Viacom v. Youtube: A Proving Ground for DMCA Safe Harbors Against Secondary Liability

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VIACOM V. YOUTUBE:

A PROVING GROUND FOR DMCA SAFE
HARBORS AGAINST SECONDARY LIABILITY

BRETT WHITE*

INTRODUCTION

Copyright law appears to be set for some landscape changing shockwaves pending the conclusion of Viacom’s forthcoming case against defendants YouTube and Google. The media giant, Viacom, contends that YouTube, a wholly owned subsidiary of Google, secondarily infringes upon its copyrighted broadcasts by failing to take adequate measures to prevent users from uploading such content onto their servers. Viacom has alleged all three theories of secondary infringement available under current jurisprudence. YouTube and Google have steadfastly maintained their innocence, averring that they are sheltered by the protective eaves of the Digital Millennium Copyright Act (hereinafter DMCA) of 1998. This is the latest in a line of cases laying siege to digital technologies capable of reproducing copyrighted works (so-called “dual use” devices), and

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1 See Denise Howell, Viacom v. Youtube Represents a Watershed Moment in Video Policy, LAWGARITHMS, Mar. 14, 2007, http://blogs.zdnet.com/Howell/?p=108 (quoting Google’s senior litigation counsel Michael Kwun, “If we don’t at least litigate to the point where we get rulings on the issues that matter to us, we’re left with less clarity in the law”); see also Steven Seidenberg, Copyright in the Age of YouTube: As User Generated Sites Flourish, Copyright Law Struggles to Keep Up, 95 A.B.A. J. 46, 49 (2009) (arguing that a Viacom victory in the instant litigation would drive other user generated sites out of business).

2 See generally YouTube.com, http://www.youtube.com (last visited Apr. 30, 2010). YouTube.com is a video-sharing website that allows account holders to upload content onto its servers. Id. YouTube requires account holders to agree to its terms of use and requires users to respect intellectual property. Id. Nevertheless, YouTube does not investigate user-generated content at the point of upload, and instead reacts to violations after third party complaints. Id.

3 These theories, to be discussed later in the note, are contributory liability, vicarious liability and inducement.


5 Sverker K. Hogberg, The Search for Intent-Based Doctrines of Secondary Liability in Copyright
represents an opportunity for the courts or Congress to clear up the confusion surrounding secondary infringement claims as well as the scope of the available safe harbors.

In addition to direct infringement claims, Viacom's complaint alleges that YouTube has induced infringement (Count IV), contributorily infringed upon (Count V), and vicariously infringed upon (Count VI) plaintiffs' copyrighted material. The complaint also accuses YouTube of knowledge of the infringing material present on its website and further alleges that YouTube has been refusing to use filtering technology in order to identify and remove copyrighted works unless the copyright owners grant them a license. These licenses would be granted on terms presumably favorable to YouTube, coercing copyright holders into the choice between a lesser of two evils; either sign over a license or continue to allow your copyrights to be infringed upon. Viacom withdrew from licensing negotiations with YouTube in February 2007, with Viacom complaining that YouTube failed to offer a fair market value in exchange for its licenses.

YouTube counters that it is shielded by section 512(c)(1) of the DCMA, which reads in relevant part:

§512(c) Information residing on systems or networks at direction of users.

Law, 106 COLUM. L. REV. 909, 912 (2006) (noting that a "dual use" device is a device that is capable of both infringing and non-infringing uses).


7 Id. at ¶ 23.

8 Id.

9 Geraldine Fabrikant & Saul Hansell, Viacom Tells YouTube: Hands Off, N.Y. TIMES, Feb. 3, 2007, at C1 (noting YouTube’s alleged position that it requires a licence to show Viacom’s content as a prerequisite to filtering Viacom’s material).

10 See Bruce Boyden, Viacom v. Youtube, PRAWFSBLAWG, Mar. 15, 2007, http://prawfsblawg.blogs.com/prawfsblawg/2007/03/viacom_v_youtub.html (quoting Complaint at ¶ 7, 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (No. 1:07-cv-02103), 2007 WL 775611) (discussing allegation by Viacom that YouTube used coercive measures in order to obtain licenses on favorable terms); see also Fabrikant & Hansell, supra note 9 (mentioning that Viacom perceived YouTube’s lack of copyright filtering, when the company had access to such technology, as a way of forcing copyright holders to deal with YouTube).


1) In general- A service provider shall not be liable... for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, 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;

(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 as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

To escape liability, YouTube must qualify for section 512 protection and satisfy (A), (B), and (C). However, the components of paragraph (A) are disjunctive and only one segment needs to be satisfied. YouTube contends that it responds promptly to any notice of infringing material by removing the content and that it is therefore entitled to the DMCA’s safe-harbor subsection under (A)(iii). Viacom counters that YouTube has intentionally built up a library of copyrighted works on its servers in order to attract advertisers from which YouTube “directly” benefits financially. If accepted as fact, this contention removes any protection afforded by the DMCA section 512(c) as YouTube then could not satisfy subsection (B).

Through the lens of this lawsuit, part I of this note will examine the different theories of secondary infringement and the corresponding

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13 See Nate Anderson, Youtube: Viacom Dumping Piranhas in Our DMCA Safe Harbor, ARS TECHNOICA, May 27, 2008, http://arstechnica.com/tech-policy/news/2008/05/youtube-viacom-dumping-piranhas-in-our-safe-harbor.ars (noting that YouTube claims it is exactly the type of service Congress intended to cover under the safe harbor provision); Mills, supra note 11 (quoting Glenn Brown as saying “The DMCA (Digital Millennium Copyright Act) makes it very clear that Web hosting companies like YouTube... enjoy a safe harbor provided they make the removal process (of copyrighted material) straightforward for content providers as laid out by statute. We meet those requirements and go above and beyond them in helping content providers identify copyright infringements.”).


15 17 U.S.C. § 512(c)(1)(B) (2009) (requiring that a service provider not directly financially benefit from the infringing activity in order to be sheltered by the safe harbor provision).
defenses in order to reveal the relative strengths and weaknesses of Viacom's and YouTube's contentions. In part II of the note, the safe harbor provisions under section 512 of the DMCA and Sony Corp. of America v. Universal City Studios, Inc. (Sony)\(^\text{16}\) will be examined in the context of available case law and legislative history. These two safe harbors constitute defenses available to alleged secondary infringers that can shield them from pecuniary liability and injunction even in the face of a finding of secondary infringement.\(^\text{17}\) At present, however, it is unclear to what degree these safe harbors apply and to what extent they overlap. Apart from the debatable scope of these safe harbors, copyright holders and technological innovators may have other tools at their disposal that can provide a solution to the secondary infringement dilemma. The final portion of this note, part III, discusses two potential extra-judicial solutions.

