

COMMENT

THE DEATH OF THE DMCA? HOW VIACOM V. YOUTUBE MAY DEFINE THE FUTURE OF DIGITAL CONTENT*

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*“This suit is just the latest twist in a love-hate relationship between the entertainment and technology industries that has played out like a dysfunctional family’s bad home video.”*¹

I. INTRODUCTION

There are few technologies in the world today that have experienced the sort of meteoric success achieved by the Internet. It has fundamentally changed the way we do business, get our entertainment, perform research, keep in touch with family and friends, and read the news. The new information age has fundamentally changed the way the younger generations and the tech-savvy feel about media and creative content at the conceptual level. However, a problem arises when the new Internet users are pitted against the traditional media giants such as NBC Universal, News Corp., and Viacom.

The media companies’ incomes have, until now, enjoyed relatively consistent protection under the Copyright Act of 1976.² Consumers of the past depended on channels of distribution that were largely controlled by the content owners.³ But the Internet has changed both the structure of control and the concept of copyright protection.⁴ Almost every exchange of information performed on the Internet requires some sort of copying, whether it be as innocent as news articles stored locally on a user’s personal computer, or outright piracy of a new music album, shared without authorization.⁵ The extreme ease of copying content on the Internet has made obvious the battle between two competing interests. On the one hand, content owners have a right to profit from their creative work—a right threatened by the potential for copying.⁶ On the other, the individual users of

1. Bob Keefe, *A Copyright Uproar*, ATLANTA J. CONST., Mar. 18, 2007, at F2.

2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

3. See Symposium, *The Death or Rebirth of the Copyright?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1095, 1098 (2008) (describing the difficulty in applying copyright law to the Internet due to the necessity of data copying).

4. See *id.* at 1098–99 (discussing how some Internet users believe that they should copy and share material simply because they are able); see also Jonathan Handel, *Hollywood Under Siege*, ENT. & SPORTS LAW., Fall 2008, at 10, 11 (“[T]echnological innovation reduces the market share of paid professional content, and increases the market share of new technological devices and services.”).

5. See Symposium, *supra* note 3, at 1098 (discussing copying of content on the Internet).

6. See Handel, *supra* note 4, at 10 (“It’s true that people still consume media the old-fashioned way—but fewer and fewer do so every day, to the detriment of the . . . content industries.”).

the Internet, and the technology companies that develop the infrastructure and online services, see a need for a new form of content delivery that is fast, efficient, and convenient.⁷

New online businesses and services have sprung up in recent years to meet the demands of new media consumers.⁸ Some deliver content provided directly from the content owners themselves. Others leave the content to the users, who provide the content on the service. This second style of service involves what is called “user-generated content” (UGC).⁹ However, leaving the content to the users opens the door for some to abuse the system and violate copyright law, and could also result in legitimate users being labeled as copyright infringers when they believe they have done nothing wrong.¹⁰

There are several examples of this new form of content distribution, the most obvious (and infamous) of which is YouTube.¹¹ YouTube’s immense popularity has led to an allegedly high rate of piracy and copyright violation by the users of the service. This has had the effect of placing a giant target on YouTube and its owner, Google. In 2007, Viacom became the first media giant to attack YouTube, accusing the website of intentional infringement on a massive scale and seeking at least one billion dollars in damages.¹²

YouTube has asserted a number of defenses, the most important of which is “safe harbor” protection under the Digital Millennium Copyright Act (DMCA).¹³ The case law interpreting

7. See *id.* at 10–11 (explaining six reasons for the decline of traditional content, including the ease of accessing online content).

8. *E.g.*, Hulu Media Info, <http://www.hulu.com/about> (last visited Oct. 30, 2009) (providing an “online video service that offers hit TV shows, movies, and clips”); About Veoh, <http://www.veoh.com/corporate/aboutus> (last visited Nov. 21, 2009) (providing “free access to all of the great TV and film studio content, independent productions, and user-generated videos on the Web”); About Yahoo! Video, <http://www.yvideoblog.com/blog/about/> (last visited Nov. 21, 2009) (claiming to be the “best place to view and upload video on the Web”); YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited Nov. 21, 2009) (providing a free service allowing people to “discover, watch, and share originally-created videos”).

9. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1152 (N.D. Cal. 2008).

10. Consider *Lenz, id.* at 1151–52, a case in which Universal accused a mother of copyright violation based on a YouTube video she posted of her children dancing with a song by the musician Prince playing in the background.

11. YouTube, <http://www.youtube.com> (last visited Nov. 21, 2009).

12. Complaint for Declaratory and Injunctive Relief and Damages ¶¶ 2, 10, *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 1:07-cv-02103 (LLS), 2007 WL 775611 (S.D.N.Y. Mar. 13, 2007) [hereinafter First Complaint].

13. Defendants’ Answer to First Amended Complaint and Demand for Jury Trial at 10, *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 1:07-cv-02103 (LLS), 2008 WL 2260018 (S.D.N.Y. May 23, 2008) [hereinafter Answer]; Digital Millennium Copyright Act § 202, 17 U.S.C. § 512 (2006).

the DMCA safe harbor provisions has shown a clear pattern of deference to the online service providers.¹⁴ However, the current suit against YouTube has the potential to break the trend and change the future of copyright jurisprudence with regard to the Internet. Specifically, there are two issues that have particular significance to YouTube. First, can YouTube claim it has neither “actual knowledge” of infringing content located on its system nor awareness of any facts or circumstances that would make infringing behavior apparent?¹⁵ Second, are YouTube’s actions in response to copyrighted content—the removal of allegedly infringing videos—adequate to satisfy not merely the letter of the law, but the spirit of the DMCA as well?

This Comment will discuss the nuances of the DMCA safe harbor provisions and the pattern of deference to online service providers shown by the courts interpreting the provisions.¹⁶ It will also consider the possibility that the pattern of deference will be broken, rendering YouTube liable for the infringement of its users.¹⁷ Ultimately, it will examine the interests of the service providers, the content owners, and the everyday users, and attempt to evaluate how the DMCA fits into the mix.¹⁸

Part II of this Comment will discuss the development of U.S. copyright law and its current substantive provisions. It will give an in-depth description of the protections under the Copyright Act and the safe harbor provisions of the DMCA.

Part III will discuss the functions and purposes of YouTube, as well as outline the potential problems inherent in its user-driven form. It will introduce the facts surrounding Viacom’s pending lawsuit against YouTube and outline the key issues implicated in the suit.

Part IV will give an analysis of two key issues: knowledge of infringement and “expeditious” removal of infringing material. These issues, though not unique to YouTube, are made especially

14. See *infra* Part IV.A.1–2 (discussing courts’ interpretation of the knowledge requirements under the DMCA and illustrating the pattern of deferring to the service providers).

15. See 17 U.S.C. § 512(c)(1)(A) (2006) (“A service provider shall not be liable for monetary relief . . . if the service provider . . . does not have actual knowledge that the material . . . is infringing . . . [or] in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent . . .”).

16. See *infra* Parts II, IV (detailing the safe harbor provisions and discussing the courts’ interpretations of the statutory language).

17. See *infra* Part IV.A.1 (outlining various factors in the YouTube suit and discussing the likelihood that the case will break a pattern of deference to online service providers).

18. See *infra* Part V (examining the controversy from various angles and determining the role of the DMCA in the new online marketplace).

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important in this litigation due to the popularity and nature of the YouTube service.

Finally, Part V will analyze the dispute from both social and business viewpoints. It will discuss the necessity of clear rules regarding copyright infringement. Without clear guidance, neither content owners nor online service providers can be comfortable with their business models or their intellectual property rights. The current regime presents us with a catch-22: we either continue to defer to online services, thus decreasing the incentive to create content, or place a higher burden on the services to police their content, thus making it riskier for Internet entrepreneurs to design new online services. The solution may be for the content owners to create new business models that can capitalize on the development and popularity of the Internet, satisfying the desires of both users and content owners.

Despite the particular facts that may lead the court to find YouTube liable, it is likely that YouTube will still be found to qualify for DMCA safe harbor protection. The court should continue to construe the safe harbor provisions of the DMCA in the broadest way possible and find YouTube not liable for monetary damages. Although this would give less protection to content owners, it is the responsibility of the content owners to seek new and creative ways of digital online content distribution so that they can continue to profit from their content. This solution has the unexpected result of bypassing the DMCA altogether and leads to the conclusion that the DMCA safe harbors may be rendered irrelevant by advancing technology.

II. THE COPYRIGHT ACT, DIGITAL MILLENNIUM COPYRIGHT ACT, AND THE "SAFE HARBOR" PROVISIONS

U.S. copyright law currently protects "original works of authorship fixed in any tangible medium of expression" from unauthorized copying, distribution, derivative works, and public display and performance.¹⁹ The idea of a right to control and profit from one's creative content is not a novel concept in the United States.²⁰ However, copyright law has faced constant

19. 17 U.S.C. §§ 102, 106 (2006).

20. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). See generally L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), printed in 46 HOUS. L. REV. 215, 241-56 (2009) (describing the development of copyright from the Stationers' Company Charter of 1557, to the Statute of

challenges from technology, beginning as far back as the days of the printing press.²¹

In 1976, Congress revised the then-existing copyright laws by implementing the Copyright Act of 1976,²² the first major revision in almost seventy years.²³ The drafters of the Copyright Act saw only the beginning of the technological explosion set to occur over the next twenty years. As the Internet developed and expanded into the vast information network that it is today, courts faced a series of cases in which they were forced to consider what duty a website provider has to police the user-generated content on the website for offensive or illegal material.²⁴ These early cases, combined with legislation such as section 230 of the Communications Decency Act (CDA),²⁵ illustrate a pattern of deference granted to website owners or Internet service providers for liability from the content created by their users.²⁶

By 1998, the Internet had begun to take form. To clarify issues of copyright infringement on the Internet, Congress drafted and passed the Digital Millennium Copyright Act (DMCA).²⁷ The DMCA was established, in part, to “create[] the legal platform for launching the global digital on-line marketplace.”²⁸ There are two major components of the DMCA: one benefitting the copyright owners, the other in favor of online

Anne of 1710, to the provision in the U.S. Constitution).

21. See Russ VerSteeg, *Viacom v. YouTube: Preliminary Observations*, 9 N.C. J. L. & TECH. 43, 44–45 (2007) (describing the back-and-forth battle between technology and copyright protection).

22. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

23. The last prior revision occurred in 1909. H.R. REP. NO. 94-1476, at 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5660.

24. See VerSteeg, *supra* note 21, at 57–58 (discussing cases from the 1990s concerning whether to hold online bulletin board owners liable for defamatory material posted by the users).

25. 47 U.S.C. § 230(c)(1) (2006) (stating that providers of an “interactive computer service” shall not be treated as the publisher or speaker of any information provided by the user of the service). It is important to note that the CDA does not extend to intellectual property issues and is therefore inapplicable to the YouTube dispute. 47 U.S.C. § 230(e)(2) (2006).

26. See VerSteeg, *supra* note 21, at 54, 57–58 (noting that courts have “acknowledg[ed] the fact that e-mail providers and ISPs cannot screen every single piece of information” (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 138–41 (S.D.N.Y. 1991))).

27. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

28. S. REP. NO. 105-190, at 2 (1998); see also Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1060 (2007) (noting the DMCA’s success in “stimulat[ing] innovation and new services on the Internet”).

service providers.²⁹ The first provision criminalizes the circumvention of any “technological measure” that is intended to protect copyrighted works, such as the encryption used to protect digital versatile discs (DVDs).³⁰ The second, known as the “safe harbor” provisions, grants a limitation on liability for online service providers for the infringing activity of their users and clarifies the duty of the service providers to monitor the user-supplied content.³¹ The statute defines “service provider” as “a provider of online services or network access, or the operator of facilities therefor,” and includes “entit[ies] offering the transmission, routing, or providing of connections for digital online communications.”³² There is some ambiguity in determining what constitutes a service provider; however, an Internet website or service is generally considered to be a service provider if it does not substantially alter the material provided by its users.³³

Congress intended to grant a form of immunity from monetary damages to online service providers because there is “no realistic way they can monitor everything that users post on the Internet.”³⁴ Section 512(c), the provision most applicable to YouTube, grants immunity to service providers for monetary liability arising from infringing “information residing on systems or networks at [the] direction of users,” so long as certain criteria are met.³⁵ Under this Section, a service provider is not liable for monetary damages if the service provider:

- (A) (i) does not have *actual knowledge* that the material or an activity using the material on the system or network is infringing;

29. The first provision protects copyright protection schemes, thus favoring content owners. 17 U.S.C. § 1201 (2006). The second protects service providers in the form of “safe harbor” provisions. 17 U.S.C. § 512 (2006).

30. 17 U.S.C. § 1201(a) (2006).

31. 17 U.S.C. § 512 (2006). Although the safe harbor provisions insulate service providers from monetary liability, some criticize the provisions for “grant[ing] copyright holders the benefit of a temporary restraining order without the expense of going to court to make a showing of irreparable harm.” Keith Aoki, *Balancing Act: Reflections on Justice O’Connor’s Intellectual Property Jurisprudence*, 44 HOUS. L. REV. 965, 1006 (2007).

32. 17 U.S.C. § 512(k)(1) (2006).

33. Charles J. Biederman & Danny Andrews, *Applying Copyright Law to User-Generated Content*, L.A. LAW., May 2008, at 12; see also *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1082–83 (C.D. Cal. 2008) (holding that an online video service still qualified for safe harbor protection, despite employing automated processes that both converted and partitioned the user-uploaded videos).

34. VerSteege, *supra* note 21, at 57 (citing Kelly Tickle, Comment, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards*, 80 IOWA L. REV. 391, 393–98 (1995)).

35. 17 U.S.C. § 512(c) (2006).

(ii) in the absence of such actual knowledge, is not aware of *facts or circumstances from which infringing activity is apparent*; or

(iii) upon obtaining such knowledge or awareness, *acts expeditiously* to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement . . . *responds expeditiously* to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.³⁶

In addition, a service provider must adopt and implement—and inform users of—a reasonable repeat-offender policy.³⁷ Furthermore, the service provider must not interfere with “standard technical measures” that may be employed by content owners to identify infringing material.³⁸

Failure to satisfy the requirements of Section 512 does not automatically render the service provider liable for monetary damages.³⁹ If the service provider does not qualify for the exemption, “the doctrines of existing law will come into play,” and the service provider may pursue any number of common law defenses.⁴⁰

Section 512(c) not only relieves the service provider of liability for the infringement of its users, but also places the burden of policing content for potential copyright violations squarely on the copyright owners themselves.⁴¹ The copyright owners are responsible for identifying the infringing content and submitting an official notification that complies with the requirements listed in Section 512(c)(3).⁴² If a service provider receives notice of

36. 17 U.S.C. § 512(c)(1) (2006) (emphasis added).

37. 17 U.S.C. § 512(i)(1)(A) (2006). The policy must provide for termination of “subscribers and account holders of the service provider’s system or network who are repeat infringers.” *Id.*

38. 17 U.S.C. § 512(i)(1)(B) (2006).

39. 17 U.S.C. § 512(j)(1) (2006) (allowing an application for injunctive relief against a service provider that is not subject to monetary remedies).

40. H.R. REP. NO. 105-551, pt. 1, at 11 (1998). This would include defenses such as laches, implied license, estoppel, and substantial noninfringing use.

41. 17 U.S.C. § 512(c)(3) (2006) (describing the requirements for a DMCA-compliant “takedown notice”).

42. *Id.* Section 512(c)(3) requires an official notification of alleged copyright violation from an authorized agent of the copyright holder that includes, *inter alia*, a list of the allegedly unauthorized content, a statement of good-faith belief that a violation has

infringement, but the notice does not “comply substantially” with Section 512(c)(3)(A), the service provider is still likely considered to have no “actual knowledge” of the infringing behavior and may safely refuse to remove the allegedly unauthorized content without sacrificing its immunity.⁴³ In sum, the burden of policing these online services for copyright infringement is placed squarely on the shoulders of the copyright owners, and they must substantially comply with the requirements of Section 512(c)(3) if they wish to protect their IP rights.

III. THE SERVICE, THE PROBLEM, AND THE SUIT

A. *How It Works*

YouTube is not the only website to offer online content delivery, but it is certainly one of the most obvious examples. Since its humble beginnings in 2005 as an experiment created by former PayPal employees,⁴⁴ the video sharing website has evolved into an international video destination.⁴⁵ The mechanisms employed by YouTube are similar to those employed by its competitors: users can send digital video files from their computers or web-capable devices to the central YouTube system, where the video files are then converted into Adobe’s Flash Video format and stored on the YouTube servers.⁴⁶ YouTube users may then visit the website and view the videos through their web browsers.⁴⁷ This system allows users to create and share videos with friends and others without having to worry about issues such as the cost of, or limitations on, bandwidth.⁴⁸

occurred, and “[i]nformation reasonably sufficient to permit the service provider to contact the complaining party.” 17 U.S.C. § 512(c)(3)(A) (2006).

43. 17 U.S.C. § 512(c)(3)(B)(i) (2006). There is an exception, however, if the copyright holder substantially complies with clauses (ii), (iii), and (iv) of Section 512(c)(3)(A). In this case, a service provider qualifies for immunity under Section 512(c) only if it “promptly attempts” to contact the complainant or takes “other reasonable steps to assist in the receipt” of proper notification. 17 U.S.C. § 512(c)(3)(B)(ii) (2006).

44. Branwen Buckley, Note, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 235 (2008); YouTube Company History, <http://www.youtube.com/t/about> (last visited Nov. 21, 2009).

45. Google’s purchase of YouTube in 2006 for approximately \$1.6 billion lends credence to the significance of the website. Jason C. Breen, *YouTube or YouLose: Can YouTube Survive a Copyright Infringement Lawsuit?*, 16 TEX. INTELL. PROP. L.J. 151, 152 (2007).

46. Jonathan Strickland, *How YouTube Works*, HOWSTUFFWORKS, <http://money.howstuffworks.com/youtube.htm> (last visited Nov. 21, 2009). The Flash Video format is well suited to this sort of application because of its ease of use and high compression ratio, leading to smaller file sizes and faster downloads.

