of illegal copying based upon circumvention are too great. (I would, of course, disagree.) But not granting the exemption because game enthusiasts might possibly violate a different part of the statute, without informing proponents that they bore the burden of proving non-violation of that provision, is unacceptable... That eliminates much of the legal clarity that the exemptions are meant to provide.”

- Albert on the 2015 exemption ruling (November 13, 2015)

Two other exemptions in 2015, one for computer programs operating on wireless devices and one for smartphones and tablets, indirectly impact platforms like Twitch by facilitating broader access to the platform through various devices. The 2015 DMCA exemptions for computer programs operating wireless devices and enabling smartphones and tablets to run legally obtained applications have significantly impacted digital platforms like Twitch by broadening access and empowering content creators (O’Kane, 2015). These exemptions underscore the critical need for seamless connectivity and interoperability across devices, facilitating the creation and consumption of content without legal hindrances. For Twitch streamers and their audiences, this means being able to use a wider array of devices and applications to produce and engage with content, ensuring that creativity is not limited by technological or legal barriers. Particularly beneficial for the music industry and gaming communities, these exemptions reflect a progressive step towards accommodating the digital ecosystem's evolving nature, promoting innovation and flexibility in how content is created and shared. By supporting the use of preferred tools and applications, these legal adaptations

recognize the dynamic processes inherent in digital content creation and the importance of legal frameworks that embrace technological advancements.

Lastly, an exemption in 2018 regarding the use of motion pictures for criticism or comment directly impacts content creators on platforms like Twitch and YouTube, who use film clips within their streams or videos for review, commentary, or educational purposes - all of which may or may not contain copyrighted music (Stoltz, 2018). It allows content creators to legally use short clips for purposes of criticism or commentary, facilitating a rich culture of review and discussion that benefits both creators and audiences. For Twitch streamers who discuss or critique music videos, documentaries, or concert footage, this exemption provides a legal foundation for their content, bridging the gap between copyright protection and the transformative use of copyrighted materials for commentary and education.

These exemptions, all established within the last decade, illustrate the complex interplay between protecting copyright holders' rights and accommodating the digital era's demands. For Twitch, the music industry, and video games, these legal adjustments signal a recognition of the changing landscape of content creation, distribution, and consumption. They highlight the necessity for copyright law to adapt, ensuring it supports a diverse array of interests in a globally connected, digital world. This narrative flow from scholarly analysis to specific DMCA exemptions underlines the nuanced relationship between law, technology, and creative expression, emphasizing the need for a balanced approach that fosters both protection and creativity.

If that is the DMCA, where does Twitch fit?

Chapter 1 illustrated the intricate journey through the development and challenges of copyright law in the context of digital platforms like Twitch. This exploration, framed by the

historical evolution of copyright law and the enactment of the Digital Millennium Copyright Act (DMCA), underlines the critical intersections of technology, policy, and creative expression. The subsequent amendments and exemptions to the DMCA, particularly those relevant to the music industry, video games, and platforms like Twitch, highlight the ongoing effort to adapt copyright protections to the realities of the digital age.

Considering these developments, the DMCA's role in shaping the digital landscape—where technology constantly evolves, and new forms of content emerge—underscores the importance of a dynamic legal framework that balances copyright protection with the need for innovation and accessibility. The exemptions specifically tailored for the digital era, such as those allowing for the modification of video games, the interoperability of applications across devices, and the use of copyrighted material for criticism or commentary, demonstrate a nuanced understanding of copyright law's role in supporting a diverse array of interests in a globally connected world. Furthermore, these legal frameworks' evolution reflects a broader dialogue about copyright's place in digital culture, emphasizing the need for policies that recognize the transformative potential of technology and the importance of access to creative content.

In Chapter 2, the lessons learned from the DMCA's history and its impact on the music industry, video games, and digital platforms set up the history on how content moderation systems were developed. Moreover, the chapter traces the history of Twitch.tv's predecessor, also known as Justin.tv, its early battles with copyright and piracy, and the impact those legal challenges had on the platform. Through this analysis, it will help explain processes behind the filtering of content and the translation from legislation to in-house policy practices on Twitch, situating them within the larger narrative of digital platform evolution and the dynamic interplay between copyright law and online content creation.

Chapter 2: Have We Learned Nothing from Justin.tv's Past?

Despite the nearly 2,000 DMCA notices that were sent to Twitch and its creators back in June 2020, creators had to simply suck it up and continue going on with life. As beloved creator Leslie 'fuslie' Fu stated when she received her two DMCA strikes from the platform:

“Have talked with multiple @Twitch staff all telling me my best option is to delete all of my clips ever. On top of it being near impossible for me to delete >100,000 clips, the creator dashboard isn't loading any of my old clips. How am I supposed to protect myself here? I'm willing to do anything to keep my channel, even if it means deleting all my clips and memories from the past years. I feel so helpless right now. I've built this channel up for 5 years and to potentially lose it all so fast to something like this would be devastating.”

- Fu on X (formerly Twitter, 2020b)

Simply put, Fuslie's entire career was at the mercy of the DMCA and Twitch gods. As stated in Chapter 1, there was no policy or practice in place by Twitch to resolve being punished a third time other than deleting all her streams (also known as VODs and clips). Bezos' response and testimony in Congress certainly did not help provide any solace for any creator. However, it would only be a few months until *a second wave* of DMCA notices were sent to more Twitch creators. And again, the sender of these notices was the Recording Industry Association of America (RIAA) for copyright infringement. There was little headway between Twitch and the record label, let alone the entire music label industry, since the first batch of notices were sent and after the House Judiciary Committee hearing in July 2020 (Stephen, 2020). One e-sports journalist, Rod Breslau, even called this second wave of DMCA takedowns a “bloodbath” (2020).

However, as writer Bijan Stephen noted, Twitch is allowed to host user-generated content under the DMCA because they qualify under safe harbor provisions. The important thing is that Twitch immediately deleted creators' content instead of allowing for counterclaims to be filed or

to give creators a chance to even archive their content, which is what happened with Fu and other Twitch streamers impacted by the first wave of notices. Fu and other streamers needed to ensure that their career would not shatter to pieces. But, if the DMCA is the basis for content moderation policies on Twitch, what does the public know? What do we not see behind the scenes? And who gets the final say about the content that does get flagged for violating platform guidelines?

In this chapter, I explore the relevant history and affordances about the transformation of legal policy, such as the DMCA, into platform policies regarding content moderation on Twitch. Specifically, I look at the history of Justin.tv's involvement with copyright in policy practice and application, as well as legal involvement and media outlet coverage. I argue that before Twitch's rise, there has been a clear pattern of copyright infringement that took place under Justin.tv, and due to the language of the DMCA, Justin.tv and other online service providers (OSPs) are not allowed to be a proactive platform in fighting copyright infringement.

Content Moderation: What the F* is it? How Does it Work?**

Like copyright, content moderation is not easy to define due to its operations behind the scenes. Thomas Stackpole (2022), a writer for *Harvard Business Review*, described content moderation as being “largely invisible,” as humans filter through content on the social media platforms we know and use daily. Information studies scholar Sarah Roberts (2017) further explained that content moderation is an “organized practice of screening user-generated content (UGC) posted to Internet sites ... to determine the appropriateness of the content (p. 1).”

Whatever content is posted on a site may get taken down if it violates any policy. And with human workers performing this labor, content moderation is vital to the cultural production that we see on social media platforms.

In *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media*, author and scholar Tarleton Gillespie (2018) asserted that not only content moderation is essential, but these platforms cannot exist without it (p. 21). Moreover, because platforms present themselves as participatory, open for all, and neutral, they cannot be as “open” and transparent regarding their policies and practices (Gillespie, 2010). On the legal side, platforms can moderate content thanks to Section 230 of the Communications Decency Act in 1996, also known as 'safe harbor' provisions, allowing these platforms to be shielded from any liability from inappropriate UGC that was posted. Due to this broad discretion and a platform's flexibility, the social responsibility to protect users is up to the platform. But since social media platforms transcend international boundaries, international governance does not really exist for the Internet which only furthers the blurring of boundaries for legal and policy enforcement (Grygiel and Brown, 2019).

What is even more interesting about content moderation is that there are various methods of going through content and determining its appropriateness. The most visible and researched content moderation method is commercial content moderation (CCM), where workers look at all UGC to verify that it falls within community guidelines, user agreements, and legal language (Roberts, 2018). In her book, *Behind the Screen: Content Moderation in the Shadows of Social Media*, Roberts notes that there is a workforce of over 100,000 people from multiple countries, including developing nations like the Philippines. Ranging from in-house employees to call centers, the invisibility of this factory style-like labor force serves the interest of big tech and data companies in Silicon Valley. CCM's non-neutrality via algorithms and historical patterns of imbalanced, colonial socio-political and economic relationships between first and third-world countries only continues to work for those in power. What is more poignant is the job's

emotional toll on these workers and the exposure of vile UGC impacting the workers' own beliefs and values (Musambi and Anna, 2023). And because companies keep content moderation and other forms of platform labor invisible and non-public facing, users will continue to not question the practices these platforms perform for capital gains.

Moreover, Gillespie (2018) noted that most social media platforms, like Facebook and X, use some mixture of community flagging, human editorial review, and automated algorithms. But as more users continue to sign up and use these social media platforms, the platforms are now facing operational challenges with the sheer volume of UGC that is produced daily. In turn, this has necessitated the increased use of artificial intelligence (AI) to manage the workload. Prompted by the COVID-19 pandemic, the adoption of AI technologies has been expedited to manage an increasing number of violations without resorting to increasing human labor (Gillespie, 2020). Though AI moderation holds promise, there are significant drawbacks, such as reinforcing inherent biases in human-flagged content which are reinforced from existing algorithms and patterns that Roberts underscored earlier. And while AI scholar Ysabela Gerrard (2020) scrutinized the neutrality of content moderation by illustrating its inherent biases and areas for improvement, such as the moderation policies being created by tech-savvy, educated, white liberal men, it is noted that a platform's population is more dynamic and diverse.

Taken together, these scholars claim that community guidelines are public facing, which reveal more about a platform's values than actual procedures to resolve user concerns. And the practice of 'flagging' content, or when users report content to be removed, often leads to inconclusive outcomes (Gerrard, 2020). The human element in commercial content moderation creates other inconsistencies that often stem from outdated guidelines. And because of who made

these systems and algorithms, automatic moderation leads to disproportionate flagging of content by users of marginalized communities.

But what do these algorithms do, and what do they look like? Gorwa et al. (2020) analyzed the intricacies of algorithmic content moderation by spotlighting its blend of technological and political challenges. Techniques such as matching and classification are utilized to enhance sophistication in natural language classification but are not immune to issues of overblocking or misinterpretation of context. By emphasizing the need of human moderators and essential training of these practices and machines, Gorwa and colleagues provided a potential avenue of transparency, fairness, and depoliticization for content moderation.

However, the solutions to this divide are unclear, and social media scholar Adrienne Massanari (2017) noted this divide on Reddit with two case studies: #GamerGate and The Fappening. On the forum-based platform, these events sparked the proliferation of a white, masculine, and toxic geek-centric culture that continues to exist today. A close inspection of Reddit's intrinsic features—like its upvoting system, the existence of specialized subreddits, and its stance on harassment and sexually explicit content—reveals that these mechanisms inadvertently create spaces where individuals coalesce around shared interests and assert their expertise. Platforms like Reddit have continued to take a lax stance on community moderation policies to often tacitly endorse a geek-centric masculinity that produces more harmful outcomes while sidelining other voices (Massanari, 2017). Content restrictions, such as limiting search results and shadowbanning, are treated as quick fixes but lead to inconsistent applications and enforcement.

However, content moderation and social media platforms are based on algorithms and procedures that target non-white users. One media scholar that studies this phenomenon is

Alexander Monea (2022), who focused on the pervasive influence of heteronormativity on the internet and broader society. By examining the censorship of LGBTQIA+ content, including pornography, heteronormative narratives are often reinforced due to algorithms and coding that perpetuates these stereotypes. And media expert Kate Eichhorn (2022) further goes in-depth with the idea of content itself and the work that content creators do to boost their brand and identity. Content is both pervasive yet indefinable in nature, as its scope has broadened to serve various functions—informing, entertaining, or even circulating without specific purpose. Content is now crafted not only for human eyes but for algorithmic ones, altering the very fabric of its intent and consumption at the expense of privacy and exploitation.

Eichhorn is not the only academic who has noted these discrepancies of content and content creators when it comes to content moderation. Internet scholars Whitney Phillips and Ryan Milner (2017) examine the complex terrain of online behavior and content, ranging from folkloric expression to identity play and public debate, specifically with the idea of digital communities creating an “us vs. them” mentality, which has contributed to the perception of biases towards content moderation. Moreover, Phillips (2019) found racial and privileged biases operating under the guise of harmless fun that is seen in digital content, which illustrates how the web can serve as a breeding ground for white supremacy and other extremist ideologies. In this landscape, journalists and regular social media users are not mere spectators but active agents that are capable of either quelling or fueling the fire through their coverage.

Combined, these scholars have found that a variety of factors, ranging from biases and the clash of human and machine labor have produced these complex conditions to manage content moderation on digital platforms. As a platform that revolutionized live streaming, Twitch's moderation challenges extend beyond conventional social media dilemmas, grappling

with real-time content and a diverse, global user base. The upcoming section will explore Twitch's journey in navigating these complexities, from its early days as Justin.tv to its current standing as a live streaming juggernaut. In the next section, I examine how Twitch has adapted its content moderation policies in response to the DMCA and the broader implications of these adaptations for creators, viewers, and the platform itself. This exploration aims to shed light on the tensions between legal policy and platform practices, illuminating the nuanced ways in which Twitch navigates copyright concerns and content moderation in the digital age.