I. SECONDARY LIABILITY AS INTERPRETED BY THE JUDICIARY HAS PRODUCED A BROAD FIELD OF POTENTIAL LIABILITY AS WELL AS IMPORTANT SAFE HARBORS

Secondary liability has been adopted from common law principles. Over the course of the twentieth century, the judiciary has refined the elements of the different theories of liability applicable against a party who has not directly infringed, but has created a product\(^\text{18}\) that is capable of infringement and either contributed to user's direct infringement, or turned a blind eye to infringement while profiting there from. The former is commonly known as "contributory infringement" while the latter is called "vicarious liability."\(^\text{19}\) Most recently, the Supreme Court, in Metro-


\(^{17}\) See Lauren Brittain Patten, From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course, 10 VAND. J. ENT. & TECH. L. 179, 187 (2007) (suggesting that the Sony safe harbor holds that "if there are "substantial noninfringing uses" for an article - actual or potential - then a court should not impute knowledge for the purpose of evaluating contributory infringement."); see also 17 U.S.C. § 512(c)(1) (2009) (explaining that a service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider).

\(^{18}\) See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (holding that secondary liability is not limited to those that create dual use products, liability can also be found from the hosting of a directly infringing activity); see also Inwood Laboratories, Inc., v. Ives Laboratories, Inc., 456 U.S. 844, 854-55 (1982) (noting that a manufacturer or distributor may be contributory liable for infringement as a result of continuing to supply a product to one whom it knows or has reason to know is engaging in trademark infringement).

\(^{19}\) See R. Carter Kirkwood, When Should Computer Owners Be Liable for Copyright Infringement by Users?, 64 U. CHI. L. REV. 709, 718-22 (1997) (describing vicarious and contributory infringement by computer users); see also Angela R. Dean, Expanding the Doctrines of Vicarious and Contributory Copyright Infringement: Fonovisa, Inc. v. Cherry Auction, Inc. Targets the Primary Distribution
Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. (Grokster III), recognized a new theory of secondary liability, adding to the weapons in plaintiffs’ arsenal against copyright infringers. Incidentally and unfortunately, that case confused technological innovators who are now unsure whether their new products and inventions will ultimately subject them to secondary liability once the products are placed in the hands of individual users on the market. To ease this uncertainty, the judiciary and legislative branches have endeavored to protect certain classes of non-culpable, technological innovators by providing safe harbors in case law and by passing the aforementioned DMCA.

A. Traditional Theories of Secondary Liability

Contributory liability for infringement is perhaps the most flexible of the theories for secondary infringement. Courts have often struggled to define the standards necessary for a finding of liability under this theory. An early and oft-cited attempt was seen in Gershwin Publishing Corp. v. Columbia Artists Management, Inc. The Gershwin court defined contributory liability as requiring “knowledge of the infringing activity, [and] inducing, caus[ing] or materially contribut[ing] to the infringing conduct of another.” There, a management company organized and promoted concerts for performing artists and printed the names of works to be performed by the artists in concert programs without regard to whether or not the works were copyrighted. The court of appeals followed the
district court’s ruling and found the requisite intent inherent in these printed programs since the management company knew the artists would be performing some copyrighted works without seeking licensing from the copyright holders. In addition to this intent, which satisfies the “knowledge” requirement, some kind of inducement or material contribution to the infringing activity must be present to find contributory liability. This was obvious in Gershwin; the printing and distribution of the programs (where unlicensed songs were listed) as well as the staging of the concerts (where the songs were performed) was at the very heart of the management company’s business and materially contributed to the direct infringement.

In a more recent case, A&M Records, Inc. v. Napster, Inc. (Napster I), a district court in the ninth circuit found that the peer-to-peer file sharing innovator Napster, Inc. had both actual and constructive knowledge that its service was used to infringe copyright by its users. There was direct evidence that the founders of Napster knew that users were sharing copyrighted music via the service. The court noted that even without this actual knowledge of infringement, the constructive knowledge of infringement is enough to satisfy the intent requirement. Additionally, the plaintiffs also had to show that Napster somehow materially contributed to or induced the users’ infringement. The court found that by providing

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28 See id. at 1163 (citing Gershwin Pub’g Corp. v. Columbia Artists Mgmt, Inc., 312 F. Supp. 581, 583 (S.D.N.Y. 1970)) (noting that CAMI’s pervasive participation in the formation and direction of this association and its programming of compositions presented amply support the district court’s finding that it “caused this copyright infringement”).

29 See ChillingEffects.com, What is Contributory Infringement?, http://www.chillingeffects.org/dmca5l2/question.cgi?QuestionlD=268 (last visited Apr. 22, 2010) (noting that contributory infringement can be found by providing an online forum where users can either download or upload infringing content if the provider knows of such activity); see also Perfect 10, Inc. v. Visa Int’l Ass’n, 494 F.3d 788, 795 (9th Cir. 2007) (quoting Gershwin, 443 F.2d at 1161) (noting that “a defendant is a contributory infringer if it (1) has knowledge of a third party’s infringing activity, and (2) ‘induces, causes, or materially contributes to the infringing conduct’”).

30 See Gershwin, 443 F.2d at 1161 (holding that printing programs where copyrighted works were listed and providing all the necessary for the actual infringing performances materially contributes to the infringement of copyright).

31 114 F. Supp. 2d. 896 (N.D. Cal. 2000) (discussing the plaintiff’s burden of proof in asserting a copyright infringement claim).

32 See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 n.5 (9th Cir. 2001). “[C]o-founder Sean Parker mentioned “the need to remain ignorant of users’ real names and IP addresses ‘since they are exchanging pirated music’ “; and (2) the Recording Industry Association of America (“RIAA”) informed Napster of more than 12,000 infringing files, some of which [were] still available.” Id. See also A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d. 896 (N.D. Cal. 2000). “The evidence indicates that Napster executives downloaded infringing material to their own computers using the service and promoted the website with screen shots listing infringing files.” Id. at 919.

33 Id. at 918 (citing Gershwin, 443 F.2d at 1163) (noting that constructive or implied knowledge of infringement is enough to satisfy the knowledge element of contributory infringement).

34 Id. at 919 (noting that plaintiffs met the Fonovisa burden of showing material contribution).
software that allowed users to search for and download copyrighted files from other Napster users, the peer-to-peer software provider acted, in effect, as a conduit for direct copyright infringement.\textsuperscript{35} It was of no importance to the court that Napster was a free service to users.