47. *Id.*

48. Video files, even in Flash format, are larger than other forms of digital media,

One potential reason for YouTube's immense popularity despite its numerous competitors is its ease of use.⁴⁹ Once a user uploads his video to YouTube through the system described above, he is asked to give a brief description of the video and to apply certain keywords, or "tags."⁵⁰ From this point forward, the process is almost entirely automated. Barring any issues, the video will be available for viewing on YouTube in mere minutes.⁵¹

It is just as easy to view the videos as it is to upload them. Users can visit the website and browse the YouTube library for whatever it is they seek. The video is then delivered quickly and efficiently to the viewer's web browser. In addition, YouTube recommends featured or related videos for further viewing.⁵² Furthermore, videos may be "embedded" into other websites so that they may be shared outside of the YouTube website.⁵³ The relative ease of use makes YouTube an attractive medium for sharing and viewing content.

To preserve the YouTube community and protect itself from liability, YouTube has established and published terms of service, to which all users must agree before uploading any videos, as well as general community guidelines.⁵⁴ Users are prohibited from uploading both material that is sexually explicit, excessively violent, or otherwise offensive, and material for which the users do not have authorization to upload, such as copyrighted content.⁵⁵ The terms also state that YouTube will terminate, when appropriate, the accounts of any users who

and thus require more bandwidth to view or share. Because YouTube hosts the videos on their servers, it is YouTube's Internet connection that shoulders the bandwidth burden. This allows users to share their videos without worrying about going over a potential bandwidth cap imposed by their personal Internet service provider.

49. Breen, *supra* note 45, at 155 (opining that YouTube's ease of use is "[o]ne reason for its meteoric growth").

50. Strickland, *supra* note 46. "Tags" are keywords that are attached to a particular video that serve as search terms, allowing others to more easily find the video.

51. *Id.*

52. *Id.*

53. YouTube Fact Sheet, *supra* note 8 ("Users can insert a YouTube video into . . . other Web sites where anyone can watch them.").

54. YouTube Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 21, 2009) ("By using and/or visiting this website . . . you signify your agreement to (1) these terms and conditions . . . and (3) YouTube's Community Guidelines . . ."); YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines (last visited Nov. 21, 2009) ("YouTube is not for pornography or sexually explicit content. . . . Don't post videos showing bad stuff like animal abuse, drug abuse, under-age drinking and smoking, or bomb making. Graphic or gratuitous violence is not allowed.").

55. See Terms of Service, *supra* note 54 ("[Y]ou further agree that you will not submit material that is copyrighted . . . unless you are the owner of such rights or have permission from their rightful owner . . ."); Community Guidelines, *supra* note 54 (describing various limitations on explicit content).

repeatedly violate the terms of service.⁵⁶ Because the YouTube process is largely automated, most content is generally subject to initial policing not by YouTube employees, but rather by the users themselves, who may “flag” a video for official review and potential removal.⁵⁷

B. *The Trouble with YouTube*

YouTube was designed to allow users to share their own creative content with friends and others. But because the system is user-driven and largely automated, YouTube can be used to upload, display, and view copyrighted content, despite the Terms of Service explicitly prohibiting such behavior.⁵⁸ Users can easily upload videos from copyrighted TV shows, movies, music videos, or any other copyrighted work for which the user does not have authorization. This direct infringement is usually easy to spot; for example, if a user uploaded an unaltered clip of a copyrighted TV show, it would be clearly in violation of the Copyright Act.⁵⁹ However, it is entirely possible for a user to disguise copyrighted content. For example, a user could upload a clip from Viacom’s *The Colbert Report* without proper authorization, but mask its content by labeling it as something else, such as “funny clip” or any other equally vague title. This makes it more difficult for the copyright owners to find all of the potentially unauthorized content.

Infringement is even more difficult to spot due to the sheer popularity of the website. As of May 2009, YouTube estimates that twenty hours of video are uploaded to the site every minute.⁶⁰ Expanding that estimate shows us that each day, a staggering *twelve hundred days*’ worth of video is uploaded to the site—almost *four years* of video.⁶¹ Manually monitoring all the

56. Terms of Service, *supra* note 54. The Terms, however, do not clearly explain when termination for repeat offenses would be “appropriate.”

57. Once a video has been flagged, a YouTube employee will review the video and decide whether to remove the content. Community Guidelines, *supra* note 54.

58. A brief search through the YouTube library will still show a substantial amount of material that is questionable at best. *See, e.g.*, Video, <http://www.youtube.com/watch?v=oHg5SJYRHA0> (last visited Nov. 21, 2009).

59. 17 U.S.C. § 106 (2006). This assumes, of course, that the user neither has authorization from the copyright owner nor qualifies for exceptions, such as the fair use doctrine.

60. Posting of Ryan Junee, *Zoinks! 20 Hours of Video Uploaded Every Minute!*, to YouTube Blog (May 20, 2009), http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploaded-every_20.html.

61. Assuming twenty hours of video are uploaded each minute, a total of 28,800 hours of video are uploaded daily (twenty hours of video per minute multiplied by 1,440 minutes per day). This means 1,200 days of video are uploaded each day (28,800 hours of

uploaded video would require 3,600 employees working constantly in eight-hour shifts.⁶² Equally startling is the bandwidth utilization. In 2007, YouTube's bandwidth usage was equal to that used by the entire Internet in 2000.⁶³ It would take tremendous amounts of time and money to sift through every video in the YouTube library and search for infringing content. Neither YouTube nor the content owners can reasonably be expected to constantly police the online library for potentially infringing material, especially infringement that may be hidden or buried in an otherwise legal video.

In addition, there is yet another complication that adds to the difficulty of identifying infringing material on YouTube. In the recent case of *Lenz v. Universal Music Corp.*, the federal district court of the Northern District of California held that before issuing a DMCA takedown notice, a content owner must consider whether the content falls into the fair use doctrine.⁶⁴ In *Lenz*, the plaintiff uploaded to YouTube a film of her young children dancing in the kitchen to the song "Let's Go Crazy" by Prince.⁶⁵ Universal sent a DMCA takedown notice to YouTube at Prince's behest, alleging the video violated their copyright in the song.⁶⁶ After YouTube removed the video, the plaintiff filed suit against Universal for issuing the takedown notice in bad faith because it did not consider whether the video would fall under the fair use doctrine.⁶⁷ The court held that a takedown notice is not sent in good faith unless the content owner first considers the fair use doctrine.⁶⁸ After this decision, if content owners wish to assert their rights, they must not only find their material buried deep within derivative works, but also consider whether the use of their content is legally acceptable under the ambiguous fair use doctrine, which requires a balancing of elements.⁶⁹

video divided by twenty-four hours per day).

62. Twelve hundred days of video per day would require twelve hundred employees working around the clock. Assuming the standard eight-hour shift, it would require 3,600 employees (three shifts per day multiplied by 1,200).

63. Steve Lohr, *Video Road Hogs Stir Fear of Internet Traffic Jam*, N.Y. TIMES, Mar. 13, 2008, at A1.

64. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) ("[I]n order for a copyright owner to proceed under the DMCA with 'a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,' the owner must evaluate whether the material makes fair use of the copyright." (quoting 17 U.S.C. § 512(c)(3)(A)(v) (2006)); 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

65. *Lenz*, 572 F. Supp. 2d at 1151-52.

66. *Id.* at 1152.

67. *Id.* at 1153.

68. *Id.* at 1154.

69. 17 U.S.C. § 107 (2006) (providing the factors to be considered in a fair use

It is clear that the enforcement of intellectual property rights on social networking websites faces many barriers.⁷⁰ However, these issues are not unique to YouTube. Social networking or streaming video sites that allow users to create, share, or view creative content, both professional and amateur, are gaining in popularity. Although some media companies have entered into licensing deals with these sites,⁷¹ others have taken the more aggressive approach of filing suit against the websites for copyright violation.⁷²

C. Viacom v. YouTube

Viacom International is a large media conglomerate with a substantial collection of well-known creative content—as well as TV networks like Comedy Central, MTV, BET, and Nickelodeon.⁷³ After a drawn-out dispute over the presence of Viacom’s creative content in the YouTube library, Viacom filed suit on March 13, 2007, for one billion dollars, alleging “brazen disregard,” “willful infringement,” and “massive damages.”⁷⁴ Viacom asserts that the availability of copyrighted works is a fundamental part of YouTube’s business plan: the copyrighted content brings additional visitors to the YouTube site, which then earns more money through advertisements.⁷⁵ Viacom further

analysis, including the nature of the work, the purpose and character of use, the amount of the copyrighted work used, and the potential market effect); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (noting that the fair use doctrine is to be decided on a case-by-case basis).

70. *See infra* Parts IV–V (discussing judicial deference towards online service providers and examining the competing interests at stake).

71. *E.g.*, Jeff Leeds, *Warner Music Makes Licensing Deal with YouTube*, N.Y. TIMES, Sept. 19, 2006, at C2 (discussing a licensing arrangement between YouTube and Warner Music Group). Additionally, a brief search of the YouTube library will show a number of large content providers, such as the BBC, have established their own “channel” on the YouTube site that displays authorized copyrighted content. *See* YouTube Partner Directory, <http://www.youtube.com/channels?s=al&t=&g=5&c=0&to=0&nb=0&p=66> (last visited Nov. 21, 2009). *But see* Brian Stelter, *Warner Removes Its Videos from YouTube as Licensing Talks Stall*, N.Y. TIMES, Dec. 22, 2008, at B5 (discussing Warner Music’s revocation of YouTube’s license).