The Wonkiest Story of Justin.tv and Copyright

To understand the relationship of content moderation and copyright law with live streaming, the origins of Twitch must be told, which is known as Justin.tv. Back in 2007, classmates and best friends Justin Kan and Emmett Shear launched Justin.tv as a reality show where viewers could watch Kan and Shear go through their lives, answer questions from viewers, and according to its slogan, “waste time watching other people waste time (Guynn, 2007).” Originally two software developers who created Kiko, a calendaring app, Kan and Shear were trying to do something different. In a 2011 article for *TechCrunch*, Kan noted how the idea came to be, as well as the pros and cons of starting this site:

“I remember telling Emmett an idea that popped into my head: what if you could hear an audio feed on the web of our discussion? Wouldn't that be interesting to other like-minded entrepreneurial types? We kept going, and eventually the idea morphed into a video feed. Then it became a live video feed. Then it became a continuous live video feed that followed someone around 24/7. Then it had chat, and a community built around watching this live show, which was now a new form of entertainment... Our plan? Launch the show and see what happens.”

And soon enough, Kan, Shear, and their friends became overnight sensations. But since the show was not going to be sustainable due to not having enough content and being fatigued from performing in front of cameras, they quickly pivoted to making Justin.tv a general-purpose

live streaming platform. Through this transition, the platform allowed users to broadcast solely their own live video content, ranging from everyday activities to niche interests (Kan, 2011). Over the next few years, Kan and Shear searched for more creators that would want to share more of their lives on the Internet to see, such as Justine ‘iJustine’ Ezarik, who is now a popular gamer on YouTube that also creates content on the newest tech products (Popper, 2014). However, it was gaming content that quickly gained traction and led to the development of Twitch as a separate platform catering to the gaming community, leading to the shutdown of Justin.tv following Amazon’s acquisition for nearly \$1 billion USD (Amazon.com to acquire Twitch, 2014; Popper, 2014, Hamilton et al., 2014; Johnson, 2014).

But the main question to answer is: Did Justin.tv have any issues with copyright, or think about copyright at all during its first launch? And if so, what did they do? Well, *Fast Company* writer Andrew Rice wrote about some of this detailed history of Justin.tv, specifically regarding the changing leadership between the friend group of Kan, Shear, and friends Michael Seibel and Kyle Vogt. Due to the unsustainability of the reality show and Kan’s exhaustion of needing to perform in front of cameras, Siebel took over as CEO in 2007 and decided to make Justin.tv part of “the marketplace for live user-generated content” by “democratizing live video” (Rice, 2012). In short, Justin.tv’s stars all left (including iJustine), and the platform’s content ranged from cooking shows, coverage of global demonstrations, and even watching people playing video games. This free coverage was all fun and games until Greg Punzo, a Chicago Bears fan, streamed NFL games to Justin.tv in 2008, which led to the tripling of web traffic to the live-streaming site, despite being illegal due to copyright infringement and piracy (Rice, 2012).

Punzo’s idea of streaming to promote access to watch NFL streams is not a new situation. In fact, Viacom sued YouTube (and Google) for over \$1 billion because of users uploading clips

of Viacom-based programs, including “The Daily Show with Jon Stewart” , the year prior to Punzo pirating NFL games (Stelter, 2014). And though Viacom claimed that YouTube did not fall under the safe harbor provisions of the DMCA, it took seven years to finally settle after repeated legal defeats in 2010 and 2013 (Kafka, 2013). In his ruling, federal Judge Louis L. Stanton wrote the following:

“But the governing principle must remain clear: knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement... YouTube’s decision to restrict its monitoring efforts to certain groups of infringing clips ... do not exclude it from the safe harbor, *regardless of their motivation*... There is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity.”

- Ruling in *Viacom v. YouTube, Inc.* (United States District Court, 2013)

YouTube was not actively engaging in the persuasion of users uploading infringing content onto their platform; users were taking an active stance. Simply put, YouTube was not incentivized to be a proactive participant in fighting copyright and was being a neutral intermediary. Prior to this ruling, it was free reign for companies to approach piracy and copyright infringement, especially on Justin.tv. In return, the sports industry, which has historically relied (and still relies on) broadcast and media rights valued for millions, even billions, of dollars, was stunned and targeted live streaming sites. For instance, Premier League, the UK-based soccer league, sued Justin.tv around the same time for live-streaming matches (Masnick, 2008; Matyszcyk, 2008). The sports industry felt they had no other choice but to push back against piracy:

“This [Piracy and live streaming sporting events] poses a major issue for the leagues and organizations who own and control sports as the sale of broadcast rights represents a major source of revenue, enabling the sports leagues to thrive and continue, from grassroots level to professional league.”

- 2008 Organization for Economic Cooperation and Development report (Arango)

Because these sports leagues were threatening legal action towards any live streaming sites, things needed to change to ensure the sports industry was not going to collapse immediately. In 2009, Seibel testified on behalf of Justin.tv under the House Judiciary Committee for a live sports and piracy hearing (Masnick, 2009). TechCrunch (2009) obtained the report and noted that Justin.tv falls under safe harbor provisions as a technology service provider. In his testimony, Seibel noted the efforts that Justin.tv took to avoid copyright infringement and piracy:

“We comply with the DMCA by, among other things, responding to take down notices and terminating the accounts of repeat infringers expeditiously. Like Justin.tv, all four major sports leagues host user generated content on their web sites and rely upon the DMCA to protect themselves from liability for the content uploaded by their users... One example of this effort is our copyright protection system, an online tool that enables copyright owners to instantly remove their content from the site... This system was deployed on November 15th [2009] and immediately began removing FOX’s static content from the site.”

- Seibel’s testimony in *Live Sports Broadcasting and Piracy* hearing by the House Judiciary Committee (December 16, 2009)

This statement from Siebel was one of the first times that Justin.tv was explicit in its copyright enforcement protocols. Three months prior, Justin.tv signed a deal with Fox and content filtering firm Vobile to crackdown on DMCA violations on their site (Carlson, 2009). Even Fox called Justin.tv a leader for partnering with one of the biggest media companies to stop copyrighted content from being live streamed (Carlson, 2009). Though Justin.tv took significant steps to comply under the DMCA to take down any infringing content, the question about how proactive the platform remained. The copyright protection system became live only a month prior to the House Judiciary Committee hearing, creating discrepancies about Justin.tv’s true intentions on fighting copyright, with or without pressure of legal action from bigger companies.

One example that comes to mind with Justin.tv allowing users to upload live sporting events is Napster. Napster, founded by Shawn Fanning and Sean Parker, was created in 1999 to allow users to exchange music files with one another (Coughlin, 2023). However, Napster was shut down due to promoting piracy in their music distribution model (Woodworth, 2004). As a result, committee member and Rep. Henry “Hank” Johnson (D-TX) engaged with both Siebel and Christopher Yoo, the John H. Chestnut Professor of Law, Communication, and Computer & Information Science from the University of Pennsylvania, about Justin.tv’s responsibility to copyright and any similarities to Napster:

“Johnson: What is the difference between this case and, say, Napster, which was kind of forced to change its—it was forced to change its methods of distribution of copyrighted music without—that they were doing it without the consent or payment of royalties or anything like that. How does—can somebody shed light on the Napster case and how it would apply to this case?”

Seibel: Justin.tv is different in two ways. First, the system was never designed or conceived of to be distributing unauthorized content. And second, we actively work with over 150 copyright owners in the world and give them tools to remove their content in real-time from our site.

Yoo: Napster intentionally pursued copyright infringement as its business strategy, and the Supreme Court in the *Grokster* case made very clear that is a sole sufficient basis for liability by itself... the business community is left with a great deal of legal ambiguity about the precise extent to which providers like Justin.tv, who are not actively fomenting infringement, may nonetheless be subject to liability.”

- Transcript from *Live Sports Broadcasting and Piracy* hearing by the House Judiciary Committee (December 16, 2009)

By positioning Justin.tv as an active participant in removing infringing content while also being a platform that was not designed for unauthorized content to be shown, is a clear example of how these issues surrounding copyright come to a head. Moreover, Seibel noted that policing a few pirates when there are millions of Justin.tv users would create unequal expectations for copyright holders and goes against Justin.tv’s purpose and business model (Rice, 2012).

TechCrunch noted the discrepancy and questioned if Justin.tv was being proactive in the first place. But in 2010, Justin.tv hired Eric Goldman, a law professor at Santa Clara University, as a copyright adviser to further boost their credibility as a viable platform while also fighting piracy by its users. (Schonfield, 2010). But what is more astounding is writer Erick Schonfield's statement on Justin.tv not being able to be proactive because of the law that protects copyright holders. Yep, you guessed it: the DMCA:

“But if Justin.tv is really serious about cleaning up the pirated streams on its network, why not simply police itself and strip the most questionable content from at least the most popular channels to start? In the bizarro world created by the DMCA, legally it can't. Under the DMCA, the responsibility for finding copyright violations lies with the copyright holders. The second that a site starts to take on that responsibility itself, it risks losing the protection of the DMCA's "safe harbor" provision. So Justin.TV can give copyright holders the tools to remove content from the site, but can't do it themselves.”

- Schonfield in *TechCrunch* (2010)

In short, Justin.tv and its workers cannot necessarily be blamed for their inaction on copyright because that is not within their capabilities. The legal language in the DMCA constrained them and other platforms from being active participants, or else they become liable without any legal protections, including safe harbor. Per the DMCA, copyright holders must report and inform these platforms regarding copyright infringement by its users, and platforms must notify the users and takedown the content. The onus relies on copyright holders to ensure content is being used legally, and on users to not violate the DMCA.

And as the rise in piracy continued on Justin.tv, the UFC (Ultimate Fighting Championship) filed a lawsuit because of the platform's failure to allow users to upload videos from UFC events that are pay-per-view for \$45 (Deleon, 2011). Less than a year later, a judge ruled that Justin.tv did not have any evidence they were rebroadcasting UFC events, a blow to the UFC:

“In essence, Zuffa alleges that Justin.tv’s users copied Zuffa’s UFC event and then rebroadcast the UFC event over the internet. This is not the type of conduct properly addressed by the Communications Act, but by copyright law (and, potentially, trademark law) because Justin.tv had no relationship with the original cable or satellite signal: by the allegations, Justin.tv did not receive or intercept any actual cable or satellite signal or broadcast.”

- Court’s ruling in *Zuffa LLC v. Justin.tv, Inc.* (Goldman, 2012)

With this ruling and the platform’s choice to work with the sports industry, Justin.tv was seen as more favorable at the expense of its web traffic falling by over 20 percent (Rice, 2012). Punzo continued to stream NFL games despite Justin.tv’s effort to get rid of him but said that he would move somewhere else because of the platform’s unusability to stream sporting events (Rice, 2012). At the same time, Congress proposed the Stop Online Piracy Act, which targeted these platforms by restricting access to sites hosting or facilitating pirated content, (Pepitone, 2012). But somehow, people playing video games was seen as more advertiser-friendly and controlled in terms of copyright infringement, leading to the invention of TwitchTV (now Twitch.tv) in 2011 with tens of millions of visitors each month. And eventually, Justin.tv was no longer seen as a viable option due to Twitch’s popularity, leading to its eventual shutdown in 2014.

Now, we get the rest of the Twitch story ... or so we thought.

After transitioning from Justin.tv to Twitch, Kan, Shear, Seibel, and Vogt capitalized on the gaming community's vibrant culture and retained distinctive features like the chatbox or “chat,” a pivotal aspect of Twitch's identity. This chat function revolutionizes viewer interaction, reminiscent of AOL's chat rooms in the late '90s and early 2000s, by enabling real-time communication between viewers and streamers, fostering a sense of community and engagement. Viewers use the chat to greet, react with “LOL” during amusing moments, or use emotes—picture-based symbols with context-specific meanings, akin to GIFs or memes, but for

live interaction. Emotes, integral to Twitch's unique cultural lexicon, allow viewers to express emotions, support, or inside jokes, further cementing the platform's communal feel. This feature not only enhances viewer engagement but also contributes to a shared culture, as emotes become a language of their own, understood and appreciated within the Twitch community. Through this interaction, Twitch chat transcends mere communication, becoming a dynamic space where collective experiences are shared and celebrated, embodying the platform's ethos of community-driven entertainment. The preservation of such features, as noted by Hamilton et al. (2014), underlines Twitch's commitment to nurturing the communal aspects of gaming, setting it apart from other streaming platforms.

Another pivotal aspect of Twitch's ecosystem is the economic model that empowers fans to directly contribute to their favorite streamers' livelihoods. Twitch's innovative subscription model and donation system facilitate a deeper bond between streamers and their audience, enabling viewers to financially support creators in a more personal and impactful way (Postigo, 2016; Partin, 2023). Subscriptions offer fans a means to express their support and gain access to exclusive content, emotes, and badges for a nominal fee each month, thereby creating a steady revenue stream for streamers. This subscription revenue is often the backbone of a content creator's income, particularly for those dedicated to streaming as their primary occupation beyond the confines of a traditional workweek (Partin, 2020). Beyond subscriptions, Twitch provides several other avenues for viewer contributions, including one-time or recurring donations and the Bits system, which allows viewers to cheer for streamers in chat. Gifting subscriptions is another popular feature, enabling community members to pay forward the benefits of subscription to others, fostering a sense of generosity and community spirit. This comprehensive suite of financial support tools underscores Twitch's commitment to creating a

sustainable platform for content creators, ensuring they can focus on producing engaging content. As such, Twitch's economic contributions model not only benefits streamers financially but also enhances the overall community experience by promoting active viewer participation and support.

These features have significantly shaped unique cultures and practices on Twitch, notably through parasocial relationships where viewers feel a close bond with streamers, despite the inherently one-sided nature of their interactions. Streamers nurture these connections by engaging directly with their audience, sharing personal stories, and reacting to chat in real-time, creating an environment of intimacy and inclusivity (Sjöblom and Hamari, 2017). Furthermore, the adoption of professional e-sports elements into streams adds depth to the viewer experience, blending entertainment with education on gameplay strategies and industry insights (Witkowski, 2012). This melding of personal and professional content delivery is facilitated by Twitch's interactive features, like chat emotes, which serve as a communal language that deepens viewers' connections to the streamer and the broader community. These dynamics foster a multifaceted viewer experience characterized by emotional engagement, educational value, and a sense of belonging to a community that shares common interests and values. This unique blend of interaction and content distinguishes Twitch from other platforms, cementing its success and the strong loyalty of its user base.