The theory of vicarious liability is related to, and to a degree, hopelessly intertwined with, the theory of contributory. The second circuit relied on this theory in deciding \textit{Shapiro, Bernstein & Co. v. H.L. Green Co.}\textsuperscript{36} There, the defendant store, Green, was held to be liable for operating a record department that was selling unlicensed, bootleg copies of records made by direct infringers.\textsuperscript{37} The court held that a defendant can be held vicariously liable where he has (1) the right and ability to supervise or control the direct infringer’s activity and (2) financially benefits from this infringing activity.\textsuperscript{38} Although no element of knowledge is required to find vicarious liability, some courts imply that this knowledge is imputed to an infringer that exerts control over and profits from the direct infringement.\textsuperscript{39}

To again use \textit{Napster I}\textsuperscript{40} as a contemporary example, even though Napster did not directly profit by charging users a fee, the court found that they nevertheless had economic incentives in increasing its user-base.\textsuperscript{41} In \textit{A&M Records, Inc. v. Napster, Inc. (Napster II)},\textsuperscript{42} the Ninth Circuit held that “[f]inancial benefit exists where the availability of infringing material ‘acts as a “draw” for customers.’”\textsuperscript{43} As to the element of control, there was

\textsuperscript{35} See id. at 920 (comparing the Napster peer-to-peer service to the defendants in Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) where the defendants provided parking, advertising and facilities to vendors at a swap meet where the defendants knew copyrights were being infringed by the vendors, thereby materially contributing to their infringement).

\textsuperscript{36} 316 F.2d 304, 307 (2d Cir. 1963).

\textsuperscript{37} Id. at 306.

\textsuperscript{38} See id. at 307; see also Deutsch v. Arnold, 98 F.2d 686, 688 (2d Cir. 1938) (holding that a landlord is not vicariously liable for the copyright infringement of a tenant on the leased premises where the landlord has surrendered control of the premises and does not supervise the tenant thereon); but see Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929) (finding the proprietor of a performance hall liable for the infringing performance of copyrighted works by an artist where the proprietor profits from increased number of customers on-site even where the proprietor has no knowledge of the artist’s direct infringement).

\textsuperscript{39} See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984) (noting that if vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the potential for infringement); see also Polygram Int’l. Publ’g., Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1324 (D. Mass. 1994) (explaining that actual knowledge is not required for a finding of vicarious liability where the defendant exploits and has an opportunity to supervise the infringing activity).

\textsuperscript{40} 114 F. Supp. 2d at 920.

\textsuperscript{41} See id. at 921 (citing internal Napster documents that stated that revenues would be driven up directly from increases in user base).

\textsuperscript{42} 239 F.3d 1004 (9th Cir. 2001).

\textsuperscript{43} Id. at 1023 (quoting Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263-64 (9th Cir. 1996)).
direct evidence, provided by Napster itself, that Napster policed its servers to remove users that were the subject of copyright-holder complaints.\textsuperscript{44} The court saw this as tantamount to an admission that Napster had the right and ability to supervise its service, thus satisfying the other element of vicarious liability.

In a case that many hoped would bring clarity to the secondary liability debacle, \textit{Grokster III}\textsuperscript{45} introduced a new theory of secondary infringement. There, the creators of "peer-to-peer" software were sued by various copyright holders under various theories of secondary liability.\textsuperscript{46} In a unanimous decision, the Supreme Court found merit in the "inducement" claim brought by plaintiffs and did not reach the broader issue of whether defendants were liable under traditional theories of secondary liability.\textsuperscript{47} Because of clear evidence in the record that the defendants were soliciting the former users of a peer-to-peer service previously shut-down by the courts, and because of the high volume of infringing activity taking place via the defendant's networks, the Court found that defendants actively induced users to infringe upon copyrighted works via their dual-use products.\textsuperscript{48} The Court recognizes that the inducement theory of liability is limited to a particular set of facts where there is clear evidence demonstrating an active and affirmative intent that users of the dual-use product infringe upon copyrighted works.\textsuperscript{49} Being so limited, concurring opinions by Justices Ginsburg and Breyer attempted to flesh out the scope of the \textit{Sony} defense to contributory infringement absent the active

\textsuperscript{44} See \textit{Napster I}, 114 F. Supp. 2d at 920-21 (comparing Fonovisa, Inc., 76 F.3d at 262 where the defendants were able to bar particular vendors from the swap meet to Napster that was able to remove particular users known to be infringing upon copyrights).

\textsuperscript{45} 545 U.S. 913, 936-37 (2005) (adopting the inducement rule found in patent law for use in third party copyright infringement analysis).

\textsuperscript{46} Id. at 920-21 (summarizing Plaintiffs' claims).

\textsuperscript{47} Id. at 931 n.9 (explaining that because the court resolved the case based on an inducement theory, there is no need to analyze separately MGM's vicarious liability).

\textsuperscript{48} Id. at 939-40. The Court found that the intent to induce infringement was easily satisfied for three reasons: 1) each defendant was targeting former Napster users in their advertising; 2) neither company attempted to provide any affirmative filtering tools to prevent or diminish users from directly infringing; 3) the advertising revenues were dependent upon a high-volume of use, much of which was infringing use. \textit{Id.} The Court notes that although this third reason is evidence of intent to induce infringement, taken alone it would not be sufficient to provide for this intent. \textit{Id.}

\textsuperscript{49} See \textit{id.} at 936-37. It is important to note that many courts apply the inducement theory as an element of the theory of contributory infringement. Courts commonly look first to see if an allegedly contributory infringing party has either materially contributed to infringement or induced infringement before moving on to whether they had knowledge or intent of such infringement. Inducement thus satisfies the first prong of the contributory infringement test. See \textit{Perfect 10, Inc. v. Visa Int'l. Serv. Ass'n}, 494 F.3d 788, 795 (9th Cir. 2007). The court held that defendant neither induced nor materially contributed to infringement by providing a payment system to several websites that were directly infringing on plaintiff's copyrights. \textit{Id.}
inducement.\(^5\)0 The concurrences strongly indicate that the battle over contributory and vicarious liability has yet to be fully waged.\(^5\)1

**B. The Sony Safe Harbor Defense to Contributory and Vicarious Liability**

In *Sony*,\(^5\)2 the Supreme Court introduced a safe-harbor provision protecting certain dual-use technologies, reigning in secondary liability, and preventing the stifling of technological innovation. Plaintiffs sued a VTR manufacturer under a theory of contributory infringement based on the distribution of devices that allowed users to copy copyrighted television programs.\(^5\)3 The Supreme Court considered the taping of these programs a mere "time-shifting" of the works, and accordingly found this to be a fair use based upon evidence in the record that many of the copyright owners did not object to the "time-shifting" of their programming.\(^5\)4 The Court fleshed out a "staple article of commerce"\(^5\)5 safe-harbor provision, co-opted from patent law's statutory code\(^5\)6 that shields producers of dual-use devices from liability when their product is "merely . . . capable of substantial non-infringing uses."\(^5\)7 Accordingly, since time-shifting was a substantial non-infringing use, the safe harbor defense applied and Sony was absolved of liability for the manufacture and distribution of its VTRs.