72. *E.g.*, *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081 (C.D. Cal. 2008) (an infringement suit against Veoh, another online video site); *Viacom Int’l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (a similar infringement suit against YouTube); *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046 (C.D. Cal. 2007) (an infringement suit against the online community MySpace).

73. First Complaint, *supra* note 12, ¶ 20.

74. *Id.* ¶¶ 2, 10, 28; *see also* Miguel Helft & Geraldine Fabrikant, *Viacom Sues Google over Video Clips on Its Sharing Website*, N.Y. TIMES, Mar. 14, 2007, at C1 (discussing the ongoing dispute between Viacom and YouTube/Google).

75. *See* First Complaint, *supra* note 12, ¶ 5 (“[T]he availability on the YouTube site of a vast library of the copyrighted works of Plaintiffs and others is the cornerstone of Defendants’ business plan.”).

alleges that YouTube “has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site,” instead shifting the burden of monitoring the site to the copyright owners.⁷⁶ Furthermore, once the copyrighted works are identified and removed, Viacom alleges that YouTube does nothing to prevent the same content from being re-uploaded in a slightly altered format.⁷⁷ Viacom brought seven causes of action against YouTube, all violations of the Copyright Act. The first four are more traditional claims of direct infringement: public performance, public display, reproduction, and distribution.⁷⁸ The final three—inducement of infringement, contributory infringement, and vicarious infringement—are of a different sort.⁷⁹ Viacom alleges that millions of Internet users are violating the Copyright Act due to, or with the help of, YouTube.⁸⁰

YouTube answered with language equally as strong as that of the complaint, asserting that YouTube is exactly the kind of service Congress meant for the DMCA to protect and that YouTube goes above and beyond its legal obligations.⁸¹ YouTube further asserts that Viacom’s complaint “threatens the way hundreds of millions of people legitimately exchange information, news, entertainment, and political and artistic expression.”⁸² YouTube also brought a laundry list of defenses, including fair use, innocent intent, copyright misuse, waiver, unclean hands, substantial noninfringing use, and, most importantly, protection under the DMCA safe harbor provisions.⁸³

Congress enacted Section 512 “to provide greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”⁸⁴ Although the DMCA’s drafters had no way of predicting how

76. *Id.* ¶ 6. It is interesting to note that it is not YouTube that shifts the burden to content owners; it is the DMCA itself. *See* 17 U.S.C. § 512(c) (2006).

77. First Complaint, *supra* note 12, ¶ 41.

78. First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial ¶¶ 48–71, *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 1:07-cv-02103 (LLS), 2008 WL 2062868 (S.D.N.Y. filed Apr. 24, 2008) [hereinafter Amended Complaint].

79. *Id.* ¶ 72–97.

80. *VerSteeg*, *supra* note 21, at 52 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

81. Answer, *supra* note 13, at 1.

82. *Id.* at 1–2.

83. *Id.* at 10–12. Although there is much to be said about each of the defenses, this Comment will be limited to discussion of the DMCA safe harbor under 17 U.S.C. § 512.

84. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)).

much and how quickly technology would advance,⁸⁵ YouTube argues that it is exactly the type of service the legislature intended to protect.⁸⁶ But it is unclear whether YouTube does in fact qualify under the safe harbor provisions. There are two issues warranting discussion. First, should YouTube, because of its very nature, be subjected to a lesser standard of “actual knowledge?” Traditionally, the test for knowledge of infringement has “been interpreted very narrowly and favorably for service providers.”⁸⁷ Even the stricter requirement that service providers have no awareness of “facts or circumstances from which infringing activity is apparent”⁸⁸ has been interpreted in the narrowest way possible.⁸⁹ But some argue that YouTube has a sort of imputed knowledge of infringement because of the sheer amount of infringing activity allegedly conducted every day on the website.⁹⁰ Viacom argues that YouTube ignores various “red flags’ from which infringing activity is apparent, such as description terms and search tags using Plaintiffs’ well-known trademarks,” and should therefore be held liable for the infringing content on the website.⁹¹ Whether YouTube does in fact ignore these red flags is uncertain.⁹²

The second issue regarding the safe harbor provisions’ applicability to YouTube concerns YouTube’s actions in removing or disabling access to infringing material. YouTube asserts that

85. See VerSteeg, *supra* note 21, at 46 (remarking that the drafters of the 1976 Copyright Act “had no crystal ball with which to foresee such a revolutionary change in communications technology”). This comment will likely apply equally as well when future scholarship looks back at the DMCA.

86. See Answer, *supra* note 13, at 1–2 (“YouTube fulfills Congress’s vision for the DMCA. YouTube also fulfills its end of the DMCA bargain Viacom’s complaint threatens the way hundreds of millions of people legitimately exchange information . . .”).

87. Breen, *supra* note 45, at 164.

88. 17 U.S.C. § 512(c)(1)(A)(ii) (2006).

89. See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (“[T]he question is not ‘what a reasonable person would have deduced given all the circumstances.’ Instead, the question is ‘whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.’” (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.04[A][1] (2009))). The *Corbis* court emphasized that a service provider fails under Section 512(c)(1)(A)(ii) only if it ignores “red flags.” *Id.* at 1108.

90. See Amended Complaint, *supra* note 78, ¶¶ 2–8 (asserting that YouTube’s business model anticipated the infringing activity and is based on the added web traffic this activity would attract).

91. *Id.* ¶¶ 37, 47.

92. One author conducted a cursory search of the YouTube library in 2006 for the most obvious red flags such as “illegal,” “pirate,” and “bootleg,” and found little evidence of obviously infringing material, save for several videos of live sporting or entertainment events. See Breen, *supra* note 45, at 165. The Author of this Comment repeated the search in November of 2009 and found similar results.

it complies with the DMCA because it removes or disables access to any content that is identified in a DMCA-compliant takedown notice.⁹³ YouTube's method of removing or disabling access to content facially complies with the requirements of the DMCA.⁹⁴ But Viacom argues that YouTube's response to takedown notices is insufficient.⁹⁵ Viacom asserts that YouTube should be required not only to remove the identified infringing content, but also any related infringing content that may not have been identified by Viacom.⁹⁶ Any burden placed on YouTube to inspect the content uploaded by users would likely be difficult, if not impossible, to meet.⁹⁷

IV. DOES YOUTUBE DO ENOUGH?

Some believe that Viacom's lawsuit against YouTube is merely a bargaining tool and will never reach a conclusive judgment.⁹⁸ But the issues concerning YouTube—knowledge and removal—are not unique. YouTube is merely one example of the new wave of online content distribution,⁹⁹ and it is important for

93. See Answer, *supra* note 13, ¶ 39 (asserting that YouTube's "Terms of Use contain certain content-based restrictions on the types of videos users may upload and store on the service, and that YouTube reserves the right to remove from the service material uploaded in violation of YouTube's Terms of Use").

94. YouTube Copyright Infringement Notification, http://www.youtube.com/t/dmca_policy (last visited Nov. 21, 2009) (explaining the procedures for filing a takedown notice with YouTube and describing the company's actions upon receipt of a notice, including placing "[c]laimant information . . . in place of disabled content"); see also *infra* Part IV.B (discussing the removal requirements under the DMCA safe harbor provisions).

95. Amended Complaint, *supra* note 78, ¶ 42 ("Even when YouTube responds to notices of specific infringing videos, its response has been ineffectual.")

96. *Id.* ¶¶ 41–46 ("For all these reasons, no matter how much effort and money copyright owners expend to protect their rights, there will always be a vast collection of infringing videos available on YouTube to draw users to its site.")

97. See *supra* notes 60–62 and accompanying text (noting YouTube's estimate that twenty hours of video are uploaded to the site every minute and discussing the manpower that would be necessary to monitor that content).

98. See VerSteeg, *supra* note 21, at 66 ("If the case is actually litigated—which is a big if—it may never come to judgment, because, as some have argued, this is just brinksmanship and Viacom sued only as a negotiation tactic to provide leverage for settlement." (footnote omitted)); Geraldine Fabrikant & Saul Hansell, *Viacom Tells YouTube: Hands Off*, N.Y. TIMES, Feb. 3, 2007, at C1 (noting that analysts have posited the takedown demand was merely a business tactic).

99. Hulu, for example, is owned in part by News Corp. and NBC, and allows fast and free access to feature-length movies and television shows. Hulu Media Info, <http://www.hulu.com/about> (last visited Nov. 21, 2009). MySpace includes a personal video site similar to YouTube. MySpace Press Room Fact Sheet, <http://www.myspace.com/pressroom?url=/fact+sheet> (last visited Nov. 21, 2009). Pandora creates a custom internet radio station tailored to the user's tastes. About Pandora, <http://www.pandora.com/corporate> (last visited Nov. 21, 2009). Veoh is similar to YouTube, but with a greater focus on television shows and movies in addition to the user-generated content. About Veoh, <http://www.veoh.com/corporate/aboutus> (last visited Nov. 21, 2009). Various television

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these issues to be resolved so that future service providers can operate free from legal ambiguity.