The literature on Twitch and live streaming provides insights into the reasons why viewers watch live streams, which range from learning about a certain game to being part of a community that shares the same values and beliefs. Collin's (2004) Interaction Ritual helps to explain how live streaming platforms can create a collective identity, emotions, and shared sense of belonging. However, group interactions can now apply to digital spaces, as they have shifted

online with the creation of the Internet and its constantly evolving infrastructure. Hamilton et al. (2014) found that viewers engage with streamers and their behavior both individually and collectively, and that metrics such as perceived streamer friendliness and likelihood of creating a social atmosphere of shared attitudes are pertinent to determine how viewers engage with streamers. Jodén and Strandell's (2021) research builds on Collin's theory by focusing on streamers playing single-player exploration and role-playing games (RPGs), which help to illustrate group incentives and other behaviors via interactions within subgroups, communities, and mass movements.

Twitch became a site for fellow creators and developers to connect, thus reinforcing the idea that gaming is a legit and viable industry (Taylor, 2018). Also, Twitch helped with the development of e-sports and professional gaming as a big industry. E-sports can be traced back to arcades where local organizations and groups hosted tournaments with small prize pools; online gaming and dedicated gaming communities were the catalyst that saw e-sports become more visible with a higher net worth (Taylor, 2018). Thanks to Twitch, fans can watch their favorite teams compete live, chat with other fans, and participate in competitive gaming from their home for free, like watching traditional spectator sports (Hamilton et al., 2014).

Twitch has helped to elevate the status of gaming as a legitimate form of entertainment and cultural expression, while also bringing private gameplay to the public (Taylor, 2018). In its early days, Twitch's content was dominated by gamers sharing their gameplay, with some incorporating commentary and other forms of entertainment. Over time, Twitch expanded its content offerings to include streams of e-sports tournaments, creative streams, music performances, and even “Just Chatting” streams, which focus on conversation and interaction between the streamer and their audience (Vaish et al., 2014). By doing so, Twitch has not had to

rely on gaming content as much as they used to when they first launched in 2014. Twitch's growth and its content diversification have been accompanied by the development of popular content creators interacting with their viewers more than the average celebrity with prior technologies (Abidin, 2018; Duffy, 2017). For gaming streamers, this emphasis on skill and performance is reflected in their content and persona, while non-gaming streamers are bringing their own unique cultures and practices to the platform for fans to enjoy (Sjöblom and Hamari, 2017).

Twitch's journey from a niche live streaming platform to a cornerstone of digital entertainment has been influenced by its community dynamics, particularly concerning gender. Historically dominated by a predominantly white, male demographic, Twitch initially mirrored broader gaming community trends. However, as the platform evolved, there has been a noticeable shift towards greater diversity, with an increasing number of women both creating content and participating as viewers. This shift challenges the status quo, promoting a more inclusive environment (Gee and Hayes, 2010; Shi and Kirsh, 2013). Despite these advances, female streamers continue to face significant challenges, including harassment and sexualization, which impact their ability to share content freely and shape their online personas. The industry's deep-seated gender norms further exacerbate these issues, often subjecting women to unfair scrutiny based on their attire and behavior on stream, leading to derogatory labeling and undermining their professionalism (Ruberg and Lark, 2020; Ruberg, Cullen, and Brewster, 2019).

In response to these challenges, Twitch has implemented various measures aimed at promoting a safer and more inclusive platform for all its users. Revisions to community guidelines, the introduction of automated moderation tools, and the support of initiatives like

Women in Games are just a few examples of Twitch's commitment to combating harassment and hate speech. These initiatives not only serve to protect streamers but also to highlight and celebrate the contributions of women to the gaming community, providing positive role models for young girls and women. Such efforts by Twitch to address and mitigate the challenges faced by female streamers underscore the platform's dedication to fostering a diverse and inclusive environment, where content creators of all genders can thrive and contribute to the rich tapestry of digital entertainment (Together for Legendary Women, 2023; NASEF, 2020).

Twitch's continuous efforts to navigate the complex landscape of content moderation, gender dynamics, and community engagement underscore its pivotal role in shaping the future of live streaming entertainment. By addressing the challenges faced by female streamers and actively working towards a more inclusive platform, Twitch sets a precedent for digital communities worldwide. However, the journey does not end with inclusivity and community policies; it extends into how the platform manages the intricacies of copyright through its DMCA practices.

As Twitch grows, so does the necessity for a nuanced approach to copyright enforcement, balancing the rights of content creators with the legal obligations to copyright holders. This ongoing challenge is not just a matter of policy but a dynamic interplay between technology, law, and the community. This chapter revealed the major influence of copyright legislation and evolving platform policies on creative expression and the operational dynamics of live streaming platforms. Specifically, the transition from Justin.tv to Twitch serves as a critical juncture, highlighting the platform's strategic shift towards gaming content and its evolving approach to copyright issues and content moderation. This evolution underscores the complex interplay between fostering a vibrant, inclusive community and adhering to legal and ethical obligations.

As the story of Justin.tv goes, attention now shifts towards an in-depth analysis of Twitch's engagement with DMCA policies from 2012 to 2019. Chapter 3 will dive deep into a qualitative textual policy analysis of Twitch's 2019 DMCA guidelines, which were pivotal during the flurry of DMCA notices in 2020. Additionally, I conduct more qualitative analyses on the platform's public statements and resources during 2020 that provide additional context and clarification on Twitch's decisions in response to copyright. The policy analysis will dissect the foundations and strategic maneuvers shaping Twitch's approach to copyright, offering insights into the enduring challenges digital platforms face in balancing copyright compliance with the promotion of creative freedom and community engagement.

Chapter 3: Twitch's Passivity and Proactivity Led to the 2020 Strikes

Following the UFC/Justin.tv settlement in 2012, any controversy surrounding Justin.tv appeared to fade away. Competitors, such as Livestream, Ustream (now owned by IBM), and Own3D TV, entered the live streaming space with little success. The fascination around people watching others play video games continued to grow, along with the rise of e-sports leagues and tournaments, which led to people flying to TwitchTV (Taylor, 2012). And as a result, founders Justin Kan and Emmett Shear (now CEO) needed to continue growing Twitch, such as building up its audience, streamers, and platform. Over the next two years, Twitch's major accomplishments furthered the hype around the platform. For one, CBS and Major league Gaming signed a deal to partner with Twitch to stream e-sports events (*CBS Interactive expands into eSports*, 2012). Twitch also launched free apps for iOS and Android devices, as well as continuing to receive millions of dollars in investment, and in turn had a "near monopoly on the market" (*TwitchTV launches iPad and Android apps*, 2012; Popper, 2013). A *CNBC* video and article by writer Darren Geeter (2019) explained Twitch's rise and fascination by its web traffic:

"In 2012, monthly visitors jumped from 3.2 million visits to 20 million visitors. And in 2013, Twitch would become the number one video streaming site in the video game category with 45 million visits a month."

As a result, Twitch's growth led to Amazon and Google—the two biggest online tech giants—fighting to acquire the live streaming platform. But according to a YouTube video by Kan, the fight for Twitch was more complicated than was reported. Yahoo then backed out, only for Amazon and Twitch to negotiate to the \$970 million deal that was finalized (Kan, 2021). :

"We had signed a deal with Google, and then walked away from a billion dollars... Zuck [Mark Zuckerberg] actually called Emmett up and said, 'Hey, I want to invest \$50 million, and you guys should keep going.' But the next big dog company to come knocking at our doors for an acquisition was Yahoo... They came back to us really quickly with a big number: \$1.25 billion plus \$250 million in retention. That was 50 percent more than what Google just offered."

- Kan on the Twitch/Amazon deal (2021; 0:48-0:53, 2:13-2:21, 2:28-2:40)

This chapter explores Twitch's nuanced journey through the evolution of its DMCA guidelines from 2014-2019. The main portion of this chapter critically analyzes Twitch's copyright policies and its resources provided by Twitch in 2019 and 2020, which was a period marked by significant upheaval for creators, copyright holders, and Twitch itself. Through this analysis, I argue that Twitch's policies and systems at the time of the DMCA strikes were inadequately set up due to the lack of clarity within their DMCA guidelines, as well as the lack of tools to help streamers delete their content while omitting that a counter-notifications process even existed for streamers to fight these notices in the first place.

Twitch is Living in La La Land ... kind of? (2014-2019)

As covered in the past two chapters, Twitch (formerly Justin.tv) has had a bit of history, even controversy, surrounding their handling of copyright. But because of their status as a platform under the safe harbor provisions in the DMCA, neither Justin.tv nor its employees were legally allowed to fight infringement and piracy without notification from the targeted copyright holders. And by working with media companies such as Fox to help automate systems and be more effective at catching infringing users, Justin.tv's popularity fell off apart from people watching other people play video games (Carlson, 2009). These two main factors led to the shutdown of Justin.tv in 2014, with founders Justin Kan and Emmett Shear focusing their attention on Twitch. Along with that, some of the unique features Twitch has, such as its chatbox, emotes, and multiple ways of monetary transactions, created distinction from other digital platforms.

However, copyright infringement continued to be a major issue, even beyond Justin.tv's shutdown. Two weeks prior to the Amazon acquisition on August 25, 2014, Twitch announced a

significant step towards addressing the complex issue of copyright infringement on its platform. In a blog post by Elizabeth “Boo” Baker, general counsel for Twitch, the platform outlined its new partnership with Audible Magic, a move aimed at safeguarding both broadcasters and copyright owners in the digital age of live streaming (Baker, 2014). This announcement marked a pivotal moment in Twitch's ongoing effort to balance the legal requirements of copyright law with the creative freedom of its community. Baker elaborated:

“Starting today, Twitch will be implementing technology intended to help broadcasters avoid the storage of videos containing unauthorized third-party audio. We respect the rights of copyright owners, and are voluntarily undertaking this effort to help protect both our broadcasters and copyright owners. ... Audio Recognition will only be run against audio in VODs. We are not scanning live broadcasts and there is no automated takedown of live content. Flagged Content will display an on-screen notification informing viewers that content owned or controlled by a third party has been identified.”

- Baker on muting parts of VODs containing DMCA content (August 7, 2014)

By focusing on VODs and excluding live broadcasts from automated scanning, Baker and Twitch attempted to be more proactive in its copyright infringement procedures. The platform's decision to inform viewers of identified copyrighted content through on-screen notifications serves both as a deterrent and an educational tool, emphasizing the importance of copyright respect within its community while providing free-to-use music alternatives (Baker, 2014). And the best way, in Twitch’s opinion, was to partner with Audible Magic, a company that focuses on automatic audio detection for video content. They attempted to be like YouTube, which by this point, had created its own Content ID system to detect any copyrighted audio (McWhertor, 2014). However, this selective enforcement strategy raises questions about Twitch's broader responsibilities under the DMCA and its role in mediating copyright disputes. How far are they willing to go without risking their safe harbor protections? And what qualifies as being a neutral intermediary or online service provider?

In addressing the management of recorded content, Twitch's implementation of Audible Magic technology exemplified a proactive strategy to mitigate the risk of DMCA takedown notifications. This technology, designed to automatically scan and mute or delete VODs and Clips with copyrighted audio, reflects Twitch's commitment to copyright compliance while recognizing the limitations of technological solutions. Furthermore, the introduction of Soundtrack by Twitch and partnerships with licensed music providers offer practical alternatives for creators to include music in their streams legally. These measures not only facilitate creative expression within the bounds of copyright law but also signal Twitch's intent to provide creators with resources that support both legal compliance and creative freedom, underscoring the delicate balance between automated enforcement and individual responsibility in upholding copyright rights.

However, this blog post only caused more confusion than clarity, as Twitch had already made an announcement regarding the changes to streamers' archives earlier in the day (McWhertor, 2014). An op-ed by Philip Kollar (2014) went as far as to say that these changes are "terrible, poorly implemented and absolutely necessary." YouTube went through their Content ID system implementation in 2013 with similar backlash after videos involving video game footage was removed for copyright infringement (Kain, 2013). Despite this criticism, Kollar appreciated Shear's own admission that this decision was not an easy one to make, but one out of necessity:

"Shear even owned up to this in response to a question on Reddit: 'You can choose not to believe me, but the music industry doesn't think that music licensing is a joke and we don't either.' ... These changes are an important start toward appeasing frustrated broadcasters and viewers, but more will need to be done. Twitch has wisely protected itself; now it needs to give its audience a renewed reason to stay invested."

Overall, this DMCA debacle did not appear to slow Twitch down, as they were acquired by Amazon in the weeks after Baker's blog post and Kollar's op-ed. And according to Kollar (2014), people were still visiting Twitch, and streamers wanted to stay on. If anything, 2014 was a year to improve for Twitch to boost its popularity and continued buildup of their operating systems and staff. Beyond copyright, Twitch had to navigate through multiple cases of adversity, such as being hacked in 2015 and through the Gamergate crisis, where women in the video game industry were constantly harassed and experiencing misogyny across multiple online platforms (Weissman, 2015; Romano, 2021). The aftereffects of Gamergate translated into streamers facing harassment and toxicity, causing Twitch to update its community guidelines in 2018 to ensure that "Hate simply has no place in the Twitch community (*Twitch community guidelines updates*, 2018)." Yet, part of those revisions included revisions to a dress code that disproportionately targeted women streamers (D'Anastasio, 2018).