The *Sony* defense is only available against contributory infringement claims when the manufacturer of the dual-use product has mere knowledge of the infringement without more, and, conversely, does not preclude

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\(^5\)0 See *Grokster III*, 545 U.S. at 942, 949 (Ginsburg, J. and Breyer, J., concurring).

\(^5\)1 See id. The concurring opinions will be discussed in section B.


\(^5\)3 *Id.* at 420 (noting that respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights).

\(^5\)4 *Id.* at 456 (explaining that respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works).

\(^5\)5 *Id.* at 426 (highlighting that selling a staple article of commerce -- e.g., a typewriter, a recorder, a camera, a photocopying machine -- technically contributes to any infringing use subsequently made thereof, but that this kind of contribution, if deemed sufficient as a basis for liability, would expand the theory beyond precedent and arguably beyond judicial management).

\(^5\)6 See 35 U.S.C. § 271(c) (2007). Section 271 covers infringement of patents and provides in relevant part: (c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer. *Id.*

\(^5\)7 See *Sony*, 464 U.S. at 442 (discussing how the sale of copying equipment does not constitute infringement if the product is widely used for legitimate non-objectionable purposes).
liability based on the intentional inducement of users to infringe copyright.\textsuperscript{58} The Court made this clear in \textit{Grokster III} by recognizing and finding liability under MGM’s inducement claim in the face of the potential for substantial non-infringing uses.\textsuperscript{59} Perhaps looking into a crystal ball that foretold a cloudy and uncertain future, the concurring opinions attempted to flesh out a more precise scope and definition of the Sony defense. This led to a sharp divide of opinion among the members of the Court, spear-headed by Ginsburg’s and Breyer’s differing opinions on the meaning and import of the Sony ruling.\textsuperscript{60}

The key ruling in the Sony case is that the distribution of copying devices will not result in liability for secondary infringement if the product is “merely. . . capable of substantial non-infringing uses.”\textsuperscript{61} Justice Ginsburg argued for a flexible interpretation of this language, claiming that the interests of copyright holders in exploiting their creative works should be balanced against “the rights of others freely to engage in substantially unrelated areas of commerce.”\textsuperscript{62} This contention stems from the likelihood that almost all dual use devices can be perceived as potentially capable of substantial non-infringing uses although, in all likelihood, many will never realize any of this potential and will continue to be used almost solely for copyright infringement \textit{ad infinitum}.\textsuperscript{63} Ginsburg cited \textit{In re Aimster}

\textsuperscript{58} See \textit{Grokster III}, 545 U.S. at 937 (noting the inapplicability of the substantial non-infringing use safe harbor when users are intentionally induced to use a service to infringe copyright).

\textsuperscript{59} See \textit{Id.} (explaining that the inducement rule premises liability on purposeful, culpable expression and conduct and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise).

\textsuperscript{60} See \textit{Grokster III}, 545 U.S. at 945-55 (Ginsberg, J. and Breyer, J., concurring). In Justice Ginsburg’s concurring opinion, she expresses how this case “differs markedly from Sony,” based on the insufficient evidence of non-infringing uses. \textit{Id.} at 945. Justice Ginsburg found that there was evidence that Respondent’s products were being used to infringe and that the infringement was an overwhelming source of revenue from the products. \textit{Id.} at 948. She felt that the Sony standard should not be applied here in light of this evidence and the lack of evidence to “demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially noninfringing uses were likely to develop over time.” \textit{Id.} Justice Breyer, concurring, found it not to be necessary to revisit the Court’s decision in Sony, since the Respondents in this case were actively seeking to advance the infringement. \textit{Id.} at 951. Justice Breyer’s concurrence would find the Respondents protected under the Sony standard since their products were “capable” of noninfringing uses, were it not for their active inducement of their customers to use the products illegally. \textit{Id.} at 953.

\textsuperscript{61} \textit{Sony}, 464 U.S. at 442.

\textsuperscript{62} \textit{Grokster III}, 545 U.S. at 943 (Ginsberg, J., concurring).

\textsuperscript{63} See Katie Dean, \textit{File Sharing Has Supreme Moment}, \text{WIRE.COM}, Mar. 29, 2005, http://www.wired.com/entertainment/music/news/2005/03/67060 (highlighting that more than 90 percent of the content on services such as Grokster and Napster was infringing, despite the multitude of potentially non-infringing uses); see also Pamela Samuelson, \textit{The Gravity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens}, 74 FORHAM L. REV. 1831, 1840 (2006) (discussing that although the Sony Betamax machines had non-infringing capabilities, majority of the owners utilized the machines for infringing purposes).
Copyright Litigation, to argue in favor of a balancing of infringing and non-infringing uses, whether actual or prospective, when evaluating dual use technology, and to show that courts have not strictly adhered to the language of Sony that requires a mere possibility, no matter how remote, of a substantial non-infringing use.

Justice Breyer, on the other hand, favored a strict interpretation of Sony’s language, and claimed that the opinion offers a clear rule for determining whether or not purveyors of dual use technologies are shielded from secondary liability. Breyer specifically focused on the word “capable” and pointed toward the possibility of as-of-yet undiscovered markets for non-infringing uses. Breyer clarified his understanding of the term “capable” by noting that it “refers to a plausible, not simply a theoretical, likelihood that such uses will come to pass, and that fact anchors Sony in practical reality.” Additionally, Breyer found that Grokster satisfied its burden of proof with respect to showing current, substantial, non-infringing uses in the trial record. He detailed several non-infringing uses for Grokster, including, research information, public domain films, historical recordings, digital photos, and freeware. According to Breyer, these uses, although they comprised only an estimated 10% of Grokster’s total file-base, qualified as “substantial non-infringing use” under Sony when combined with the potential for future non-infringing uses.

These disparate opinions on an issue not even necessary to the disposition of the underlying case, herald a coming storm. The scope of the Sony defense is still very much uncertain and, should the Viacom v. YouTube dispute reach the land’s highest court, the tension over the scope of the safe harbor may at last be delineated, much to the relief of skittish future innovators.