A. *Actual or Apparent Knowledge*

The DMCA safe harbors were not intended to protect service providers who intentionally flaunt copyright law. To qualify for immunity from monetary damages, a service provider must show that it had neither actual knowledge of infringement nor awareness of any facts that indicate infringement may be occurring.¹⁰⁰ One court noted:

This [safe harbor] immunity, however, is not presumptive, but granted only to “innocent” service providers who can prove they do not have actual or constructive knowledge of the infringement The DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe.¹⁰¹

The tests for knowledge have been interpreted narrowly,¹⁰² but it can be argued that YouTube will break the trend of leniency.¹⁰³

1. *Actual Knowledge.* In order to understand the “knowledge” requirement of the DMCA, it is necessary to examine the case law that has dealt with standards for contributory, or indirect, copyright infringement. In the 2007 case of *Perfect 10, Inc. v. Amazon.com, Inc. (Perfect 10 I)*, the Ninth Circuit considered the test for the knowledge necessary to support a claim for contributory infringement.¹⁰⁴ Applying the standard laid out in the well-known *A&M Records, Inc. v. Napster, Inc.*,¹⁰⁵ the court held that “a computer system operator can be held contributorily liable if it ‘has *actual* knowledge that *specific* infringing material is available using its system.’”¹⁰⁶ The system operator must know of specific, particular infringing content; vague knowledge of the possibility of infringement is not enough.¹⁰⁷

networks have also started offering their creative content on their own websites.

100. 17 U.S.C. § 512(c)(1)(A) (2006).

101. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001).

102. *See infra* Part IV.A.1–2 (showing the continued deference towards online service providers in determining whether the providers had knowledge of infringement).

103. *See infra* notes 138–41 and accompanying text (discussing Viacom’s argument that its case against YouTube should break this trend in the DMCA case law).

104. *Perfect 10, Inc. v. Amazon.com, Inc. (Perfect 10 I)*, 508 F.3d 1146, 1170–73 (9th Cir. 2007).

105. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

106. *Perfect 10 I*, 508 F.3d at 1172 (quoting *Napster*, 239 F.3d at 1022).

107. *Id.* at 1171–72; *see also* *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090,

This standard is similar to that used in the DMCA safe harbor provisions. The DMCA requires service providers to have no “actual knowledge that the material or an activity using the material on the system or network is infringing.”¹⁰⁸ The standard under the DMCA does not use the same language as the *Napster* standard applied in *Perfect 10 I*—the DMCA makes no mention of “specific” infringing material.¹⁰⁹ However, it has still been interpreted very narrowly in favor of the service providers.¹¹⁰

a. Specificity of Knowledge. In *Corbis Corp. v. Amazon.com, Inc.*, the court considered the knowledge requirement under the DMCA safe harbors.¹¹¹ This case is unique because the plaintiff declined to send the defendant any takedown notices pursuant to 17 U.S.C. § 512(c)(3) and instead decided to file an infringement claim.¹¹² Corbis alleged that individuals were violating its copyrights by selling Corbis’s content through an online marketplace, known as “zShops,” owned and operated by Amazon.¹¹³

In considering whether Amazon had the requisite “actual knowledge” to be disqualified from safe harbor protection, the court noted that “[t]he issue is not whether Amazon had a general awareness The issue is whether Amazon actually knew that *specific* zShops vendors were selling items that infringed Corbis copyrights.”¹¹⁴ Had Corbis sent a DMCA takedown notice, that notice would have been solid evidence of Amazon’s specific knowledge of infringement.¹¹⁵ Corbis’s failure to use the DMCA notice provisions “stripped it of the most powerful evidence of a service provider’s knowledge.”¹¹⁶ In light of this decision, and considering the lack of an affirmative duty for service providers to search for infringing material,¹¹⁷ it seems

1107–09 (W.D. Wash. 2004) (holding that defendants must have had knowledge of specific infringement, not a mere “general awareness”).

108. 17 U.S.C. § 512(c)(1)(A)(i) (2006).

109. *Id.*

110. See Breen, *supra* note 45, at 164 (discussing the tests for knowledge of infringement under the DMCA safe harbor provisions).

111. *Corbis*, 351 F. Supp. 2d at 1098–99.

112. *Id.* at 1107.

113. *Id.* at 1094–97.

114. *Id.* at 1108 (emphasis added). The court here adopted the requirement of specificity from *Napster*, thus bringing the DMCA analysis in line with general contributory infringement.

115. *Id.* at 1107.

116. *Id.* (citation omitted).

117. *Id.* at 1104.

near impossible to show actual knowledge under the safe harbor provisions without explicit notice of infringing content.¹¹⁸

b. Adequacy of Notice. Even if the content owner provides notice of infringing material to the service provider, that notice may still be insufficient to establish actual knowledge.¹¹⁹ To qualify as a proper notification, the content owner must submit a written communication based on a good faith belief of infringing behavior.¹²⁰ The notification must also identify the allegedly infringing content and declare under penalty of perjury that the complainant is authorized to act on behalf of the copyright owner.¹²¹ Section 512(c)(3)(B) goes on to state that a notification that “fails to comply substantially” with the requirements above does *not* establish actual knowledge of infringing content on the part of the service provider.¹²²

A recent case in the Ninth Circuit, *Perfect 10, Inc. v. CCBill LLC (Perfect 10 II)*, addressed this issue indirectly when considering the reasonableness of the defendants’ repeat infringer policy.¹²³ In this case, the owner of an adult magazine and the associated website brought infringement claims against a web hosting company and an online payment processing company.¹²⁴ The plaintiff alleged that the defendants knowingly provided online services to websites that used the plaintiff’s copyrighted content without authorization.¹²⁵

In considering the reasonableness of the repeat infringer policy required under Section 512(i)(1)(A), the court also determined whether the defendants had actual knowledge of the infringing behavior.¹²⁶ The plaintiff claimed the defendants were duly notified of the infringing content not by one DMCA-compliant notice, but rather by three separate collections of documents.¹²⁷ However, each set of documents was missing at

118. See Breen, *supra* note 45, at 164 (discussing the “actual knowledge” requirement and concluding that proving knowledge without notification would be “almost impossible”).

119. See generally 17 U.S.C. § 512(c)(3) (2006) (discussing the requirements for a proper notification and providing that a noncompliant notice does not establish knowledge).

120. 17 U.S.C. § 512(c)(3)(A) (2006).

121. *Id.*

122. 17 U.S.C. § 512(c)(3)(B)(i) (2006).

123. *Perfect 10, Inc. v. CCBill LLC (Perfect 10 II)*, 488 F.3d 1102, 1109–11 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 709 (2007).

124. *Id.* at 1108.

125. *Id.*

126. *Id.* at 1111.

127. *Id.* at 1112.

least one of the requirements of Section 512(c)(3)(A).¹²⁸ Although the plaintiff maintained that the three notifications, when taken together, should establish actual knowledge, the court held that a notification must comply substantially with *all* the requirements of Section 512(c)(3)(A) before it can establish actual knowledge.¹²⁹ The court went on to note that “[p]ermitting a copyright holder to cobble together adequate notice from separately defective notices . . . unduly burdens service providers. Indeed, [the DMCA] requires that the notice be ‘a written communication.’”¹³⁰

The deference to the service provider did not end there. Despite the defendants’ admission that they indeed had adequate information to find and restrict access to the infringing content, the lack of a sworn statement of authorization prevented the notification from substantial compliance with the DMCA.¹³¹ The absence of a sworn statement under penalty of perjury led the court to hold that the defendants did not have the sort of knowledge that would either trigger the defendants’ responsibility to intervene or disqualify them from DMCA safe harbor protection, despite their admitted knowledge.¹³²

c. Whether YouTube Has the Requisite “Actual Knowledge.”

The case law interpreting the actual knowledge prong does not establish a *per se* standard.¹³³ The only clear pattern is one of extreme deference to the online service providers.¹³⁴ It seems that the only way to clearly establish actual knowledge is to issue a takedown notice that is *entirely* in compliance with Section 512(c)(3).¹³⁵

128. The first two alleged notifications were not sworn to under penalty of perjury; the third was a set of interrogatory responses that merely incorporated the prior notifications by reference. *Id.*

129. *Id.*

130. *Id.* at 1113 (citing 17 U.S.C. § 512(c)(3) (2006)).

131. *Id.* at 1112 n.4 (“Perfect 10’s argument that its initial notice substantially complied with the DMCA’s notice requirements because Fisher, the recipient of that notice, admitted that he could have found the infringing photographs on the basis of the . . . bates-stamped production, is thus beside the point. Without the predicate certification under penalty of perjury, Fisher would have had no reason to go looking for the photographs.”).

132. *Id.* at 1113 (“Since Perfect 10 did not provide effective notice, knowledge of infringement may not be imputed to [defendants] based on Perfect 10’s communications.”).

133. *See supra* text accompanying notes 111–32 (discussing the case law regarding actual knowledge under the DMCA).

134. *See id.* (showing the pattern of deference toward service providers in determining whether the providers had actual knowledge).

135. *See Breen, supra* note 45, at 164 (“[I]t appears that absent notification, establishing an instance of actual knowledge of infringement would be almost impossible.”).