Because of these various events, copyright was not as important an issue, even though the International Federation of the Phonographic Industry (IFPI) targeted some Twitch streamers for playing background music while live (Cushing, 2018). Even after another situation where multiple streamers were banned for playing music by the late rapper Juice Wrld, their DMCA bans were quickly resolved (Goslin, 2018). Meanwhile, Twitch continued to dominate in live streaming, as Tyler 'Ninja' Blevins became the most popular streamer after playing *Fortnite* with Drake (Grayson and D'Anastasio, 2018). *The New Yorker* and NPR authored articles about popular streamers and/or Twitch itself, moving Twitch further into a mainstream media platform (Chen, 2018). It was smooth sailing from here... well, until COVID-19 arrived.

Twitch's DMCA Guidelines in 2020 Screwed Everyone Else Over

In 2020, Twitch found itself at a pivotal juncture, grappling with the enforcement of the Digital Millennium Copyright Act (DMCA) amidst a deluge of copyright notices that threatened the foundation of its streamer/content creator community. To comprehensively understand Twitch's approach to the Digital Millennium Copyright Act (DMCA) at the time of the 2020 DMCA notices, I conducted a qualitative textual analysis. This analysis encompassed all available versions of Twitch's DMCA guidelines from 2019, alongside related policy pages and resources such as the Twitch Creator Camp. Utilizing the Internet Archive, there is one distinct version of the DMCA guidelines examined (2019), in addition to relevant pages addressing the reporting of unauthorized music usage and a guide for musicians starting on Twitch. The analysis aimed to trace changes before and after significant influxes of DMCA notices to creators by the RIAA, seeking answers into Twitch's contemporary policy adjustments and their implications for content creators.

Notification of Infringement

To begin, Twitch introduced a basic framework in 2019 for addressing copyright infringement, which was closely aligned with DMCA requirements. This was the platform's early attempt to establish its approach in complying with the DMCA, as well as building upon its previous changes like the integration of Audible Magic. These guidelines laid out a structured process for rights holders to report violations, emphasizing the need for exhaustive details to facilitate efficient copyright infringement identification and resolution. Firstly, Twitch set the guidelines on how to file DMCA notices in a clear and easily accessible manner. Within the guidelines, filing a DMCA notification was one of the main priorities, as it was the first main section of the page following the opening remarks.

At the core of the process for sending DMCA notifications is the identification of the copyrighted work that is claimed to have been infringed. This initial step is crucial, as it establishes the foundation for the copyright owner's claim, necessitating a clear and concise delineation of the copyrighted material. Whether the complaint involves a single piece of work or multiple works hosted on Twitch, providing a representative list of these works is imperative for establishing the basis of the infringement claim. This requirement ensures specificity and clarity, aiding Twitch in the subsequent identification and assessment of the alleged infringing material.

The guidelines then proceed to detail the need for precise identification of the material claimed to be infringing, coupled with information sufficient to enable Twitch to locate this material within its vast content repository. This stipulation is particularly noteworthy, as it highlights the operational challenges faced by digital platforms in managing and moderating content. By specifying that a link to the broadcaster's feed and a timestamp of the infringing segment are the most effective means of identification, Twitch streamlines the process for locating the content in question, thereby facilitating a more efficient review and resolution process.

Furthermore, the guidelines underscore the importance of a good faith belief on the part of the complainant that the use of the material was not authorized by the copyright owner, its agent, or the law. This declaration serves as a testament to the seriousness with which copyright claims are treated and the expectation of integrity and honesty in the submission of these notifications. The requirement for a statement under penalty of perjury further reinforces the legal gravity of the notification process, ensuring that claims are submitted with a conscious acknowledgment of their legal implications. Although positioned as a measure to ensure the

veracity of claims, the reliance on the complainant's subjective belief could lead to a spectrum of interpretations of what constitutes unauthorized use, thereby muddying the waters of copyright enforcement. The call for a statement under penalty of perjury aims to add a layer of legal seriousness to the process; however, it also raises concerns about the accessibility of the DMCA mechanism for individuals without the legal knowledge or resources to navigate these requirements confidently. This approach, while designed to deter frivolous or malicious claims, may inadvertently favor copyright holders with greater legal acumen or resources, potentially skewing the balance of power in copyright disputes and placing an undue burden on less-resourced creators or agents.

Finally, the last part of filing a DMCA notification involves providing contact information, as it enables Twitch to engage directly with the complainant for any necessary follow-up or clarification. This aspect of the guidelines emphasized the importance of open communication channels between Twitch and copyright owners or their agents, facilitating dialogue and potential resolution of copyright issues. Lastly, the inclusion of a physical or electronic signature by a person authorized to act on behalf of the copyright owner signifies the formal completion of the notification. This requirement not only adheres to legal standards but also personalizes the claim, attaching a verifiable identity to the copyright notification.

Counter-Notifications and Retractions

In analyzing Twitch's counter-notification process within its 2019 DMCA guidelines, it is evident that while the platform has outlined a path for streamers to contest copyright claims, the practical accessibility and awareness of these procedures among streamers were significantly lacking. Despite the structured approach laid out for submitting counter-notifications, including detailed identification of the contested material and a comprehensive set of legal agreements and

personal information, the reality for many streamers during the 2020 DMCA takedowns was far removed from engaging in this formal process. The tone of panic and stress prevalent among the Twitch community, exacerbated by guidance from Twitch staff to delete content as a preventive measure, underscores a disconnect between the theoretically accessible legal recourse provided by the guidelines and the immediate, stress-induced reactions from streamers facing potential channel terminations.

This discrepancy is stark when compared to the straightforward mechanism available to copyright holders for filing infringement notifications. Copyright owners are empowered to easily assert their rights through a written notification, setting in motion a process that can lead to the swift removal of content or disabling of access, often without prior notice to the affected streamer. In contrast, streamers, advised under duress to purge their content archives, were placed in a defensive position, burdened with the responsibility of navigating a complex legal counter-notification process amidst fears of losing their livelihoods. This imbalance highlights a broader issue within the platform's approach to copyright disputes, where the scales seem tipped in favor of copyright holders, leaving streamers to resort to social media and other public platforms to amplify their plight and seek communal support or advice.

Moreover, the requirement for streamers to consent to jurisdiction, swear under penalty of perjury about their good faith belief in the mistake or misidentification of material, and provide extensive personal information for a counter-notification adds layers of legal complexity and potential risk. These requirements not only demand a significant understanding of legal nuances from streamers, many of whom may lack such expertise, but also place them at a disadvantage compared to copyright holders, whose initial claim can catalyze content removal with minimal effort. The emphasis on legal formalities within the counter-notification process,

juxtaposed against the advice from Twitch staff to simply delete content, illustrates a gap between the platform's provided mechanisms for dispute resolution and the practical, often panic-driven responses employed by streamers.

Regarding retractions, Twitch offers an avenue for copyright claimants to withdraw their infringement notices, acknowledging the potential for resolution through direct dialogue between the claimant and the affected party. This provision recognizes the dynamic nature of copyright disputes and the possibility of misunderstandings or agreements reached post-claim. By allowing for retractions, Twitch provides a pathway towards rectifying situations where copyright claims may have been filed erroneously or where the parties involved have come to an amicable resolution independently.

For streamers, the retractions section offered a semblance of recourse for streamers faced with copyright infringement notices, by allowing claimants to retract their accusations. This mechanism suggests a potential for dispute resolution outside the formal DMCA counter-notification process, hinting at a pathway for content reinstatement through direct negotiation between the claimant and the affected party. However, the reality of this process places a considerable burden on streamers to initiate contact and seek a resolution, a task that is daunting and not always fruitful. The guidelines require retractions to be submitted via the same email address as the original claim, with detailed information about the disputed material and an electronic signature. This requirement, while ensuring the process's integrity, also reflects the challenges inherent in resolving copyright disputes on Twitch.

Contrasting sharply with the straightforward method for copyright holders to file claims, streamers endure the most of the platform's copyright enforcement mechanisms. Advised to preemptively delete content to avoid further notices, streamers are thrust into a reactive position,

often resorting to social media to amplify their case in hopes of reaching a resolution. This dynamic epitomizes the disparity in the experiences of copyright holders and streamers, highlighting an imbalance of power and responsibility in Twitch's copyright ecosystem. The reliance on direct communication for retractions, although potentially effective, underscores a broader challenge of accessibility and support for streamers defending their content.

Designated Copyright Agent and Repeat Infringer Policy

Finally, the sections on Twitch's "Designated Copyright Agent" and "Repeat Infringer Policy" encapsulate the platform's attempt to navigate the intricacies of copyright law within the digital space of live streaming. The designation of a copyright agent is a direct response to DMCA requirements, providing a streamlined process for copyright holders to communicate their claims. This procedural step is essential for legal compliance and offers a clear pathway for initiating copyright disputes. However, the efficiency of this system is contingent upon Twitch's capacity to manage and respond to the influx of notifications. Concerns arise regarding the platform's ability to effectively process potentially high volumes of claims, which could lead to delays or oversights in addressing copyright infringements. This potential bottleneck highlights a critical limitation in Twitch's framework, where the procedural setup for claims processing may struggle under the weight of demand, impacting both copyright holders and creators awaiting resolution.

On the other hand, the "repeat infringer" policy was briefly stated, indicating swift termination for users identified as repeat violators without detailed criteria for determination. These guidelines also underscored the severe repercussions for "repeat infringers," showcasing Twitch's commitment to legal compliance while acknowledging the intricacies of copyright disputes. But the "Repeat Infringer Policy" was only two sentences long, calling into question

how explicit and forward Twitch was when creating these guidelines without detailed criteria for termination of a creator's account:

“Twitch will promptly terminate any user's access to the Twitch Service if that user is determined by Twitch to be a “repeat infringer” of copyrighted works. Twitch may, at its sole discretion, limit access to the Twitch Service and/or terminate the accounts of any users who infringe any intellectual property rights of others, whether or not there is any repeat infringement.”

Notably absent from these two sentences is an explicit mention of the “three-strike system,” a common standard that streamers and the platform abide by that offers a clear framework for users to understand the consequences of repeated copyright violations. If a streamer gets three DMCA strikes, their account is permanently banned, and they are no longer able to make any content on Twitch. This omission raises questions about the transparency and predictability of Twitch's enforcement practices. Furthermore, the policy vests considerable discretion in Twitch to determine the fate of alleged repeat infringers without offering detailed guidelines on how such determinations are made. This vagueness places creators in a precarious position, where their access to the platform and, by extension, their livelihoods can be jeopardized without clear recourse or understanding of the process.

If anything, Twitch's guidelines are present more so to comply with legislation versus educating its streamers, fans, and copyright holders on how to use the platform properly. Upon receiving these DMCA notices, many streamers noted that the URLs that included the alleged copyrighted content no longer existed. Since these clips were taken down so Twitch stayed in compliance under safe harbor, streamers were not able to even see how their infringement took place to begin with. Due to these notices being based on content and clips from 2017 to 2019, years prior to these notices being sent, there is not any obvious reason why the RIAA suddenly decided to send these notices out. If anything, the RIAA contributed to the retaliation or

irrational logic as to why they were being sent to begin with. Though, this is not the first time the RIAA has tried to be copyright enforcers, as seen back in the late 1990s to early 2000s following the signing of the DMCA.

This approach by Twitch reflected the original clash in content moderation and copyright enforcement that Justin.tv faced a decade earlier. And according to Fuslie, she was told to delete her content (per Twitch workers) and the strikes were not taken away from her account. But under the 2019 guidelines, *Fuslie and other streamers could have filed a counter-notification* to fight against the notices they received for potential counter-notifications and/or retractions. Twitch did not make counter-notification filing an explicit method for creators other than providing the processing guidelines. What is even more surprising is that these were the DMCA guidelines on Twitch from March 2019 to May 2021, or over two years. No changes to Twitch's DMCA guidelines took place in 2020. And so, when those two waves of DMCA notices were sent in June and October 2020, Twitch creators had to follow these 2019 policies.

The emphasis on detailed reporting and the mechanism for handling repeat infringers were steps toward ensuring compliance, but the brevity and lack of detail in these areas highlight a need for greater clarity and support for creators navigating this landscape. As live streaming continues to evolve as a prominent medium for entertainment and creative expression, the refinement of these guidelines will be crucial in fostering an environment that respects copyright while supporting the innovative potential of content creators. This early framework did not adequately set the proper protocols in place for streamers to fight these DMCA notices prior to 2020, and/or the ability to manage the capacity for a mass batch of notices in the first place.

And what did Twitch say in response?

Unfortunately, things did not change quickly enough. As stated in the introduction of Chapter 2, the RIAA sent another mass batch of DMCA notices in October 2020. This second wave of strikes precipitated a crisis of content deletion and archival shifts, as prominent streamers like Fuslie and Pokimane sought refuge for their content on YouTube, circumventing Twitch's archival limitations. Twitch's subsequent public statement, issued a month later, aimed to address the surge in music-related copyright claims, marking a critical juncture in its approach to copyright enforcement. The statement acknowledged the creators' frustration and confusion, promising transparency and the development of tools and educational programs to aid creators in navigating the DMCA landscape. Yet, this acknowledgment might have been perceived as belated, underscoring a reactive stance towards copyright management:

“Your frustration and confusion with recent music-related copyright issues is completely justified... We were as surprised by this sudden avalanche of notifications as many of you were. We also realized that we needed to provide streamers with more educational programs and content management tools to help you deal with this unprecedented number of notifications coming in all at once. So, while we continued to remove content targeted by these notifications as required by the DMCA, we understood VODs and Clips from years ago may not necessarily reflect your current approach to music. Therefore, we also paused the processing of strikes associated with these batched notifications in order to give you the tools, information, and time that you would need to deal with them.”

To be fair, credit should be given to Twitch for recognizing that there was no system in place or tools that could alleviate what happened. But the idea that nothing was created or existed prior to these DMCA takedowns signified that copyright was not a high priority for the platform to solve at the time. What is even more poignant is the two tips Twitch gave to streamers, which were not playing music at all and/or deleting clips that *may contain* music, since almost every notice was because streamers were playing music in the background. The platform's admission of surprise at the volume of notifications underscores a notable unpreparedness for such copyright enforcement dynamics, revealing a gap in Twitch's

anticipatory measures and systems designed to support content creators against such eventualities. Despite Twitch's legal adherence and respect for copyright owners' rights, the platform's guidance—that creators either refrain from playing copyrighted music or delete potentially infringing clips—signaled a rudimentary stopgap rather than a nuanced, sustainable solution. This approach, while pragmatic, underscored the platform's limitations in offering robust copyright navigation tools and underscored the reactive nature of Twitch's strategy in addressing copyright challenges.