64 334 F.3d 643 (7th Cir. 2003).
65 See id. at 649-50. “[W]hen a supplier is offering a product or service that has non-infringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement . . . But the balancing of costs and benefits is necessary only in a case in which substantial non-infringing uses, present or prospective, are demonstrated.” Id.
66 See Grokster III, 545 U.S. at 955 (Breyer, J., concurring) (noting that the booming home-video market was an unforeseen non-infringing use of the VCR that arose after the Court’s holding in Sony).
67 Id. at 958.
68 Id. at 965-66. While Breyer found that Grokster satisfied its burden of proof by showing a plethora of non-infringing uses, he declined the opportunity to modify Sony (or interpret Sony’s standard more strictly) and joined in the majority opinion finding inducement of infringement. Id. It is possible that absent the inducement, Justice Breyer would have found that the Sony safe harbor would have shielded Grokster against contributory and vicarious liability claims.
69 Id. at 954.
70 Id. at 955 (arguing that the foreseeable development of such non-infringing uses, when taken together with an estimated 10% non-infringing material, is sufficient to meet Sony’s standard).
71 It is equally likely that the case will be decided squarely within the framework of the Digital
C. Interpretations of the Breadth and Applicability of DMCA section 512 by the Courts

The second major safe harbor available to alleged secondary infringers can be found in the DMCA.\(^72\) In fact, in YouTube’s Answer to Viacom’s Complaint, the first defense claimed is that Viacom’s claims are barred by the safe harbors provided in DMCA section 512.\(^73\) Congress passed the DMCA in 1998 to square United States law with the World Intellectual Property Organization’s (hereinafter WIPO) standing treaties,\(^74\) and to “facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age.”\(^75\)

In an action for copyright infringement, secondary liability is determined without reference to the defenses available under the DMCA; the safe harbors under section 512 serve only to limit monetary liability and injunction where applicable.\(^76\) To obtain the protections of the safe harbors at sections 512 (a) – (d),

Millennium Copyright Act, and that the Court will not reach the Sony safe harbor in deciding the case. See 17 U.S.C. § 512 (2000). The DMCA exempts on-line service providers that meet the criteria set forth in the safe harbor provisions from claims of copyright infringement made against them resulting from the conduct of their customers. \(^72\) See id. (providing exceptions and limitations on liability to shelter service providers from the infringing activities of their customers).

\(^72\) See id. (providing exceptions and limitations on liability to shelter service providers from the infringing activities of their customers).


The ‘Digital Millennium Copyright Act of 1998’ is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age. Title I will implement the new World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, thereby bringing U.S. copyright law squarely into the digital age and setting a marker for other nations who must also implement these treaties. Title II will provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online. Title III will provide a clarifying exemption in the Copyright Act to ensure that the lawful owner or lessee of a computer machine may authorize an independent service technician to activate the computer in order to service its hardware components. Finally, Title IV will begin to update our nation’s copyright laws with respect to library, archive, and educational uses of copyrighted works in the digital age.


\(^75\) S. REP. NO. 105-190, at 1–2.

\(^76\) Commonly, applicability of the DMCA § 512 safe harbors are evaluated before moving on to the issue of liability for secondary infringement. This makes sense from the standpoint of judicial efficiency, as defendants in secondary infringement actions will suffer no repercussions due to secondary infringement if shielded by § 512’s safe harbors. Conversely, inapplicability of DMCA safe harbors does not preclude other defenses. See, e.g., CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 552 (4th Cir. 2004). CoStar references the DMCA in holding that a failure of a service provider to avail itself of certain DMCA defenses does not preclude any other defenses available under current law. \(^75\) See also Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1109 (9th Cir. 2007). The court in Perfect 10 adopts the 4th circuit’s language regarding the availability of other defenses. \(^75\)
a service provider must first meet the threshold conditions set out in § 512(i), including the requirement that the service provider: [H]as adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.77

The Ninth Circuit of the Court of Appeals has held that implementation of such a policy requires the institution to have a functioning notification system with a procedure for dealing with DMCA complaint notifications. In addition, service providers cannot “actively prevent copyright owners from collecting information needed to issue such notifications.”78 Service providers must allow subscribers to learn of repeat copyright infringers. In In re Aimster Copyright Litigation,79 the district court found that Aimster did not implement a repeat infringement policy because the ISP’s encryption prevented the identification of any particular user’s infringement.80 Therefore, the court held that Aimster was ineligible for the DMCA’s safe harbor protections.

The court in Perfect 10, Inc.81 also laid out a test for the “reasonableness” of the implementation of a repeat infringer termination policy. Repeat infringers must be terminated when “appropriate.”82 This term is admittedly vague, but has been interpreted to mean that either: (1) the service provider has gained actual knowledge of a user’s repeat infringement, usually through notification provided by a copyright holder whose work is being infringed upon;83 or (2) the service provider has a “red

77 Perfect 10, 488 F.3d at 1109.
78 See id.; see also Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004). The Ellison court held that reasonable implementation requires an ISP to “(1) adopt a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances; (2) implement that policy in a reasonable manner; and (3) inform its subscribers of the policy.” Id. at 1080. The court found that because defendants changed their notification email address without notifying the copyright office, the district court erred in concluding as a matter of law that a policy was reasonably implemented such that the safe harbors under section 512 (a) – (d) of the DMCA applied. Id.
79 252 F. Supp. 2d 634 (N.D. Ill. 2002).
80 See id. at 659 (explaining that a policy of removing repeat infringers is not “implemented” when the ISP cannot identify repeat infringers due to the nature of their software encryption).
81 488 F.3d 1102, 1109 (9th Cir. 2007).
82 See Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1104 (W.D. Wash., 2004) (holding that Amazon reasonably implemented a repeat infringer policy although some repeat infringers, who were terminated, were able to create new accounts with slightly different user names and noting that policies need not be perfect, but need only be reasonably implemented; therefore, Amazon was not required to “conduct active investigation of possible infringement or make a decision regarding difficult infringement issues”).
83 See Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1111-12 (9th Cir. 2007) (noting that a service provider may have actual knowledge of repeat copyright infringement when a copyright holder
flag" that infringement is taking place. The case law has consistently held that service providers are not required to affirmatively police their sites to unearth this sort of infringement. This is illustrated by the language of section 512(c), which applies after threshold requirements have been met:

[a] service provider shall not be liable for monetary relief" if it does not know of infringement. A service provider is also not liable under § 512(c) if it acts "expeditiously to remove, or disable access to, the material" when it (1) has actual knowledge, (2) is aware of facts or circumstances from which infringing activity is apparent, or (3) has received notification of claimed infringement meeting the requirements of §512(c)(3). Were we to require service providers to terminate users under circumstances other than those specified in § 512(c), § 512(c)’s grant of immunity would be meaningless.

This indicates that the onus is first placed on the provider of the notice (usually the copyright holder) to demonstrate both that there is infringing activity and, if applicable, that the infringer is a repeat-offender. If the complainant complies with proper notice procedures, the service provider must respond by expunging the infringing material and, if repeat infringement has been shown, by terminating that user’s access to the service or website.

This rubric was applied in Corbis Corp. v. Amazon.com, Inc. There, the court held that Amazon’s repeat infringer policy was reasonable even though Amazon had not been able to prevent repeat infringers whose accounts were terminated from re-opening new accounts under pseudonyms. This is a clear indication that the threshold implementation requirement under DMCA section 512(i) does not require active policing for infringing material in order to gain entitlement to the section 512 safe

informs the provider of the alleged infringement and explaining that owners take affirmative steps by notifying service providers to remove the material from a particular venue.