Despite the allegedly “rampant” infringement on YouTube, it seems that YouTube does not have “actual knowledge” of infringement. YouTube has clearly posted information on the website regarding its copyright policy, the DMCA, and proper takedown notices.¹³⁶ YouTube asserts that it complies with the relevant provisions of the DMCA and actively removes or disables access to infringing content on receipt of a DMCA-compliant takedown notice.¹³⁷ Facially, YouTube appears to comply with the DMCA requirements for immunity from monetary damages. But Viacom argues that YouTube does not comply with the spirit of the DMCA, and that this case should be the turning point in the DMCA case law.¹³⁸ Viacom cites the “rampant infringement of Plaintiffs’ copyrights on YouTube [that] is open and notorious,” arguing that the sheer amount of infringing behavior that occurs on the website should indicate that YouTube does, in fact, have actual knowledge of the infringing material.¹³⁹

Ultimately, YouTube does not have an affirmative duty to police the content uploaded by its users, no matter how rampant the infringement may be.¹⁴⁰ YouTube will be found to have actual knowledge only with respect to specific videos identified in a DMCA-compliant takedown notice. Viacom’s argument goes against the pattern of deference to service providers and will likely not succeed in persuading the court that YouTube has actual knowledge because the alleged rampant infringement does not refer to *specific* infringing material.

2. *Awareness of Facts or Circumstances.* Even if a service provider is determined to have no “actual knowledge” of infringing behavior, it still may be disqualified from DMCA

136. See Terms of Service, *supra* note 54; YouTube Copyright Infringement Notification, *supra* note 94; YouTube Copyright Tips, http://www.youtube.com/howto_copyright (last visited Nov. 21, 2009).

137. Answer, *supra* note 13, ¶ 41; Copyright Infringement Notification, *supra* note 136.

138. See generally Amended Complaint, *supra* note 78, ¶ 41 (arguing that YouTube should be found liable due to the particular circumstances surrounding the site).

139. *Id.* ¶ 37.

140. See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004) (stating that because a service provider has no “affirmative duty to police its users, failure to properly implement an infringement policy requires a showing of instances where a service provider fails to terminate a user even though it has sufficient evidence to create actual knowledge of that user’s blatant, repeat infringement of a willful and commercial nature”); see also H.R. REP. NO. 105-551, pt. 2, at 61 (1998) (explaining that the DMCA is not intended to require a service provider to “investigate possible infringements, monitor its service, or make difficult judgments as to whether content is or is not infringing”).

protection if it is “aware of facts or circumstances from which infringing activity is apparent.”¹⁴¹ Determining what qualifies as “apparent” infringing activity is the key question in applying DMCA safe harbor protection.¹⁴² Congress clarified this standard, describing it as a “red flag” test:

[A] service provider need not monitor its service or affirmatively seek facts indicating infringing activity . . . in order to claim this limitation on liability However, if the service provider becomes aware of a “red flag” from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.¹⁴³

Congress originally stated that this is a two-part analysis, with both objective and subjective considerations.¹⁴⁴ Courts must determine both the “subjective awareness of the service provider of the facts or circumstances in question” and “whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”¹⁴⁵ Essentially, a service provider “would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.”¹⁴⁶

a. *The “Red Flag” Test.* Unfortunately, the case law interpreting the red flag standard is minimal.¹⁴⁷ However, once again, the courts show a clear pattern of deference toward the service providers.¹⁴⁸ In *Corbis Corp. v. Amazon.com, Inc.*, the court examined the red flag test and determined that Amazon.com did not have actual or apparent knowledge that its marketplace service was being used to infringe on Corbis’s intellectual property rights.¹⁴⁹ The court stressed, “[T]he question is not ‘what a reasonable person would have deduced given all the circumstances.’ Instead, the question is ‘whether the service provider deliberately proceeded in the face of blatant factors of

141. 17 U.S.C. § 512(c)(1)(A)(ii) (2006).

142. Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 596 (2008).

143. H.R. REP. NO. 105-551, pt. 2, at 53 (1998).

144. *Id.*

145. *Id.*

146. *Id.* at 57.

147. Ginsburg, *supra* note 142, at 596.

148. *See id.* at 596–97 (describing how the courts’ decisions grant service providers a wide berth).

149. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

which it was aware.”¹⁵⁰ The court continued to say that Amazon would be found to have apparent knowledge only if it provided services to something that was “clearly a ‘pirate site.’”¹⁵¹ Pirate sites are described as “obviously infringing because they typically use words such as ‘pirate,’ ‘bootleg,’ or slang terms . . . to make their illegal purpose obvious.”¹⁵²

The court didn’t stop there. Corbis alleged that because Amazon had received notification from uninvolved third parties regarding other infringing content, Amazon should be found to have ignored the statutory red flags with respect to Corbis’s material.¹⁵³ The court held that notices from unrelated third parties are not to be considered red flags of infringement.¹⁵⁴ In another case, *Hendrickson v. eBay, Inc.*, a court expanded on this, holding that takedown notices that do not substantially comply with the DMCA are also not to be considered red flags.¹⁵⁵ Considering Congress’s guidance, and in light of the *Corbis* and *eBay* opinions, it seems that the red flag needs to be “an immense crimson banner” before the service provider incurs any obligation to investigate further.¹⁵⁶

But wait—it gets even better for the service providers. Even the most obvious terms such as “illegal” and “stolen” may not be considered red flags, depending on the context. In *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit carved out an exception to Congress’s examples of red flags.¹⁵⁷ Perfect 10, owner of an adult magazine and website, alleged that defendants ignored red flags indicative of infringement because they provided services to websites such as “illegal.net” and “stolencelebritypictures.com.” Perfect 10 argued that the names of these websites were clear

150. *Id.* (quoting NIMMER & NIMMER, *supra* note 89, § 12B.04[A][1]).

151. *Id.* (citation omitted).

152. H.R. REP. NO. 105-551, pt. 2, at 58 (1998).

153. *Corbis*, 351 F. Supp. 2d at 1108 (“Corbis argues that its strongest evidence regarding apparent knowledge is that Amazon received notices that zShops vendors were infringing the copyrights of unrelated parties by selling celebrity photographs.”).

154. *Id.* at 1109 (“[E]ven if the notices of infringement would have caused Amazon to examine the content of the zShops sites, Corbis has failed to close the link by showing that those sites contained the type of blatant infringing activity that would have sent up a red flag for Amazon.”).

155. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1092–93 (C.D. Cal. 2001) (“Under the DMCA, a notification from a copyright owner that fails to comply substantially with Sections 512(c)(3)(A)(ii), (iii) or (iv) ‘shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of the facts or circumstances from which infringing activity is apparent.’” (quoting 17 U.S.C. § 512(c)(3)(B)(i) (2006))).

156. Ginsburg, *supra* note 142, at 596.

157. *Perfect 10, Inc. v. CCBill LLC (Perfect 10 II)*, 488 F.3d 1102, 1114 (9th Cir. 2007).

indications that the websites trafficked in copyrighted or otherwise illegal content.¹⁵⁸ Although the website names facially appeared to clearly be “pirate sites,” the Ninth Circuit declined to find that defendants ignored red flags indicative of infringing behavior.¹⁵⁹ The court reasoned that, in the context of adult material, descriptors such as “illegal” and “stolen” might merely be attempts to make the material more enticing and appealing. The court declined to place the burden of determining the legal status of the material on the service provider.¹⁶⁰ However, there is some indication that if a file’s title includes the full name of a well-known movie, TV show, or song, it *may* be obvious enough to rise to the level of a red flag.¹⁶¹

b. Whether YouTube Ignores the “Red Flags.” Applying the red flag standard to YouTube is difficult and yields inconclusive results. A YouTube search for Congress’s examples of red flags such as “pirate” or “illegal” gives results that include discussions on piracy and illegal street racing. It is certainly difficult to determine whether a video is “clearly” a “pirate” copy.

Viacom argues, however, that the red flag standard should be widened in the case of YouTube.¹⁶² Viacom believes that due to the allegedly large amount of infringing material on the website, the statutory “red flags” should be broadened to include “description terms and search tags using [Viacom’s] well-known trademarks and other terms identifying their popular copyrighted works.”¹⁶³ Viacom might have a valid argument: if a video clip is uploaded to YouTube and given the title of “The Daily Show 1/19/09,” it is clearly apparent that there is at least a substantial likelihood that the video is Viacom’s copyrighted content. The argument is made stronger in light of Viacom’s repeated takedown notices issued to YouTube regarding the

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* Ginsburg, *supra* note 142, at 597 (“[I]f the file title includes the name of a motion picture, television program, or sound recording of which the person or entity posting the content is obviously not the copyright owner, this may be sufficient to raise a red flag.”). It is important to consider, however, that not every file named after a movie is necessarily infringing content. It could be mislabeled, or might be a parody that would fall under the fair use doctrine. *Id.*

162. *See* Amended Complaint, *supra* note 78, ¶ 37 (“YouTube’s site is also filled with ‘red flags’ from which infringing activity is apparent, such as description terms and search tags using Plaintiffs’ well-known trademarks and other terms identifying their popular copyright works. Indeed, the presence of infringing copyrighted material on YouTube is fully intended by [the] Defendants . . .”).

163. *Id.*

same show. Although YouTube has no affirmative duty to police the content uploaded to its servers,¹⁶⁴ it can certainly be argued that the mere presence of video with titles taken from TV shows, whether actually infringing or not, should send up “crimson banners” at YouTube.