Twitch's response, while emphasizing legal compliance and the balance between creator support and copyright respect, highlighted the platform's historical underestimation of copyright enforcement's complexity within the live streaming domain. The “avalanche” of DMCA notifications not only marked a departure from Twitch's previous encounters with copyright claims but also illustrated the platform's vulnerability to copyright holders' external pressures. In its commitment to developing more sophisticated content management solutions, Twitch acknowledged the necessity of empowering creators with greater agency and control over their content. This shift towards a more creator-centric approach was further evidenced by initiatives like the “Copyright and Your Channel” Creator Camp and the promise of enhanced tools for live stream audio management and copyright dispute navigation.

In response to the crisis, Twitch committed to several initiatives aimed at better supporting its creators, acknowledging past inadequacies in their tools and resources. The platform's admission, “One of the mistakes we made was not building adequate tools to allow creators to manage their own VOD and Clip libraries,” reflects a shift towards recognizing creators' needs for more sophisticated content management solutions, and providing creators a sense of agency and control over what they want to do with archived content. Moreover,

Twitch's promise to enhance control over recorded content, improve live stream audio management, and facilitate clearer navigation of copyright disputes signifies a move towards a more creator-centric approach.

Specifically, the introduction of a “Copyright and Your Channel” Creator Camp page and the scheduling of live sessions to discuss DMCA-related topics demonstrate Twitch's commitment to empowering its creators with knowledge and resources to navigate copyright laws confidently. These educational efforts, coupled with promises of greater transparency and community engagement through forums like UserVoice, signify Twitch's recognition of the importance of an informed and proactive creator community. By providing creators with the tools and knowledge to comply with copyright laws, Twitch aims to foster a more resilient and vibrant community that can thrive within the legal constraints of the digital entertainment landscape. The emphasis on understanding and adhering to copyright laws not only highlights Twitch's proactive stance in addressing potential infringements but also demonstrates a broader effort to cultivate a well-informed community. This educational approach, coupled with updates on new tools for copyright strike management and content control, showcases Twitch's ongoing endeavors to enhance transparency and empower creators with the necessary knowledge to navigate copyright challenges confidently.

Additionally, Twitch's again explicitly mentions their partnership with Audible Magic, aimed at automatically managing copyright risks in VODs and Clips by muting or deleting flagged content, reflects a proactive stance against copyright infringement. This reliance on technology, however, brings to light the inherent limitations of such automated solutions. These systems, though beneficial for reducing the risk of DMCA takedowns, might not fully comprehend the subtleties of copyright law, including the principle of fair use. This could lead to

unwarranted censorship, inadvertently penalizing creators for potentially lawful uses of copyrighted materials. What is also touted as a step in the right direction by Twitch is the launch of Soundtrack by Twitch, which provides streamers with a library of licensed music. This initiative, while offering a creative solution, also reflects the broader constraints imposed on creators, channeling them towards Twitch's curated or other licensed music options. While these avenues offer a safer harbor from copyright infringements, they also spotlight the limitations on creative freedom, emphasizing the ongoing challenge of fostering a community that thrives on creativity and innovation within the confines of copyright law.

In addition to all these resources, Twitch hosted a follow-up live stream under the Creator Camp channel to further clarify what they are doing to encourage proper content creation without violating copyright law. Hosted by creators Aureylian and Jezforrester, they spent an hour reviewing the “Copyrights and Your Channel” page and trying to answer any clarifying questions. Some of the advice given in the stream included: not playing any music; reviewing game EULAs (end-user license agreements) to determine if in-game music needs to be disabled; and warning their creators that streaming music, *even with the proper rights*, may lead to a DMCA strike. Overall, the stream contributed to Twitch's comprehensive strategy to educate its creators in a tumultuous turn of damage control by Twitch.

The inclusion of a disclaimer in the session, clarifying that the expressed views may not mirror Twitch's official stance, subtly underscores the platform's careful maneuvering around policy discourse and support for creators. This strategy of distancing from definitive policy positions, while providing educational content, reveals a layered approach to engaging with complex copyright issues. However, this tactful navigation also invites scrutiny regarding the depth and applicability of the platform's guidance to real-world challenges faced by creators. As

Twitch commits to transparency and educational outreach, it attempts to traverse the intricate landscape of digital copyright enforcement. The goal is to cultivate a community that is not only compliant but also creatively dynamic and connected. Yet, the effectiveness of these efforts in truly equipping content creators to confidently navigate copyright pitfalls, without stifling their innovative spirit, remains an area ripe for further evaluation and critique.

In sum, Twitch's November 2020 statement serves as a critical reflection on the challenges and responsibilities of digital platforms in managing copyright issues. Through a combination of compliance efforts, creator support initiatives, and transparency commitments, Twitch endeavors to navigate the complex interplay between copyright law, content creation, and community engagement. This episode in Twitch's history not only highlights the platform's adaptation to copyright challenges but also contributes to the broader discourse on the evolution of copyright enforcement in the age of digital streaming, emphasizing the need for a balanced approach that respects the rights of all stakeholders involved. In Chapter 4, I continue my qualitative textual analysis by exploring the revisions to Twitch's guidelines post-2020. Additionally, I conduct two biographical case studies of prominent streamers Fuslie and Asmongold, who both were impacted by the 2020 DMCA strikes. Through this mixed-methods approach, this thesis will help further define the progress made by the platform over the last four years and how much impact these strikes have on the creator community.

Chapter 4: Twitch Post-2020 and the Legacy of Fuslie and Asmongold

Twitch has emerged as a cornerstone, embodying the fusion of live streaming with community-driven interaction. The platform's foray into politics, exemplified by Alexandria Ocasio-Cortez's (D-NY) *Among Us* session, which garnered 435,000 concurrent viewers (third all-time in single-stream viewership), underscored Twitch's cultural and political influence, engaging young adults in the 2020 presidential election (Frank, 2022). Amidst rapid growth and an influx of new users and streamers, Twitch's implementation of copyright changes and updates left many streamers feeling scared and uncertain about their future and the future of Twitch. However, a pivotal moment arrived in September 2021 when Twitch sought to reconcile with the music industry by signing a deal with the National Music Publishers' Association (NMPA) aimed at safeguarding copyright owners' rights (Grayson, 2021). This agreement was heralded as a step towards harmonizing the interests of the gaming community with those of music publishers, promising to “build productive partnerships” and enhance the visibility and revenue for songwriters through innovative collaborations (*NMPA and Twitch announce agreement*, 2021):

“The National Music Publishers' Association (NMPA) and Twitch today announced an agreement to work together to build productive partnerships between the service and music publishers. The deal paves the way for the economics of new gaming models to increase visibility and revenue for songwriters... Twitch will provide new opportunities to music publishers who will be offered an opt-in deal allowing for future collaborations to bring new facets to both the gaming experience and songwriter exposure. These collaborations will create an even more dynamic and expansive environment for people to discover, watch, and interact with songwriters.”

- Press release by the NMPA (2021)

Despite this deal, there were not any specific or concrete measures that both Twitch and the NMPA presented. The new process introduced by Twitch and NMPA, although more lenient than Twitch's recent DMCA record, did not fundamentally alter the restrictions on music usage

on the platform. This nuanced approach left many creators in limbo, uncertain of the implications for their content and livelihood (Grayson, 2021):

“As part of this agreement, we want to let you know about a new process that we are creating that participating music rights holders can opt into to report certain uses of their music, which is more flexible and forgiving to creators who inadvertently or incidentally use music in their streams than the existing process required under the DMCA and similar global laws... This new process does not change how music can be used on Twitch. As we’ve said consistently, it’s never okay to include music in your channel unless you’ve secured the necessary rights or have the authority to do so.”

The agreement's ambiguity underscored the complexities of navigating copyright in the live streaming domain, highlighting a disconnect between policy intentions and practical outcomes for creators. Before this accord, the NMPA had expressed intentions to clamp down on unauthorized music usage on platforms like Twitch and Roblox, a stance that underscored the friction between content creators and copyright holders (Spangler, 2021). Despite the potential for collaboration, the reality left streamers grappling with the same uncertainties about music rights and content creation. So, what can streamers do to prevent punishment by Twitch, the DMCA, and the music industry?

In this last chapter, I perform a shorter qualitative textual analysis on Twitch’s DMCA guidelines post-2020, specifically the 2021 and 2023 versions to see how Twitch has evolved in copyright enforcement since the 2020 strikes. Moreover, I analyze the experiences of Twitch streamers who faced the brunt of DMCA notices in 2020, offering a lens into the personal and professional turmoil caused by the DMCA notices they received. Through the case studies of Fuslie and Asmongold, I argue that though Twitch makes significant progress in updating its DMCA guidelines following the 2020 copyright strikes, it has led to popular Twitch streamers building animosity towards Twitch and/or outright leaving the platform for career preservation.

Analyzing Twitch, Copyright, and Content Moderation Together (post-2020)

As seen in the first three chapters, copyright and content moderation are two aspects of live streaming that were created separately but work together on digital platforms to maintain operational procedures and ensure proper use of these platform features. Game studies scholar Eirik Jungar (2016) provides a foundational perspective on how live streaming has become a powerful platform for cultural expression, allowing individuals to partake actively in media production and consumption. This democratization of content creation signifies a departure from traditional media's unidirectional flow, embracing a model where viewers and creators engage in a dynamic, interactive relationship. In terms of copyright, there is now thick tension between streamers and copyright holders within this new media landscape. By setting the stage with these considerations, Jungar opens the discourse on the intricate balance between fostering creative freedom and respecting copyright laws.

Building on the legal challenges identified by Jungar, legal scholar Yang Qui (2017) offers a proactive solution through a proposed amendment to copyright law. This amendment, aimed at reconciling the interests of copyright holders, streamers, and platforms, suggests a compulsory license system tailored for the digital age. Regarding economic models, platform scholar Partin (2019, 2020) explores the platform's economic underpinnings and its role in surveillance capitalism. Through features like Twitch Bits, Partin illustrates how Twitch quantifies viewer engagement, creating a surveillance ecosystem that benefits Amazon, Twitch's parent company. This analysis sheds light on the intricate ways in which Twitch navigates the intersection of user engagement, platform governance, and corporate interests, revealing the complex dynamics at play in the digital entertainment industry.

Staying within Twitch, social media scholar Colten Meisner (2023) examined Twitch's issues surrounding networked harassment. Through qualitative research, Meisner explores how

streamers and communities combat harassment, highlighting the limitations of Twitch's governance structures in providing adequate support. Computing scholars Joseph Seering and Sanjay Kairam (2023) even analyzed Twitch moderators, or fans of Twitch streamers who oversee chat activity when their favorite streamer goes live. Uncovering the motivations and challenges of those who volunteer to maintain community standards, Seering and Kairam found how the role of moderators evolves with channel size, underscoring the importance of social ties and shared community values in effective moderation. And because of how roles such as moderating contribute to the ideas of community building, media expert Brett Sherrick et al. (2023) investigated the effects of livestreamer commentary style and community size on parasocial relationships among viewers. Their research highlights the positive outcomes of fostering strong parasocial interactions, demonstrating the significant role streamers play in building engaging and cohesive communities on Twitch.

Post-2020: Did Twitch do the DMCA thing(s)?

In May (and July) 2021, despite two years passing and growing concerns among creators, Twitch's DMCA guidelines saw minimal changes, retaining the core structure of the 2019 version, including the succinct “repeat infringer” policy. However, the process for submitting infringement notifications was streamlined, enhancing accessibility for rights holders. Counter-notification procedures were clarified to a lesser degree, directing users to a specific Twitch email for disputes. Though small in clarification, Twitch made a small step toward simplifying the dispute resolution process as the platform defined its role regarding the DMCA for the first time:

“Twitch does not have the authority or ability to make legal judgments regarding allegations of copyright infringement. It is our policy to follow statutes and court rulings regarding uses of our services and conduct of our account holders. The DMCA and similar laws require that Twitch act as a “go-between,” processing notifications of

claimed infringement from rights holders and counter-notifications from account holders and notifying the impacted parties. It's the responsibility of the rights holder and the account holder to resolve the dispute.”

By acting as a neutral intermediary, Twitch presented itself as an open platform for all, as Gillespie (2010) has found with other digital platforms like YouTube. Additionally, Twitch clarified what it does when receiving any DMCA notice, counter-notifications, and retraction - specifically by clarifying its role in being a messenger to copyright owner and Twitch creator. Even the way to provide information about any alleged infringement or counter-notification goes further in detail to ensure there are URLs as proof for either party, despite no online form not being created yet for counter-notifications. But what was most surprising was the expansion of the Repeat Infringer Policy, which is explicit about the three copyright strikes, in the July 2021 policy page:

“We will terminate an account holder’s access to the Twitch service if that user is determined by Twitch to be a “repeat infringer” of copyrighted works on the service – under our policy, a user will be considered a repeat infringer if they accrue three copyright strikes. Furthermore, we may in appropriate cases and at our sole discretion, limit access to the Twitch service and/or terminate the accounts of any users who blatantly and egregiously infringe the intellectual property rights of others, whether or not repeat infringement has occurred. Account holders generally earn a strike when Twitch receives a complete notification of infringement and does not receive a complete counter-notification regarding the alleged infringement or a retraction of the notification. Strikes are not permanent, but rather are associated with an account for enough time for Twitch to determine whether the account holder is engaging in repeated infringement such that termination is necessary under this Policy.”