84 See Perfect 10, 488 F.3d at 1111 (citing 17 U.S.C. § 512(c) (1998)) (suggesting that a red flag is generally notifications by which it should become apparent that copyright infringement is taking place).
85 Id. at 1109 (suggesting that a service provider need not police its users, but must implement a system to handle complaints of possible copyright infringements); see also Corbis, 351 F. Supp. 2d at 1104 (holding that Amazon need not conduct active investigation of possible infringement).
86 Perfect 10, 448 F.3d at 1111 (citing 17 U.S.C. § 512(c)).
87 Corbis, 351 F. Supp. 2d at 1103 (holding that Amazon’s infringement policy was reasonable because Amazon notified the listing vendor via email regarding a copyright infringement, canceled the listing and warned vendors that repeat violations may result in account termination).
88 Id. (stating that “Amazon’s infringement policy has not been able to prevent certain vendors from reappearing on the zShops platform under pseudonyms . . . [although this type of behavior is understandably vexing for a copyright holder like Corbis, it is not clear how Posternow’s efforts to sidestep Amazon’s policies amount to a failure of implementation].")
harbors in (a) – (d) provided that the service providers do not have knowledge of infringing content, or if they do have such knowledge, that they expeditiously remove the infringing content, and prevent known repeat offenders from re-registering once blocked.89

As a final hurdle, DMCA section 512(i) requires service providers to communicate their reasonably implemented, repeat-infringer termination policy to users or account holders.90 Courts have been very liberal in construing this provision, holding that it requires nothing more than a warning to users in their terms of use statements of their repeat-infringer policy.91 Users must agree to these terms before availing themselves of the online service.

Once the threshold requirements of section 512(i) have been met, a party seeking to escape liability must also conform to the tenants of sections 512 (a) – (d). These sections contain the actual safe-harbors.92 This note will confine its discussion of the safe harbors to section 512(c), as this is the shield applicable to “service providers.” For purposes of section 512(c), section 512(k)(1)(B) defines a “service provider” as “a provider of online services or network access, or the operator of facilities therefore.”93 Courts have construed this liberally as including websites that provide user-generated content such as Amazon.com’s zShops, as well as traditional internet service providers (ISPs) such as AOL.94 YouTube falls squarely into this expansive definition.

Moving on to the language of section 512 (c), the service provider must meet three conditions. The first, subsection (A), involves the service

89 See Id. (finding that although Amazon terminated Postermow’s accounts upon receiving notification of their infringement, Amazon was not liable for not discovering Postermow’s new accounts which were created by skirting Amazon’s detection techniques).

90 See 17 U.S.C. § 512(i) (1998) (stating that the service provider shall not be held liable if the provider “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers”).

91 See Corbis, 351 F. Supp. 2d at 1101-02 (holding that Amazon had communicated its repeat infringer policy to users through their participation agreement and community rules and that Amazon complied with DMCA section 512(i) because it placed users on notice “that they face exclusion from the service if they repeatedly violate copyright laws.”); see also In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 658 (N.D. Ill. 2002) (holding that Aimster sufficiently communicated its repeat infringer policy when it placed a copyright notice on the its site, warning users that repeat infringement could result in account termination).


93 Id. at § 512(k)(1)(B).

94 See, e.g., Corbis, 351 F. Supp. 2d at 1100 (holding that Amazon is a “service provider,” under the “provider of online services” definition provided in the DMCA § 512(k)(1)(B)); see also Hendrickson v. Amazon.com, 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) (noting that Amazon falls within the DMCA’s definition of an “internet service provider”).
provider's knowledge of infringing activity taking place on their servers, and has three disjunctive subcategories: (i) the service provider must have no actual knowledge of infringement; or (ii) be unaware of "facts or circumstances from which infringing activity is apparent;" or (iii) if it is aware of the infringing activity, it must "act expeditiously to remove or disable access to the material."95 The second condition, subsection (B), concerns profit and control. It requires that the service provider: (1) receive "no financial benefit directly attributable to the infringing activity, in a case in which [(2)] the service provider has the right and ability to control such activity."96 The third and final requirement, subsection (C), requires the disabling of access to or expeditious removal of infringing content when proper notification is received, putting the service provider on notice.97 This provision overlaps with § 512(c)(1)(A)(iii) and serves as a stop-gap to ensure that service providers expeditiously remove infringing content soon after the infringing activity has become apparent where they initially had no knowledge or notification of the infringing material.

So far, in all but one of the published cases dealing with the knowledge component of subsection (A), copyright holders have provided the service providers with written notification of copyright infringement.98 For obvious reasons, this is and will continue to be the dominant means by which copyright holders seek to prove a service provider's knowledge of infringement.99 If compliant with the DMCA's notification provisions in

96 Id. at § 512 (c)(1)(B).
97 Id. at § 512 (c)(1)(C).
98 See Corbis, 351 F. Supp. 2d at 1107 (citing Ellison v. Robertson, 357 F.3d 1072, 1075 (9th Cir. 2004)); ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 620-21 (4th Cir. 2001); Hendrickson v. Amazon.com, Inc., 298 F.Supp.2d 914, 915 (C.D. Cal. 2003); Hendrickson v. eBay, Inc., 165 F.Supp.2d 1082, 1084-85 (C.D. Cal. 2001); but see CoStar Group, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 703 (D. Md. 2001)). Corbis Corp. is the exception. The court there noted that by failing to provide DMCA-compliant notification, Corbis "stripped it[self] of the most powerful evidence of a service provider's knowledge - actual notice of infringement from the copyright holder." Corbis Corp., 351 F. Supp. 2d at 1107. In some of these other cases the notification was ruled as non-compliant with the DMCA. This refutes the satisfaction of the knowledge requirement and usually results in summary judgment favoring the service provider on the issue of secondary infringement liability. DMCA compliant notification is discussed in notes 99 and 100 below.

99 A copyright holder will first seek to have a website remove their proprietary content by such a cease-and-desist notice before deciding to resort to potentially costly legal remedies. See supra cases note 98. If this notification complies with the DMCA by reasonably identifying the character and location (by pinpointing URLs) of the infringing material, the copyright holder may then sue for damages if they so wish. To file a complaint without putting a defendant on notice of the copyright infringement occurring on their service would likely result in across-the-board dismissal, unless it can be proved that the infringing activity is so egregious and apparent that a "red flag" is raised. Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1113-14 (9th Cir. 2007); see generally supra text accompanying note 84.
section 512(c)(3), a written notice would satisfy section 512 (c)(1)(A)(i) and would shift the burden to the service provider to show that it acted expeditiously to remove or disable access to the infringing material pursuant to subsection (iii). The determination of expeditious removal is a factual question and there is very little precedent on this issue. Most likely, expeditious removal would be determined using a “reasonable person” standard.