B. *Expeditious Removal*

The DMCA safe harbors thus far have proven to be highly deferential to the service providers.¹⁶⁵ However, the safe harbor provisions provide, in theory, an efficient remedy for content owners who wish to protect their material without incurring substantial litigation fees.¹⁶⁶ In order for online service providers to preserve their immunity, they must not only be innocent infringers without actual or apparent knowledge of the infringing behavior or material, but must also comply with the removal requirements of Section 512.¹⁶⁷ Specifically, either “upon obtaining such knowledge or awareness” of infringement or upon receipt of a proper takedown notice according to Section 512(c)(3)(A), service providers must “respond[] expeditiously to remove, or disable access to, the material” that may be in violation of the Copyright Act.¹⁶⁸ Congress provided guidance regarding interpretation of the requirement:

[The statute] provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider’s system or network is apparent, the service provider does not lose the limitation of liability . . . if it acts expeditiously to remove or disable access to the infringing material. Because the factual circumstances and technical

164. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004). However, the lack of affirmative duty might insulate YouTube regardless of the file names. If there is no duty to police the content, there can be no liability imposed for failing to notice the “red flag” file names. *See* H.R. REP. NO. 105-551, pt. 2, at 61 (1998) (noting that Section 512 was not intended to require a service provider to “investigate possible infringements, monitor its service, or make difficult judgments as to whether content is or is not infringing”).

165. *See supra* Part IV.A (discussing the pattern of deference to service providers when determining whether the service providers have actual or apparent knowledge of infringing material or behavior).

166. *See generally* 17 U.S.C. § 512(c) (2006) (providing copyright owners a method of “controlling” online copies of their material without having to resort to litigation).

167. 17 U.S.C. § 512 (2006).

168. 17 U.S.C. §§ 512(c)(1)(A)(iii), (c)(1)(C) (2006); *see also* H.R. REP. NO. 105-551, pt. 2, at 54 (“This ‘notice and take-down’ procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”).

parameters may vary from case to case, it is *not possible* to identify a uniform time limit for expeditious action.¹⁶⁹

Although Congress addressed (or refused to address) the issue of how quickly a service provider must disable access to the infringing content in order to be considered “expeditious,” it is important to note that no mention was made of the method or effectiveness of the removal.¹⁷⁰ It appears that by acknowledging the uncertainty of future technology and what effect it may have on “expeditious removal,” Congress was intentionally vague in an attempt to future-proof the safe harbor provisions. Had Congress given guidance on the method of removal, it likely would have been similarly vague to account for advances in technology.¹⁷¹

1. *Specificity of Removal.* Despite the lack of congressional guidance, when considering the required extent of the “expeditious removal,” one should consider the test for actual knowledge: whether the service provider had knowledge of *specific* infringing material or behavior.¹⁷² Logically, if a service provider has the requisite actual knowledge of infringement, through either a DMCA takedown notice or another method which has yet to be established, the service provider’s immunity from damages is dependent *only* on its actions with regard to the specific file or infringing content identified in the takedown notice. Therefore, as long as a service provider complies with a proper takedown notice and removes only the file or files identified, it likely satisfies the removal requirement. This would be the case even if there are multiple copies of the file, identical in all practical ways, still available on the online service, so long as they were not identified in the takedown notice.¹⁷³ For

169. H.R. REP. NO. 105-551, pt. 2, at 53–54 (emphasis added).

170. *See id.* at 50–65 (discussing the details of the safe harbor provisions but making no mention of the appropriate methods of removal or disabled access).

171. Although the DMCA was intended to promote the development of new types of online service providers, there was no way for Congress, in 1998, to predict the explosion of technology, bandwidth, and Internet usage. *See supra* note 85 and accompanying text (discussing how legislators had no “crystal ball” with which to predict the future of technology). Even today, some lawmakers exhibit a dubious understanding of technology. Former Senator Ted Stevens, then Chairman of the Senate Committee on Commerce, Science and Transportation, gave this now-infamous description of the internet: “The Internet . . . is not something you just dump something on. It’s not a big truck. It’s, it’s a series of tubes.” Noam Cohen, *The Internets, They Can Be Cruel*, N.Y. TIMES, June 4, 2007, at C4 (quoting Sen. Ted Stevens) (internal quotation marks omitted).

172. *See supra* Part IV.A.1 (discussing the case law regarding the “actual knowledge” test and the apparent requirement of knowledge of each infringing file).

173. It is still necessary to consider the “red flag” test. It is possible that files with identical names to those identified in a DMCA takedown notice may rise to the level of a

example, if a network owns the rights to “The Mudkip Show” and issues a takedown notice (in which several files are identified) to an online video site, the video site has absolutely no obligation to remove other clips of “The Mudkip Show” that might have been overlooked by the network, even if there are over nine thousand such videos.

The analogy to the current case is clear. YouTube maintains that it removes videos for which it receives proper DMCA notification, making them unavailable to its users.¹⁷⁴ The removal is still subject to the counter-notification process, through which a user can assert that his removed video was not, in fact, infringing.¹⁷⁵ YouTube appears to strictly follow the letter of the law with regards to removing content once notified of the content’s allegedly infringing nature.

2. *Efficacy of Removal.* Although YouTube strictly complies with the statutory removal requirements, Viacom maintains that YouTube does not satisfy the *spirit* of the DMCA. Viacom argues that removing only the identified infringing files is an ineffective remedy. The complaint asserts:

[E]ven after [YouTube] receives a notice from a copyright owner, in many instances the very same infringing video remains on YouTube because it was uploaded by at least one other user, or appears on YouTube again within hours of its removal. YouTube has deliberately chosen this approach because it allows YouTube to profit from infringement while leaving copyright owners insufficient means to prevent it.¹⁷⁶

The argument has some merit. The takedown–re-post cycle has been described as “hydra-like” because as soon as you remove one video, two more appear in its place.¹⁷⁷ Granted, YouTube itself is not the one re-posting the videos; this is entirely the behavior of YouTube’s users. In addition, as discussed earlier, YouTube’s continuing compliance with the DMCA and the takedown

red flag that would trigger the service provider’s obligation to intervene or investigate further. *See supra* note 161 and accompanying text.

174. *See* Terms of Service, *supra* note 54 (informing copyright owners of how to file a DMCA takedown notice with YouTube and providing a “counter-notice” procedure for users who feel their submissions were erroneously removed or disabled); Fabrikant & Hansell, *supra* note 98 (discussing YouTube’s removal of the identified Viacom content).

175. 17 U.S.C. § 512(g)(2) (2006). A user who believes the content was wrongly removed may counter-notify the service provider. The service provider, to preserve immunity, must then re-post the allegedly infringing file. At this point, it is the responsibility of the content owner to pursue legal action. *Id.*

176. Amended Complaint, *supra* note 78, ¶ 6.

177. Ginsburg, *supra* note 142, at 591.

procedures insulate it from monetary damages. The lack of legislative and judicial guidance allows YouTube to continue with this course of inaction without sacrificing immunity under the safe harbors. Under the DMCA, YouTube remains free from liability so long as it responds to the content owners' frantic efforts to cling to their intellectual property rights. It is not clear whether this process is what Congress really had in mind when they drafted the DMCA in 1998.

A recent technological development might have solved the problem, at least for now. YouTube and Google believe they have gone above and beyond their legal requirements by providing a method of active content filtering.¹⁷⁸ Their new "Video Identification" program has recently been made available to any content owner who wants more protection for their content.¹⁷⁹ Content owners who participate in the program must turn over to YouTube the content they wish to protect so that it can be analyzed using a number of factors and added to the list of copyrighted content.¹⁸⁰ The Video ID program then acts as an automated gatekeeper that compares newly uploaded files to a library of known copyrighted content.¹⁸¹ When a video is found to match what is essentially a "fingerprint" belonging to copyrighted material, the video may be either promoted or removed, or made so that the content owner receives a portion of the advertising revenue derived from the video.¹⁸²

At first glance, this seems like a viable solution. Viacom, if it chooses to participate in the program, can retain control over its copyrighted material, and YouTube is less likely to be the target of litigation. However, there is a third party that is affected by this program: the users. The Video ID program is incapable of making the sort of balancing decisions required for the fair use doctrine. It indiscriminately adds advertisements to, or altogether removes, individual users' content regardless of whether it is in fact infringing on someone's copyright. This skips the takedown procedure altogether and unilaterally shifts the burden away from the content owners, placing it squarely on the shoulders of the users.

178. YouTube Video Identification Beta, http://www.youtube.com/t/video_id_about (last visited Nov. 21, 2009).

179. *Id.*

180. *Id.* This still places a burden on content owners because they must turn over their content library to a third party. The tradeoff would come from the decreased amount of "police work" for the content owners.

181. *Id.*

182. *Id.* A content owner can choose how the infringing videos are to be treated.