Despite being more detailed than the previous two-sentence policy in March 2019, there is still ambiguity about how long strikes stay on an account, what is an incomplete counter-notification, and other vital factors that play in someone receiving a strike. And despite strikes not being on the streamer’s account forever, leaving its duration up for interpretation is not necessarily a resounding solution for all parties. Twitch’s failure to be outright in how various criteria and processes take place for copyright infringement after two years of revisions only

further the idea that platforms are not as open and equal to all users. In the current version of these guidelines (July 2023), Twitch revised little to their copyright policies and practices.

However, they added a section called “Copyright School,” which has existed since at least 2023, for current and future streamers to be a restorative solution for copyright infringement:

“We understand that mistakes happen and want everyone in the Twitch community to have the information needed to educate themselves and avoid making future mistakes. If you receive a copyright strike and are eligible to have the strike removed by completing Copyright School, you’ll receive an invitation to attend Copyright School through email and on twitch.tv via a top-of-page banner notification. If you successfully complete Copyright School following this invitation, one copyright strike will be removed from your account. You can take Copyright School once every 12 months. Because Copyright School contains valuable information for all streamers, we make it available for everyone (not only streamers who’ve received a copyright strike).”

Alongside this creation of Copyright School showed that Twitch wanted to make things easier for aspiring and current streamers, Twitch also made policies in 2022 dedicated to inadvertent or incidental copyright infringement, which is divided into two categories dependent on the stream and/or streamer’s context (*Twitch.tv - Music Reporting Process*, 2022). This “Music Reporting Process” usually leads to removing or muting of any VODs (videos on demand, which include various streams, highlights, uploads, and clips) after being audio scanned by the automated system known as Audible Music (Hoppe, 2020). Through muting, streamers are not typically punished but rather warned as a portion of the stream has no audio. But if channels engage in certain activities, such as broadcasting of recorded music, it falls under a warning and penalty system to account termination after three violations.

Fuslie: Resilience was the Key to Her Career’s Survival

One such streamer that has been mentioned consistently throughout this paper surrounding copyright and content moderation is Leslie ‘Fuslie’ Fu, a popular Twitch (now YouTube Gaming) personality who has carved out her own identity and community in the

gaming and live streaming industries. Fu's career encapsulates the quintessential experience of a content creator navigating the turbulent waters of copyright law and platform moderation on Twitch, and later, YouTube Gaming. Her journey from a graduate exploring the realms of gaming to becoming a cornerstone of the gaming and entertainment industries embodies the transformative potential of digital platforms. Fu's story serves as a primary case study for the broader challenges and opportunities facing streamers in the copyright landscape.

Born in 1992, Fu had always been interested in games since growing up like *Star Fox* and *Pokemon* (Fu, 2023). As a child of Chinese immigrants, Fu grew up with the expectation of working in the STEM or medical fields as well as learning how to sing and play the piano. And in 2014, she was a recent college graduate from the University of California, Irvine trying to figure out her post-graduate plans (Coomes, 2018). Inspired by the success of other Twitch streamers and her friends introducing to her games like *League of Legends* and *Counter-Strike: Global Offensive*, she decided to try streaming in 2015 while being a full-time master's student at the University of California, Los Angeles (Yang, 2022). Though streaming was to first explore her interests in different games, Fu also saw the value in creating non-gaming content. Experimenting with Q&A and singing sessions, along with in real life (IRL) streams, she was part of the vision that Kan and Shear saw when they first launched Justin.tv back in 2007.

Unlike other streamers and Internet celebrities that have gotten famous through viral moments, Fuslie's popularity on Twitch was slow and gradual. After becoming a Twitch Partner in 2016, she was stuck at 80 viewers per stream for every stream until fellow streamer and friend Albert 'boxbox' Zheng hosted her stream on his channel, leading to over 3,000 viewers watching her (Carrigo, 2022). In the meantime, she worked with Zheng to create Streamer Camp, an event to help smaller streamers build the skills necessary to become a great streamer. With this trial

and error, she slowly gained more viewers and chances to do non-gaming content. As Fu continued to grow, the introduction of games like *Among Us* combined with staying at home due to the COVID-19 pandemic boosted Fuslie's career at an exponential level due to how she interacted with others during these games and streams (Fu, 2023):

“When you're sitting in front of a camera, you don't really feel like the difference in 34 viewers, and like 100, and then 100 to 200, 200 to 500, 500 to a thousand, a thousand to like two thousand to five thousand to seven thousand. So, as I was growing ... I'd get all these cool opportunities to sing for things....”

- Fuslie on her audience growth (2023, 7:15-8:05)

But when she received those two DMCA strikes on Twitch in June 2020, it was a turning point in her Twitch career. Despite how far Fu had gone in her career, she was filled with absolute fear that everything she worked for would be taken away if a third strike appeared on her account. Most of the news, entertainment, and gaming articles used Fu's tweets to cite Twitch's issues around the DMCA. And because she had gone to Twitter (now X) to express her concerns, many people saw her tweets and felt sympathy for her and other streamers going through this. And because she also mentioned Twitch workers did not do anything other than advise her to delete anything, that sparked criticism from streamers like Pokimane, Asmongold, and others about Twitch's ineptitude. The idea of multi-platform presence was essential in making the issues streamers face more visible beyond Twitch. Or in this case, copyright.

Right after the strikes, she talked with some of her friends from the content creator group in OfflineTV and Friends, in a podcast to discuss her experience of receiving that notice:

“I click on the link that says, like, ‘This is the clip.’ It's gone, so I can't even see, like, how loud it was, what the context was and it just says, ‘You've been struck once. If this is your third strike, your account is now banned or something.’ And then I was like, ‘Okay, well I've been streaming songs on this platform for years, just kind of chilling in the background, listening to music. So maybe, just this one time it was a problem and it'll never happen again.’”

- Fu on the OfflineTV podcast (OfflineTV Podcast Clips, 2020, 0:50-1:16)

Fuslie's recount of her experience with the DMCA strike on Twitch, as shared on the OfflineTV podcast, underscores a profound disconnect between content creators and the platform's mechanisms for copyright enforcement. This moment encapsulated the precariousness of a streaming career on digital platforms, where years of content creation and community building can be jeopardized by opaque copyright policies. Fuslie's inability to even review the clip in question highlighted a critical flaw in Twitch's system, depriving creators of the opportunity to understand or contest the infringement claim effectively or even at all. This experience marked a pivotal point in Fuslie's career, illuminating the urgent need for clearer guidelines and more supportive practices from platforms to safeguard the interests of creators navigating the complex landscape of copyright compliance.

Unfortunately for Fuslie, receiving a DMCA strike did happen again, which caused her to be in full panic mode. The podcast, hosted by fellow streamers and creators Lily 'LilyPichu' Ki, Michael Reeves, and William 'Scarra' Li, also discussed how YouTube has adapted to the issues they faced with copyright in the past. Yet, Twitch has decided to take a different approach:

“Reeves: I don't know why Twitch is so harsh. That seems like a pretty... it must have been seen coming... You know they must have seen like, 'You know, if it applies to all clips that someone can get like... three strikes for everything.

Scarra: The VOD system on Twitch, bless their soul, is garbage... If there is DMCA [content on the VOD], I think it just mutes the section.

Reeves: That sounds like a good thing.

Scarra: Yeah, that's reasonable but for some reason, like clips, is where the problem is coming from.”

- Reeves and Scarra on the Twitch/DMCA chaos (OfflineTV Podcast Clips, 2020, 4:50-5:35)

Reeves and Scarra's discussion reveal a significant inconsistency in Twitch's response to copyrighted content: while VODs with infringing material are simply muted, clips can lead to harsher penalties, including strikes that threaten creators' careers. This discrepancy underscored a systemic issue within Twitch's moderation practices, suggesting a lack of preparation and an arbitrary application of enforcement policies that was mentioned later in the November 2020 statement. Their insights call attention to the necessity of reforming Twitch's DMCA policies to better support and protect content creators like Fuslie from undue penalties for minor or unintentional copyright infractions, advocating for a platform that acknowledges the realities of digital content creation and fosters a supportive environment for its community.

And despite Twitch executives and workers expressing both their support and inability to help Fuslie, this situation illustrated the lack of support platforms can provide in times of crisis. After June 2020, Fu did everything she could to keep her Twitch career intact. From preventing any DMCA audio from being played on her stream and playing background music that was either royalty-free or had permission to use, Fuslie's streams remained unchanged. She even stopped humming songs or constantly changed playlists on the off-chance the music was DMCA-strikeable (Offline TV Podcast Clips, 2020). By continuing to play music, it went against what Twitch asked streamers to do, which was to not play music at all. But what sucked the most, according to Fu, was that she was unable to make content without thinking about the two DMCA strikes on her account (Fuslie, 2022).

And when the strikes restarted in October 2020, Fuslie told her fans that she was posting all her Twitch streams onto her YouTube channel called Fuslie VODs, which is solely dedicated to old Twitch streams (Fu, 2020d). However, Fu was able to continue making content on Twitch over the next two years without receiving that third DMCA notice. Her popularity continued to

grow and allowed her to collaborate with other streamers and content creators in games like GTA RP, where streamers make their own characters and storylines and roleplay in the city of Los Santos (parody of Los Angeles), which so happens to include music made by streamers such as Fu. Fu continued to be used for Twitch's promotional content and events for streamers, such as TwitchCon, the bi-annual convention for Twitch streamers to meet other streamers and their fans. She even joined e-sports organization 100 Thieves as a content creator in 2021, which is co-owned by former professional Call of Duty player Matthew 'Nadeshot' Haag, and fellow YouTube Gaming streamer and friend/roommate Valkyrae 'Rachell' Hofstetter and Jack 'CourageJD' Dunlop (100 Thieves, 2021).

Eventually in September 2022, she announced her switch from Twitch to YouTube Gaming. This announcement came as a shock to many streamers, but in her first stream on YouTube, Fu explained that the move was due to a variety of factors, including ad requirements and the potential permanent ban of her Twitch channel due to the two DMCA strikes on her account (Fu, 2022b). However, the decision for her was quite easy, despite all the uncertainty and attempting to cover up her move with a fake last stream on Twitch (only to stream multiple times after until her contract with YouTube started). She even goes on to describe the differences between Twitch and YouTube of their respective DMCA systems:

“The system [here on YouTube] is very different for DMCA... I get warnings, and if I ignore the warnings, then BOOM! Then I get a DMCA strike. On Twitch, it's like, 'Hey! Two years ago, there's this clip of you listening to Ariana Grande, and you listened to it two times in one day, so that's two strikes on your channel. One more [strike], we're gonna have to permanently take your channel down. And by the way, this was two years ago.' And you're like, 'HUH?!' After fearing for my career, straight up like that. After being [at] the forefront of that, not about that. '7 rings' [by Ariana Grande], we do not play that song.”

- Fuslie on the YouTube DMCA system vs. Twitch (2022, 14:26-15:01)

By contrasting the two platforms' DMCA systems, it became clear that YouTube had adapted a lot easier and quicker to any issues surrounding copyright. She points out the immediacy and severity of Twitch's DMCA strikes for past actions, painting a picture of a system where content creators are punished retroactively for infractions they may not even remember, exacerbating the fear and uncertainty around copyright compliance. This retrospective punishment for listening to copyrighted music, like Ariana Grande's '7 rings', underscores the punitive nature of Twitch's approach and its impact on creators' careers. Her move to YouTube, where the system begins with warnings before escalating to strikes, exemplifies her search for a platform that offers a more reasonable and creator-friendly approach to copyright management.

In the same section of the video, Fu goes on to share screenshots of her old tweets alongside articles that mention her and other streamers being permanently banned. And by recognizing that she was at the center of a huge problem Twitch had faced multiple times before, it felt different with the amount of backlash combined with most of the world being at home due to COVID-19. She even went on to say that she was the biggest streamer that had two strikes, and Twitch's inability to state counter-notifications as a potential solution nor having a mass deletion tool:

“To hear that from them [Twitch] directly ... IT WAS TERRIFYING! There's nothing! Whereas, YouTube dealt with this stuff, many, many years ago. So now, in [their] system, like 'Hey, [we're] flagging you. You're listening to DMCA music, whatever. Stop doing that... That [YouTube's] system feels very comforting to me, especially feeling that feeling of literally almost losing my career in a split second.”

- Fuslie on the comfort of being on YouTube (2022, 15:53-16:30)

Fuslie's account of her interactions with Twitch's DMCA policies and platform workers spotlight the deep-seated fear and uncertainty that copyright strikes instilled in her, despite her

longstanding affiliation and gratitude towards the platform for kickstarting her streaming career. The stark terror she expresses upon receiving direct, retrospective threats from Twitch for actions taken years prior starkly contrasts with her experiences on YouTube, where the DMCA process feels more manageable and less threatening to her livelihood. This juxtaposition highlights the emotional toll created by Twitch's approach to copyright enforcement, underscoring a critical disconnect between the platform's punitive measures and the supportive environment creators like Fuslie seek.

Somehow, Fu's success on Twitch (and YouTube) has led her to accomplishments outside of being on-camera, such as being nominated for Content Creator of the Year at the 2021 Game Awards and being interviewed by entertainment news publications such as Refinery29 (Yang, 2022). Additionally, she has helped women pursue a career in gaming and e-sports via scholarship funding and handling toxic gamers (CONQuest Philippines, 2023; NASEF, 2020). Even with all the sponsorships and other obligations, Fu has continued to maintain and even expand her loyal fanbase that messages her constantly whenever live, makes fanart and send gifts to her house, as well as subscribing to her as a "Member" (name for YouTube Gaming subscribers) despite leaving Twitch in the last few months.

As Twitch has continued to evolve as the most dominant live streaming platform, variety streamers like Fuslie have become increasingly vital for the platform's identity. Regardless, Fu's move to YouTube Gaming has become more representative of the gradual clash that is taking place in the live streaming industry, as more streamers are deciding if they should stick with Twitch, or if they should go to YouTube, Facebook Gaming, or even the upstart live streaming platform Kick. But for Fuslie, staying grounded in those moments of adversity, such as the two

DMCA strikes, helped her be grateful and to continue doing what she has always done: being who she is (Yang, 2022):

“This is my own personal journey ... and you're gonna have all these bumps in the road, and sometimes, it's gonna feel like you failed everything because you don't have that husband or life or job you thought you were gonna have. And you're like, everything's gone wrong or you've made a big mistake. But then you realize that makes it your journey and it's okay. I thought I'd have two kids by now when I was a kid for sure. I thought I'd be married, living in Northern California as a doctor. In an alternate universe, that's happening. But my life right now is far from it, and I couldn't be happier.”