If the copyright holder’s notification is insufficient, it may seek to prove, under section 512 (c)(1)(A)(ii), that the provider knew of “facts or circumstances from which infringing activity is apparent.” The legislative history illustrates that this is not “what a reasonable person would have deduced given all the circumstances, [but] whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.” This is a burdensome standard to meet for copyright holders. They typically must show that the service provider advertises their service as a “pirate” or “bootleg” site. In other words, in order to impute knowledge, the infringement must be readily apparent to a casual observer.

After satisfying the knowledge requirement of section 512(c)(1)(A), the service provider next must show that it has no ability to control the infringing content or, in the alternative, that it does not directly benefit financially from the infringement. Instructively, one court has noted that “the right and ability to control infringing activity, as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its...

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100 A compliant notification must “provide the service provider with adequate information to find and examine the allegedly infringing material expeditiously.” H.R. REP. No. 105-551, pt. 2, at 48 (1998) (citing 17 U.S.C. § 512(c)(3)).

101 See Corbis, 351 F. Supp. 2d at 1108. The court noted that Amazon would be required to expeditiously remove the allegedly infringing material after being put on notice. Id. Although the court refers to DMCA § 512(c)(1)(C) in this instance, the language is identical to § 512(c)(1)(A)(iii) and so presumably the only difference is whether knowledge was actual, constructive, or via notification. See 17 U.S.C. § 512(c)(1)(A)-(C).

102 See Jefferson v. Kernan, No. 05-0977, 2009 U.S. Dist. Lexis 37525, at *24 (E.D. Cal. 2009) (defining a reasonable person as “an abstract individual of ordinary mental and physical capacity who is as prudent and careful as any situation would require him to be”); see also BLACK’S LAW DICTIONARY 1294 (8th ed. 2004) (defining a “reasonable person” as a “hypothetical person used as a legal standard, especially to determine whether someone acted with negligence”).


104 See Corbis, 351 F. Supp. 2d at 1108.

105 See Id.; see also S. REP. No. 105-190, at 48 (1998) (Conf. Rep.).


According to the district court in *Corbis Corp.*, a right and ability to control infringing activity requires some kind of direct supervision by the service provider of the direct infringers. The court intimates that if the service provider screens or filters the content, or has its hands in the sale of a product, it is exercising an ability to control the content. Even if the provider is deemed to have such a right and ability to control content, it may still be absolved of liability under the DMCA if it does not derive a direct financial benefit.

The terminology "direct financial benefit" has been interpreted quite literally. The legislative history instructs that it would not be a considered a direct financial benefit "where the infringer makes the same kind of payment as non-infringing users of the provider’s service." Cases have distinguished the financial benefit required to remain under the DMCA’s section 512(c) safe harbor from those required to find common law secondary infringement. Notably, the *Costar Group Inc.* court explains:

> Whereas in *Playboy...*, the finding of added value to the defendant was evidence that the defendant induced the infringement, for the purposes of the DMCA, the financial benefit must be "directly attributable to the infringing activity." 17 U.S.C. § 512(c)(1)(B) (1998). CoStar might make an argument that the indirect type of benefit cited in *Hardenburgh* is also present here. However, such a benefit does not fit within the plain language of the statute. Accordingly, § 512(c)(1)(B) does not present a barrier to LoopNet remaining in the safe harbor.

Therefore, added revenue from incidental increased usage due to the presence of infringing material is relevant to determining intent and financial benefit under traditional theories of secondary infringement, but does not remove a service provider from the DMCA’s section 512(c) safe harbors.

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109 See *Corbis*, 351 F. Supp. 2d at 1109 (noting that Amazon does not have the right and ability to control merely due to their ability to disable material posted on its service).

110 See id. at 1110 (laying out a test for the ability to control content under the DMCA).


112 See Costar Group, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 705 (D. Md. 2001) (differentiating the case at bar from *Playboy Enters. v. Russ Hardenburgh*, 982 F. Supp. 503 (N.D. Ohio 1997), which evaluated traditional theories of secondary copyright infringement and was decided before the DMCA was signed into law in 1998).

113 Id. at 705.

114 Common law secondary infringement is determined without respect to the DMCA. See *supra*.
The third and final subsection to be satisfied, DMCA section 512(c)(1)(C), serves to restrict access to, or ensure quick removal of the infringing content soon after a service provider is put on notice by a copyright holder or by the apparent and prevalent nature of the infringing activity.115 As noted above, very little precedent is available as to what constitutes expeditious removal. Most likely the same decision standards will be used in interpreting § 512(c)(1)(C) as section 512(c)(1)(A)(iii), as the language itself is identical, differing only with respect to how the knowledge of the infringement was itself obtained.116

II. EVALUATING YOUTUBE'S LIABILITY UNDER THE DMCA AND THE SECONDARY LIABILITY REGIME

Not surprisingly, YouTube denies all allegations of wrong-doing in its answer to Viacom’s complaint.117 While YouTube may in fact be liable for some form of the secondary infringement theories alleged by Viacom118 as described in subsection I(A) of this note,119 it is likely that the trial court will adhere to the commonly employed practice of first evaluating YouTube’s potential absolution under DMCA section 512(c) before moving on to decide the secondary liability issues.120 This method makes sense in terms of judicial efficiency, as the DMCA safe harbors, where applicable, preclude pecuniary and injunctive relief against a defendant.

note 56 and accompanying text. In Costar, the court explained that determining financial benefit under common law infringement and under the DMCA require different tests and standards. 164 F. Supp. 2d at 705.

115 17 U.S.C. § 512(c)(1)(C) (2006) (requiring a service provider, upon notification, to expeditiously remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity); see Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1149-50 (N.D. Cal. 2008) (finding service provider Veoh Networks, Inc.'s general practice of responding to notices of copyright infringement within one day or a few days to comply with DMCA's requirement that infringing material be expeditiously removed or access disabled); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1106-07 (W.D. Wash. 2004) (holding that if Amazon was put on notice of infringing content by plaintiff, Amazon would be required to show that the infringing material itself or users' access to it was quickly removed).

116 See supra notes 101-02 and accompanying text.


119 See supra notes 25-51 and accompanying text (outlining the currently recognized forms of secondary copyright infringement).