Furthermore, we must not forget about the other online service providers that are exposed to the same sort of liability as YouTube. Under the current regime, service providers have no obligation to filter the content being uploaded to their servers.¹⁸³ It could be argued, however, that filtering programs such as YouTube's Video ID might become some sort of "industry standard," thus placing an expectation or burden that did not previously exist under the DMCA on online service providers. This would be difficult for other service providers to implement. YouTube guards the source code to the Video ID program very closely due to its value as a trade secret.¹⁸⁴ YouTube and Google estimate the Video ID program is the result of "approximately 50,000 man hours of engineering time and millions of dollars of research and development costs."¹⁸⁵ Should this sort of active filtering eventually become the norm, it could place a prohibitively large wall in the path of new Internet startup companies who do not have wallets the size of YouTube's. This would be contrary to the stated purpose of the DMCA.¹⁸⁶

V. CONCLUSION: IS THIS REALLY WHAT WE WANT?

Content owners certainly have a right to control and profit from their creative content. If they lose control over their intellectual property, there is arguably little to no incentive to create more content. Copyright's *raison d'être* is specifically the encouraging of creative minds to continue to develop new works of art and entertainment.¹⁸⁷ But the Internet presents us with something foreign; something to which we do not know how to react. The DMCA safe harbors were created almost as a counterpoint to copyright law—while copyright law restricts the use of creative content, the purpose of the safe harbors is to promote the means of sharing and distribution. If the DMCA safe harbor protection is weakened, service providers will no longer

183. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D. Wash. 2004).

184. *Viacom Int'l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 260–61 (S.D.N.Y. 2008) (Viacom sought disclosure of the Video ID source code; court found its value as a trade secret outweighed Viacom's interest in examining the code).

185. *Id.*

186. *See* S. REP. NO. 105-190, at 2 (1998) ("[T]he law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. [The DMCA safe harbor] provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works.").

187. *See* U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

have incentive to develop new and innovative ways of creating and sharing content. It seems like a catch-22: we either decrease the incentive to create content, or make it riskier for Internet entrepreneurs to design new online services. Should the court in the current Viacom lawsuit impose a stricter duty on service providers, the DMCA may potentially be weakened in a way that would stifle development of new online services.

There are two competing viewpoints in this battle. On one side are the content owners, some of which are trying to maintain absolute control over their material. On the other side are those who have grown accustomed to the Internet and its fast, easy, and efficient access to information, and those who wish to create innovative new online services for these users. The DMCA currently occupies the uneasy middle ground, providing comfort for neither the content owners nor the users who have been accused of infringement. Notwithstanding the Video ID program, in order to control their creative material, content owners still must play whack-a-mole with infringing videos that constantly sprout up online. Users of websites such as YouTube have to deal with the possibility that their home videos may be removed due to the use of a short clip of popular music. The service provider is caught in the middle, hiding under the umbrella of the safe harbor protection. But in this situation, the middle seems to be the safest place—at least for now.

The *Viacom* court absolutely should not break the trend of deference by holding YouTube accountable for the infringing behavior of its users. From a legal standpoint, in order for the DMCA safe harbor provisions to have *any* meaning, they must stay true to their stated purpose: “creat[ing] the legal platform for launching the global digital on-line marketplace.”¹⁸⁸ The safe harbor provisions must stand firm in protecting online service providers if they are to fulfill their purpose.

From a social standpoint, the Internet is changing the way people consume media and information.¹⁸⁹ Newer users arguably have a different view of copyright law than those who fight to protect their content.¹⁹⁰ One professor provided an illustration:

If, for example, you buy a copy of a CD and you want to rip that CD onto your computer hard drive, I think it would be hard to find very many people who would say that there is

188. S. REP. NO. 105-190, at 2 (1998).

189. See Handel, *supra* note 4, at 10 (discussing the decrease in use of traditional media, and the detrimental impact on some content industries).

190. *Id.* at 11 (“A generation of users has grown up indifferent or hostile to copyright . . .”).

anything wrong with doing that. If that is something that people really believe is fair and reasonable, how are you going to dissuade them from doing it?¹⁹¹

The new generation of users wants inexpensive and convenient access to information and entertainment, and the Internet provides the solution.¹⁹² Simultaneously, this new generation has an interest in making sure content owners continue to produce the creative material. To keep the entertainment flowing, “it is necessary to prevent some people from being unjustly enriched by free-riding off the labor and investment of others.”¹⁹³

From a business standpoint, it is entirely reasonable for content owners to expect to get a return on their investment. In the past, this meant selling the product in tangible form, or broadcasting the material with advertisements on television. But now the copyright owners have lost control over their content and are left wondering what to do. The knee-jerk reaction was to turn to litigation, suing either the end-users or the service providers for the infringing content. This had the rather predictable side effect of engendering ill will toward organizations such as the Recording Industry Association of America (RIAA).¹⁹⁴ It is also debatable whether this course of action makes economic sense—the Viacom lawsuit could rack up “\$350 million or more in legal fees.”¹⁹⁵ YouTube itself is on questionable economic ground. Entrepreneur and billionaire Mark Cuban has argued that YouTube has no viable business without pirated content.¹⁹⁶ Back in 2006, YouTube had yet to turn a profit, and some were estimating that it was losing more than \$500,000 a month.¹⁹⁷ However, during the following two years, YouTube was able to acquire (and lose) some major licensing agreements.¹⁹⁸ It is unclear how sustainable YouTube may be in its current form. However, its current course—actively pursuing licensing deals

191. Symposium, *supra* note 3, at 1104.

192. See VerSteeg, *supra* note 21, at 64 (noting that consumers “want cheap and easy access to information, education, and entertainment”).

193. *Id.* at 65.

194. John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 INTELL. PROP. L. BULL. 1, 3–4 (2007).

195. Lisa Lerer, *Viacom's Expensive Suit*, FORBES.COM, Mar. 28, 2007, http://www.forbes.com/technology/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html.

196. Saul Hansell, *YouTube's Video Poker*, N.Y. TIMES, Sept. 30, 2006, at C1 (paraphrasing Cuban's comments from his personal blog and an interview).

197. *The Trouble with YouTube*, ECONOMIST, Sept. 2, 2006, at 57, 58.

198. See Stelter, *supra* note 71, at B5.

and clinging tenaciously to the requirements of the DMCA—will likely keep it afloat for now.

It may be possible to satisfy both the social and business concerns, both promoting creative content and Internet innovation, as well as allowing content owners to maintain a modicum of control over their material. While some have fought the Internet tooth-and-nail since the beginning, others have moved into the digital age to find new business models and new ways to make a profit. The best example of this new business model is the video service, Hulu. The service is a joint project by content owners, including NBC Universal and News Corp., that provides fast and easy access to television shows and movies.¹⁹⁹ Admittedly, Hulu is not the same sort of service as YouTube because there is no user-created content. However, the website is beneficial to both sides of the controversy. It provides users with fast, free access to copyrighted material, subject only to a few brief advertisements. This sort of service is what users have wanted. If there is a legitimate way to get the desired content that is just as easy as piracy, there is no excuse to copy the protected content. Simultaneously, it serves the interests of the content owners because it allows them to monetize their online content while retaining control over their legal rights.

The relationship between technology and copyright has always been an uneasy one.²⁰⁰ New advancements in technology stress the limits of copyright law, and it is up to the service providers and content owners to come up with a solution. But where does this leave the law? If the answer truly is to embrace the Internet and make money through advertising, it seems we bypass the DMCA entirely. Hulu will probably never have to deal with copyright infringement because it only provides content that is licensed and approved. Barring some unforeseen problems, Hulu will never have to consider whether a certain clip is “fair use,” never have to remove content in response to a DMCA takedown notice, and never have to worry about establishing a repeat infringer policy. However, outside of the Hulu solution, copyright law is obsolete and needs to be rethought. Google’s senior copyright counsel once remarked:

Copyright law has abandoned its reason for being: to encourage learning and the creation of new works. Instead,

199. Hulu Media Info, <http://www.hulu.com/about> (last visited Nov. 21, 2009).

200. See VerSteeg, *supra* note 21, at 44–46 (“[C]opyright law[] originally developed in response to the printing press, [and] must constantly try to meet the legal needs created by every new technological development. This continual attempt to catch up with new technology is a dominant theme in the history of copyright jurisprudence.”).

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its principal functions now are to preserve existing failed business models, to suppress new business models and technologies, and to obtain, if possible, enormous windfall profits from activity that not only causes no harm, but which is beneficial to copyright owners.²⁰¹

The new breed of online services remedies this issue. Content owners create new business models and thus stop suing users or providers, and any profits earned from these new models are certainly not the undeserved “windfalls” mentioned by William Patry.²⁰² This sort of arrangement leapfrogs over the DMCA while still maintaining the protections of the Copyright Act of 1979. If this is truly the solution, it seems that the DMCA may be obsolete before its time. The thirty-year-old Copyright Act may have outlasted its younger sibling.

Kevin C. Hormann

201. Handel, *supra* note 4, at 13 (quoting Posting of William Patry, *End of the Blog*, to The Patry Copyright Blog (Aug. 1, 2008, 21:12 EST), <http://williampatry.blogspot.com/2008/08/end-of-blog.html>).

202. For example, a jury in Minnesota recently awarded several content owners \$1,920,000 in damages from a single mother of four who was found to have willfully violated the content owners' copyright on only twenty-four music files. The jury determined that each downloaded song caused \$80,000 in damages. Special Verdict Form, Capitol Records, Inc. v. Thomas-Rasset, No. 06-cv-1497 (MJD/RLE), 2009 WL 1717117 (D. Minn. June 18, 2009); see also Mike Harvey, *Single-Mother Digital Pirate Jammie Thomas-Rasset Must Pay \$80,000 per Song*, TIMES ONLINE, June 19, 2009, http://technology.timesonline.co.uk/tol/news/tech_and_web/article6534542.ece.