Asmongold: Twitch Is Delusional, and Something's Gotta Change

What we saw with Fuslie was that despite moving over to one of Twitch's main competitors, she was able to continue her career and thank Twitch for providing the space to be a live streamer despite these copyright notices. But other streamers took direct aim at Twitch and decided to not just chat with fans and play video games, but to explain and criticize the DMCA strikes while streaming live. One of those streamers is Zack, or Asmongold, who just so happens to currently have 3.4 million Twitch followers and 2.47 million YouTube subscribers on his main accounts.

In a May 2014 FAQ video on his old channel (same as his moniker), Austin, Texas native Asmongold explained that he grew up playing video games and dived into World of Warcraft back in 2006, leading to the creation of said YouTube (Asmongold, 2014a). And because of some personal things, such as his mom being ill, being a YouTuber or content creator was not necessarily a career choice he had in mind, but rather something he enjoyed doing for fun:

“I made this YouTube channel because I was going to go to school in the spring, so it'll be like right now. And my mom got sick, and so I kind of was taking care of her and helping her. So, now she's better and that's good! That's why I'm going back to business school ... I got a video camera whenever I was 11 years old, and I've been making videos... I've always been interested with, like, film... [it] has always just been like a passion or a hobby. Not necessarily an idea of a career for myself, but ... I've loved [World of] Warcraft ... and wanted to make these videos and help people... It's kind of cool to have this channel that has a bunch of people watching.”

- Asmongold on why he started his channel (2014a, 2:53-3:55)

His response signified how even as other YouTube creators grew their followings and pursued content creation as a career, including Connor Franta, iJustine, and Ingrid Nilsen, it was all for fun. Asmongold's love for the game illustrated the changes that T. L. Taylor (2012) saw in the world of e-sports, where casual, fun gameplay was becoming professionalized, performative, and serious. Another interesting question he answered in this Q&A just so happened to ask if he was going to live stream anytime soon:

“Basically, I’m going to start streaming probably, whenever I get a new computer. I don’t have money to pay for a new computer right now, and so I’ve got to get, like, a new motherboard. I’ve got to get a [PC] case, maybe a processor... I need to get RAM, because I have a new graphics card, a new power supply... My Twitch.tv is just twitch.tv/Asmongold. I have an account. I’ve streamed before, and you know, I will again at some point. And so, you can go follow me or whatever, and eventually, I will come online one of these days.”

- Asmongold on live streaming (2014a, 8:30-9:23)

Less than two months later, Asmongold made another video titled “Streaming,” telling his fans that he is now streaming on Twitch (2014b). And thanks to his commentary, sometimes loud and boisterous personality, gameplay on all things World of Warcraft (WoW), and even his infamous neckbeard, Asmongold's following grew quickly over the next few years (theScore esports, 2019). His feedback, which at times, was extremely critical of Blizzard, the company that created WoW. And in 2016, that feedback led the way to Blizzard creating official WoW servers, rather than see players resort to private, unofficial servers (Bogdanos, 2016; McWhertor, 2016; theScore esports, 2019). And when interviewed by *Dot Esports* writer Dionysios Bogdanos (2016) on his success, Asmongold said, “... if you want to be successful, you have to be yourself,” noting that being authentic and relatable allows people to enjoy not only the content, but the streamer as well.

However, Zack fell into controversy even before the DMCA strikes. In 2017, Asmongold made a comment about the displacement of Hurricane Katrina victims while playing WoW, leading to a 24-hour ban on Twitch for violating the Terms of Service and/or Code of Conduct (Asmongold, 2017). In his TwitLonger, Zack explained his actions and even mentioned how Twitch has been fair, honest, and transparent:

“I’ve always been a very big supporter of Twitch and one of the few people who thinks that most of the actions they take are justified and not out of malice or preferential treatment. I love being a part of Twitch and I want to do whatever I can to continue to do so. While I feel that it’s unfair to suspend for something not explicitly against the ToS, the only thing I can hope for is better clarification so that I don’t make a mistake in the future. Please note that this is not me debating as to whether the ToS is “fair” or not, it’s about if what I said violated it. While I have my own opinions about how the ToS should be, it’s irrelevant to this discussion.”

- Asmongold on his 24-hour ban (2017)

By acknowledging Twitch's actions to temporarily ban him were justifiable, Asmongold's response underscored the complexities within the world of live streaming. Asmongold's commitment to being a constructive part of Twitch underscores the potential of the symbiotic relationship between streamers and the platform, where adherence to guidelines ensures the continuity of creative expression within a structured environment. However, Asmongold's call for clearer communication and transparency from Twitch regarding these policies reflects a broader desire among content creators for more precise guidelines that can preempt potential infractions, thereby fostering a more informed and compliant streaming community. His stance, focusing not on debating the fairness of the ToS but rather on seeking clarity about its application, exemplifies a constructive approach to platform governance, emphasizing the importance of transparency and dialogue in resolving content moderation dilemmas.

Regardless, Asmongold continued to skyrocket in Twitch followers and YouTube subscribers following the controversy. At one point in 2019, he became the most watched streamer in the third quarter of 2019 for consecutive months, dethroning streamers like Tfue and Tyler ‘Ninja’ Blevins (Vincent, 2019). But in June 2020, Asmongold was one of the many streamers to receive a takedown notice from the RIAA and Twitch. More specifically, the notice Asmongold received involved using “Cake by the Ocean” by pop group DNCE in a 2019 clip (Liao, 2020). In a tweet by Asmongold, he states that he is grateful that most of his content is on YouTube, even as he must delete all his Twitch clips that may contain DMCA content (2020a).

What is so significant here is that like Fuslie, Asmongold and other popular streamers went to X (formerly Twitter) to either: a) express grave concerns about the situation Twitch and the music industry had put them in; or b) update their fans and fellow creators about the next steps they took. Again, the idea of streamers needing to have other platforms such as X, YouTube, etc., signifies that they rely on more than just Twitch to be seen and be heard. In times of crisis, as seen here, Fuslie and Asmongold utilized X, which was seen by many involved in live streaming and not. Live streaming is much more than “turning private play into public entertainment,” as Taylor (2018) noted in her book on Twitch. And by having to stay up to date with Twitch’s policies and decisions around copyright during this time, streamers feel pressured to be more educated, more careful, and very intentional about how they present themselves live in front of thousands of people and respond to times of crises.

On June 11, 2020, Asmongold released a video regarding his take on the “Twitch DMCA Apocalypse,” where he rails against Twitch’s response:

“The difference I think with Twitch streaming, is that the music [used in Twitch streams] does not serve as a replacement for purchasing the music and consuming the music...I feel like people need to stand up and stop this from happening. I think that as more things become digital, you’re gonna have more and more people that are gonna have these

different types of greedy corporations and companies abuse these laws in order to cut into their [the users'] profits unfairly and not by their own right. And I think that people need to stop this from happening before it becomes a bigger issue because it will be a bigger issue.”

- Asmongold criticizing Twitch's response to DMCA strikes (2020b, 10:23-10:28, 11:29-11:54)

By comparing the traditional consumption and buying pattern of music to background music/in-game music that is live streamed, Asmongold challenged the notion that music being played live is competing against the music industry itself. And by playing copyrighted music on stream, artists and the industry are losing money. This response is vastly different from Fuslie, understandably so with two strikes, who was more so frustrated with Twitch's inadequate systems and procedures. Asmongold also went on to say that the DMCA is outdated to handle the digital ecosystem, and that this problem is only going to get worse as many aspects of life are being more digitized, such as monetary transactions (2020b). Due to the greediness and profit-making practices that big corporations perform, Asmongold even went further to say that people must stand up to Twitch before it is too late.

What is also very telling is the changing of support against Twitch by Asmongold. Three years prior, Asmongold was supportive of Twitch's actions to ban him. Here, he sided against the decision Twitch has made in respect to copyright enforcement. This inflection point proved to be more than the one-time rant, as the October 2020 DMCA waves led to Asmongold saying to his audience that streamers and fans should raise enough money to lobby politicians to change the DMCA itself, or “fight corruption with corruption (Periwal, 2020).” He continued to repeat this notion of lobbying politicians and the audacity for the Internet to follow a law that is over twenty years old in May 2021, when Twitch's DMCA guidelines were revised in response to a potential third wave of strikes (Lavoie, 2021). He even stated that his content should be

reuploaded and be monetized without punishment as the DMCA “is completely behind (Glaze, 2021).”

And due to only having one strike on his Twitch account, Asmongold was able to continue his career with less fear of another DMCA strike. Compared to Fuslie, who made over \$600,000 from 2019 to 2021 on Twitch, Asmongold made over \$2.5 million in the same time frame (*Twitch Earnings Leaderboard*, 2021). At the same time these waves were happening, Asmongold co-founded a streamer organization called One True King (OTK) with other streamers to create various gaming and non-gaming content, becoming one of the biggest content creator groups on Twitch (Switzer, 2020). But in 2021, Asmongold took multiple breaks from streaming and even contemplated quitting due to not having as much fun, especially with his mom’s passing from COPD (Switzer, 2021; Vandervoort, 2021; Asmongold TV, 2021).

Even though copyright did not have as much of an effect on his career, he has continued to react to content like copyright, game development news, and streamer drama. One interesting thing that has occurred during the last three years is Asmongold’s transition to stream more on his alternate Twitch channel, “ZackRawrr,” and creating content on his main YouTube Channels (Asmongold TV, Clips, and Gaming) rather than the two (Asmongold and ZackRawrr) he first started over a decade ago. In the weeks, months, and two-plus years since his mom’s passing, fans speculated why he abandoned his main Twitch channel, ranging from emotional burnout to having an inflated ego (Kamanira, 2023). But in a recent March 2024 article, *Sportskeeda* writer Jason Parker found that Asmongold wants fans to enjoy his content without advertisements or subscriptions on his alternate Twitch channel due to having so much money (Parker, 2024). In other words, Twitch loses thousands of dollars every time that Asmongold streams on his alternate account. Though the other long-standing accounts on Twitch and YouTube have not

been deleted, it has allowed Asmongold to feel unconstrained by platform rules and contracts with his content.

Through these difficulties, Asmongold has remained one of the most popular Twitch streamers. In 2022, he was nominated for “Streamer of the Year” at the Esports Awards and won Best MMORPG (multiplayer online role-playing games) Streamer at the 2022 and 2023 Streamer Awards. With OTK, Asmongold and company created Starforge Systems, a PC-building company in 2022 that has since partnered up with Sentinels, one of the most beloved e-sports organizations in the world (Walker, 2023). Outside of running businesses and winning awards, Asmongold even wrote to current U.S. Senator Ted Cruz (R-TX) regarding the concern of loot boxes in video games, or a form of online gambling that Cruz surprisingly agreed was not a good thing (Jackson, 2022).

Just like Fuslie, Asmongold’s story as a live streamer came from humble beginnings. They both faced DMCA strikes from Twitch, with each going about their careers in diverse ways. While Fuslie eventually left for YouTube’s more secure and established DMCA system, Asmongold has taken on the platform by not allowing Twitch to make money from him. His outspoken criticism of Twitch's handling of the DMCA strikes, juxtaposed against his previous support for the platform, underscores a dynamic relationship between streamers and the platforms that host them. Asmongold's advocacy for change in copyright laws, coupled with his actions to provide ad-free and subscription-free content, speaks to a deeper commitment to authenticity and community engagement. Even as he navigates personal challenges and reevaluates his streaming presence, Asmongold's legacy is marked by his dedication to speaking out against perceived injustices within the streaming ecosystem and his relentless pursuit of a fairer digital landscape for creators and fans alike.

Conclusion: Clearing the Way for a Fair Live Streaming Future

In October 2022, just one month after Fuslie's departure from Twitch to YouTube, Twitch held its first in-person event since the COVID-19 pandemic (in the United States) in San Diego, California. Known as TwitchCon, the platform's most popular streamers attend to meet their fans, participate in panel talks, and even stream from the convention. Even non-Twitch streamers, like Fuslie, go on to attend the convention to support their fellow friends who continue to work on the Amazon-owned platform. *New York Times* writer Kellen Browning (2022) wrote that streamers were not happy with Twitch's overall operations:

“Along the way, Twitch has mostly maintained the good will of the streamers who are its lifeblood. But that has been changing, and streamers say they are increasingly worried that they're being forgotten by the platform in the name of profits. More than a dozen star Twitch streamers have switched to YouTube in recent years, and the service risks losing more to other livestreaming platforms. Rebellion was in the air this month at TwitchCon, a gathering of 30,000 people in San Diego where fans meet their favorite streamers in person.”

Combined with the tumultuous handling of copyright notices, a change to decrease a streamer's profit-sharing model by 20 percent, and streamers required to run more advertisements and ruin the viewer's watch experience, there were legitimate concerns about Twitch's stronghold on the live streaming industry (Browning, 2022). In some ways, the 2020 DMCA notices may have catalyzed the start of Twitch's decline. Or at the very least, have people question where Twitch's priorities were.

This thesis aimed to explore the intersection of copyright law, platform policies, Twitch, and the impact these three had on the platform's live streamers and the live streaming industry. I argued that the Digital Millennium Copyright Act (DMCA), despite its call to balance the needs of copyright holders, allowed digital platforms to go unpunished when called to take down infringing content. In Chapters 1 and 2, the history of copyright and content moderation is so

complicated and complex that the public does not really understand what copyright is and its effects, especially in the digital world. The DMCA was supposed to make copyright clearer for everyone, but it simply could not imagine the vast amount of digital innovation. Justin.tv, Twitch's predecessor, took a lax stance when copyright infringement and piracy took place until the TV and sports industries put pressure on them to act. In Chapters 3 and 4, Twitch did the same thing pre-2020 and during the 2020 strikes, as their DMCA guidelines that were systematically inept to handle high loads of copyright notices and few resources for streamers to fight back. Since 2020, Twitch has more or less revamped those policies, but it has led to streamers like Fuslie and Asmongold to either leave Twitch or be more critical of what Twitch does for anything.

Even after all these changes to the DMCA guidelines over the last four years, Twitch still had to deal with DMCA notices after the 2020 strikes. Nine months before TwitchCon San Diego, the "react meta" became a growing phenomenon where streamers showed TV shows, movies, and more to their fans as content. In turn, just like those who were affected by the RIAA sending notices to Twitch back in 2020, streamers like Imane 'Pokimane' Anys, Hasan 'HasanAbi' Piker, and Jeremy 'DisguisedToast' Wang, all received DMCA notifications and/or temporary bans for violating copyright due to watching anime or Gordon Ramsay's "Kitchen Nightmares" (Grayson, 2022). Just like prior situations, Twitch played neutral and/or ignorant to these actions of infringement to maintain their safe harbor protections under the DMCA. But at this point, things need to change. The real question is: by how much should things change?

One way to describe the current landscape is based on how much these industries make, according to esports lawyer Devin Philip Graham:

“Whether it's music publishers seeking legislation against player pianos over a century ago ... or video game rights holders converting community efforts to develop esports

infrastructure into unearned windfalls for their own marketing, the story of copyright law has often been about established interests trying to conquer what they view as threatening upstarts... New works necessarily build on the old, coming out of places and times and groups and events as much as out of individuals' heads... And just as importantly, being limited to passive interactions with our own culture is an impoverishment that the massive infringement on Twitch, YouTube and social media shows few of us are willing to accept.”

- Graham in the *Washington Post* (Grayson, 2022)

Graham's note of corporate interest over creators' rights to make the content they desire.

The essence of creativity is presented as an active, collective, and derivative process, which challenges the idea of copyright as merely protecting individual authorship. As we have seen in the movie and music industry recently, more artists have had to credit other writers and works for their own art. And by calling these streamers copyright infringers for their use of copyrighted content, it rejects the idea of passive culture consumption. Plus, why can't we allow streamers and content creators to give credit to the works they use, especially in a digitized entertainment industry that has become more prominent with streaming services? This conclusion explains the main streamer practices that Twitch creators have performed to avoid DMCA strikes and provides policy recommendations that follow Graham's call to make the discourse and activity around copyright a more holistic, non-corporate approach.

Streamers Still Playing Background Music, eh? (and Other Practices)

As the title says, the first streamers perform to prevent a DMCA strike on their account is exactly opposite of what streamers are not supposed to do, per Twitch's November 2020 statement: play background music. In terms of in-game music, streamers are in the clear most of the time due to the free promotion streamers provide these game developers by playing the games (Grayson, 2022). Additionally, most people do not take the time to look at end game licensing agreements (EULAs) for music use, let alone the terms of service (ToS) or privacy

policy and any relevant agreement. Usually, finding a YouTube playlist or livestream of royalty-free music is typically the main solution. In Chapter 3, Fuslie mentioned that not playing background music felt foreign, and being careful was better than no music in her stream at all.

Fuslie's conundrum makes sense. Streaming is dependent on simultaneous, real-time action and filling the air with noise, not silence. And with Twitch's path to being a top streamer, it requires a lot of time, energy, and resources to move up the latter. As someone who is a Twitch Affiliate, where streamers must reach at least fifty followers, average three concurrent viewers, and stream a certain number of hours to be monetized, I can attest to this uneasy process. Meanwhile, going from Affiliate to Partner requires a higher threshold of the conditions set from Affiliate. I have personally used background music in my streams and never received a DMCA notice. Even when playing video games with in-game music, my account remained clear of strikes. At the end of the day, it is trying to keep Twitch and the music industry happy by not forcing them to go through their copyright enforcement procedures. Other streamers like John 'Masayoshi' Cable, who gives Fuslie credit for building his career, has a dedicated Spotify playlist called "avoiding DMCA" to do just that (Chuh, 2024; Cable, 2020, LazyLouis, 2021). Some of Masayoshi's fans hit on this note of trying to not be repetitive, even within background music, so that the overall streaming experience does not sound the exact same as the prior stream (LazyLouis, 2021). Even some YouTube and Spotify channels create playlists or streams just for the sole purpose of being streamer friendly. And Twitch's alternative, Soundtrack by Twitch, was shut down in July 2023 (Bussey, 2023).

Moving onto practice number two, Twitch contributed a helping hand due to its archival rules: streamers and their fans posting their streams and clips on YouTube. For top Twitch streamers, Twitch updated its archival rules back in 2014, when they implemented Audible

Magic to scan for copyright audios in streams. For top Twitch streamers, archived streams are only available for 60 days. As soon as these streams are gone, they are no longer recoverable. Additionally, fans are not able to watch streams in real time due to a plethora of reasons, ranging from work or school schedules, plans with family and friends, geographical differences or a mixture of all three (e.g., Fuslie streaming at 11 A.M. PST while a fan in Sydney, Australia is sleeping at 5 A.M. local time). How do these fans get to be fans of their favorite creators without getting to see them live?

In short, two options take place: 1) creating a channel/playlist that is dedicated to uploading full VODs on YouTube, if streamers do not go live on YouTube to begin with; and 2) fans take the time to upload clips and highlights from the streams themselves. And even if YouTube has some sort of issue with copyrighted content, Fuslie described their DMCA system as a lenient flagging system that permits for quick solutions without punishment (Fu, 2022). More likely than not, these videos will stay up forever unless it is deleted by the uploading user. And as a fan of multiple streamers, trying to keep up with them going live, some of them even going live simultaneously, it creates weird boundaries and choices for fans to determine who they should watch, for how long, etc. Through these archival modes on Twitch's rival, it provides another resource for Twitch creators to be visible for their fans and for their career.

The last practice that Twitch creators perform is what some of the "reacting" creators, like HasanAbi, have been doing: pausing videos that contain DMCA content and providing commentary. HasanAbi, a popular leftist political Twitch streamer, watches clips from main news networks like *CNN*, *NBC*, *Fox News*, etc., and gives his own commentary to thousands of fans on current events and politics (Rudenshiold, 2022). And by turning what would be so-called piracy and copyright infringement into transformative fair use, HasanAbi's content is copyright

protected. Music is a bit murkier, but giving Twitch streamers a strike while live streaming copyrighted music is a rare phenomenon. As one Reddit user puts it:

“Galadyn: Their replays are muted. They don't "get around" it at all, it's just that twitch doesn't actively monitor/"strike" against live streams, but they mute your replay during sections of copyrighted music.

[deleted]: Twitch doesn't actively monitor for copyright violations at all; a notification must come from the copyright holder. If the copyright holder discovers live infringement, they can submit a DMCA takedown, and Twitch will issue a strike.”

- In a Reddit thread: “how do streamers get around DMCA?” (2021)

So, by technicality, streamers can (and most likely are) still violate copyright infringement by playing music without having any rights to use. Thanks to Audible Magic, the section of the VOD gets muted, which is not the issue. Only when the record label wants to send notices again will they pursue a DMCA takedown and make sure these accounts get punished.

What Needs to Change for Twitch and Live Streaming to Thrive?

In December 2023, *New York Times* writer Kellen Browning wrote about Twitch’s rival competitor, Kick.com. As it has poached streamers Felix ‘xQc’ Lengyel, Adin Ross, and Hikaru Nakamura, they have continued to gain traction and popularity. Described as the “Wild West of livestreaming,” Browning goes on to explain Kick’s unorthodox approach that goes against the trend of its competitors:

“Until recently, Kick employed a laissez-faire approach to content moderation, which attracted controversial characters like Mr. [Adin] Ross, who was banned from Twitch earlier this year... Other streamers have filmed themselves committing apparent crimes, like trespassing and sexual assault. To some streamers and viewers, Kick represents a welcome freedom from what they see as the draconian rules and corporate greed on Twitch, which is more closely moderated and in recent years has taken a greater cut of its streamers’ earnings. To others, Kick is allowing harmful views to thrive... The question is: Does Kick actually want to shed its irreverent image, or is it merely paying lip service to regulation in the face of public pressure?”

- Browning on Kick’s approach to content moderation and other policies (2023)

Kick's take on content creation as a haven from Twitch's dominance is not the one to live by. Allowing creators to be able to do whatever they want with no repercussions creates legal concerns and ethical concerns about how Kick operates. Kick and other live streaming platforms need to care about the rules and systems they operate under. Unrestrained expression on live streaming must be weighed against exploitation of community safety, copyright enforcement, and profit making. For Twitch, the live streaming industry, copyright holders, creators, and their fans, collaborating on creating balanced systems and copyright policies that strike this balance is essential. Some of these policy recommendations include:

1. **Be Like YouTube and Have Content ID:** The clearest solution that comes to mind for Twitch is taking a page out of YouTube's book: adopting a Content ID system. By automatically detecting copyrighted materials in real-time, such a system would enable streamers to adjust their broadcasts on the fly, reducing disruptions and enhancing compliance with copyright laws. As Fuslie mentioned, YouTube's DMCA system is more lenient compared to Twitch's with multiple warnings before receiving a strike. This technology, however, needs to be sophisticated enough to differentiate between several types of copyrighted content use, offering streamers the chance to dispute incorrect flags directly through the platform. The introduction of a Content ID system on Twitch would not only streamline copyright enforcement but also provide valuable data for refining the platform's policies and practices. It would also necessitate ongoing dialogue with copyright holders to ensure the system accurately reflects the nuances of copyright law, including fair use and incidental use provisions. This proactive measure could

dramatically reduce the volume of DMCA takedown notices, fostering a more creative and less contentious streaming environment.

2. **Revise Licensing Agreements and More Partnerships:** The main issue with existing agreements is two-fold: they are super long and full of language that may not be comprehensive to the average person, and as a result, most people do not read them. As live streaming continues to grow, transparent and collaborative licensing agreements are a beacon of potential harmony between copyright holders and content creators. These agreements should detail explicit, permissible uses of copyrighted materials on platforms like Twitch. And by making the language clearer and more accessible for creators and everyday users, they will not feel as confused about what they can and cannot do. Unlike the reactive nature of the DMCA on Twitch with its strike system, these agreements offer a proactive blueprint for creative expression that does not feel as restricted by the law. Implementing such agreements requires a partnership where music publishers, game companies, and digital platforms work together to outline clear, fair use cases and what rights users have when it comes to copyright infringement. This strategy not only mitigates the risk of inadvertent infringements but also opens new avenues for copyright holders to monetize their works through exposure to diverse online communities. Twitch can continue to develop this by creating guides and sending out these resources to streamers and to the press. Moreover, copyright holders can work with streamers through these partnerships/sponsorships to build back these networks out even better than before.

3. **Enhanced Creator Education and Resources:** Even after 2020, Twitch has continued to work on educating everyone on copyright for the last few years. Streamers should have access to comprehensive, easily understandable guides and tutorials that explain copyright laws, including what constitutes fair use and how to secure rights for copyrighted content. But Twitch could go further in their work by ensuring their creators attend workshops, webinars, and consult with copyright experts whenever copyright issues arise. Twitch could also create an initiative by letting streamers have conversations with their fans and copyright experts live, to progress this educational aspect of copyright that is constantly changing and always complicated. By continuing to invest in education, Twitch can mitigate the fear and uncertainty for a more informed and proactive creator community. This effort would not only reduce the incidence of copyright strikes but also strengthen the platform's reputation as a supporter of both creative freedom and copyright holders.

4. **Streamline Counter-Notification Filing:** One of the biggest issues we saw in the 2020 Twitch-DMCA debacle is Twitch not explicitly stating to impacted streamers that counter-notifications could be submitted. If streamers had been directed to these notices, things might have turned out differently, or at the very least, streamers could have had some control over the situation. Integrating a more transparent and user-friendly approach could significantly improve Twitch streamers' ability to navigate copyright disputes. Where copyright holders can fill out a form regarding any alleged copyright infringement, Twitch should do the same for streamers for counter-notifications. Ideally, this form would streamline the steps outlined under Twitch's DMCA guidelines for the

counter-notification process. Moreover, Twitch should have workers that specialize in copyright to guide streamers impacted by copyright notices to file these counter-notifications and any follow up actions. This initiative would mark a departure from Twitch's existing procedures by offering a path that is not only about compliance but about education and collaboration. A streamlined dispute resolution process would empower streamers with the knowledge to defend their rights effectively.

But in turn, some or even none of these policy recommendations may not be able to take place because of the law that started it all: the DMCA. After 25+ years of being the law of the land, the time to change the DMCA may be now to allow platforms to be proactive in their copyright procedures. In 2020, Senator Thom Tillis (R-NC) drafted the Digital Copyright Act of 2021, revamping the DMCA by having platforms ensure new copies of infringing content are not being reuploaded (May and Cooper, 2021). Two years later, Tillis and former Senator Patrick Leahy (D-IL) released the bipartisan SMART Copyright Act of 2022 to require OSPs to use tools deemed designated measures to identify copyright infringement consistency (Trendacosta, 2022). Neither bill was not taken up for debate in either house of Congress, which has led us back to square one.

Despite these bills laying untouched on Capitol Hill, it is a clear sign that even politicians believe copyright law and how platforms enforce copyright must change. With the threats of a TikTok ban and AI copying artistic works without giving credit, ensuring a live streaming world and digital realm where creative expression and knowledge and cultural production is more vital than ever. As history has shown, these three aspects were why copyright was created in the first place over 300 years ago. Maybe we will go back to basics and start from nothing. Or we look at

these existing systems and revamp them with a forward-looking future of active creation and consumption in mind. Regardless, how we get there remains to be seen. But one thing is certain:

The path to fair live streaming is ours to broadcast.

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