120 See, e.g., Corbis, 351 F. Supp. 2d at 1098 (evaluating Amazon's DMCA protection when granting summary judgment without regard to Amazon's liability under common law theories of secondary infringement); Io Group, Inc., 586 F. Supp. 2d at 1141 (determining service provider Veoh Networks, Inc.'s qualification for safe harbor under the DMCA prior to discussing copyright infringement liability because of the limited injunctive relief available to copyright owners under the DMCA).
who has complied with its provisions. Therefore, this section will briefly examine Viacom's complaint and discuss the potential for finding liability under the common law, followed by the potential absolution offered by the Sony defense. Since a finding of liability under these traditional regimes is superfluous if YouTube is protected by the DMCA, this brief discussion will be followed by the more determinative analysis of whether YouTube is likely to qualify for the section 512(c) safe harbors; more specifically, whether YouTube's activities are of the sort that Congress intended to be protected when they enacted the DMCA.

A. YouTube's Potential Liability Under Common Law Theories of Secondary Infringement

Viacom, et al. began their complaint by noting that digital technology has brought great opportunity to entrepreneurs seeking to legitimately exploit their intellectual property via the internet and other digital mediums. They contend, however, that with this blessing comes a curse. With the same ease by which copyright owners can transmit their works with relative simplicity to a virtually unlimited number of wide-spread consumers, so too can infringers use the same digital processes to copy and display these works for their own illegitimate, personal benefit.

The argument advanced by Viacom as to YouTube's fault and liability under the traditional forms of secondary liability is a compelling one. For example, as discussed above in section I(A), the traditional elements of contributory infringement involve: (1) knowledge that infringement is occurring via your device, service or establishment, and (2) a material contribution, or inducement, to commit such infringement. Here, the knowledge requirement is easily satisfied. Even if YouTube is able to convince a court that they were nominally unaware of the hundreds of

121 17 U.S.C. § 512(c)(1).
122 Viacom International, Inc. is joined in its complaint by co-plaintiffs Comedy Partners, Country Music Television, INC., Paramount Pictures Corporation, and Black Entertainment Television, LLC.
124 See id. at ¶ 2. "YouTube has harnessed technology to willfully infringe copyrights on a huge scale, depriving writers, composers and performers of the rewards they are owed for effort and innovation, reducing the incentives of America's creative industries, and profiting from the illegal conduct of others as well."
125 See Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (explaining that one may be liable as a contributory infringer if they cause, induce, or materially contribute to the infringing conduct of another, with knowledge of such activity); A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000) (defining a contributory infringer as someone who "'induces, causes or materially contributes to the infringing conduct of another'").
thousands of infringing files that exist on their servers, they were put on actual notice of such infringing content by the cease-and-desist letters they received on a daily basis, pursuant to which they removed infringing content in a manner they contend conforms to the DMCA. Additionally, for the "material contribution" element, it can be argued that by allowing users to upload, embed, and share videos with no supervision as to their content at the point of uploading, and having no way of effectively identifying infringing files, YouTube materially contributes to the infringement of copyrighted videos. In fact, plaintiffs contend that by allowing users to make videos viewable only by designated "friends" and by limiting search results to 1,000 results, YouTube is actively preventing copyright owners from finding infringing videos. If accepted by the district court, this bolsters a "material contribution" or an "inducement" argument considerably.

Additionally, Viacom's complaint alleges that YouTube is intentionally withholding filtering technologies that would enable them to identify copyrighted material before it is uploaded. This is another strong indication of material contribution or inducement. YouTube claims that filtering technologies are not yet reliable, but are in development and will be instituted as soon as is feasible.

See generally Air Force DMCA-Bombs YouTube, http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=17583 (last visited Apr. 22, 2010). This is an actual take-down notice sent by the Air Force to YouTube, effectively putting YouTube on notice of infringing content that has been uploaded onto their servers. Id. As will be discussed below in the note, YouTube needs to have responded expeditiously to remove this content in order to have retained protection from pecuniary liability and injunction under § 512(c) of the DMCA.

See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (holding that because it would have been difficult for the infringement to take place without the "support services provided by the swap meet" the infringing activity would not have been able "to take place in the massive quantities alleged"); see also Cortney M. Arnold, Viacom v. Google: Whose Tube is it Anyway?, DUKE LAW & TECH. REV. IBLAWG, Mar. 31, 2007, http://www.law.duke.edu/journals/dltr/iblawg/index.php?action=showitem&id=3 (noting that YouTube, beyond its Terms of Use, takes very few steps to actively prevent the uploading of copyrighted material even though it is undoubtedly aware of infringement and profits handsomely from it).


Note that if the source videos that have been uploaded onto the YouTube site are eliminated, the videos embedded or shared elsewhere on the web are also terminated. See YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines (last visited Apr. 22, 2010). If a video is removed from the site (the source) the same embedded video will be disabled on all other sites as the source video has been taken down. Id.


YouTube admits that it does have a certain tools available only to its partners, including audio fingerprinting technology that record labels have access to. But filtering is complicated business;
has reported to Louis L. Stanton, a federal judge in the Southern District of New York, that FBI-quality fingerprinting technology will be in place by September 2008.132 Whether the development of such technology negates an inference of “material contribution” or “inducement,” or whether it is seen as a knee-jerk reaction to a one billion dollar lawsuit is a question to be determined by a fact-finder at trial.133

Turning towards vicarious liability, Viacom must prove that YouTube: (1) had a right and ability to control infringing activity; and (2) that they profited from such infringing activity.134 As Napster 1135 instructs, the profit need not be directly attributable to the infringement, but as long as the infringement attracts more customers, who, in turn, act as a draw to

YouTube can’t simply fingerprint every song in existence and then filter that music from the site, for instance, because “we will necessarily block videos containing music content licensed to us by our music label partners as well as videos containing ‘fair uses’ of that music.” The same thing is true for video. Even if YouTube can develop a reliable way to detect copyrighted material, it has no way of knowing whether that material was uploaded with the owner’s permission. Many copyright holders upload clips and even longer works in the hope of building buzz, and fair use is again a concern. By contrast, filtering out pornography, which YouTube already does, is easy to do, as “anyone can spot it just by looking at it.”

Id. 132 See Cade Metz, YouTube Video-Fingerprinting Due in September, THE REGISTER, http://www.theregister.co.uk/2007/07/30/youtube_video_fingerprinting_due_in_fall/ (explaining the problems with YouTube’s current systems in place for policing infringement); see also Licino, infra note 141 (discussing the new fingerprint recognition algorithm system to be in by September 2008).

133 See MGM Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007). In that case, the court noted that injunction may be granted as to infringing uses of a dual-use product while still allowing the continuance of noninfringing uses to the extent made possible by filtering technology. Id.

The court states,

A permanent injunction will issue requiring StreamCast to reduce Morpheus’s infringing capabilities, while preserving its core noninfringing functionality, as effectively as possible. StreamCast’s duties will include, but not necessarily be limited to: (1) a filter as part of future Morpheus software distributed to the public; and (2) steps to encourage end-user upgrades from non-filtered legacy software. Such duties represent the proper balance between competing interests. Plaintiffs’ copyrights can be protected to the extent feasible, but Morpheus’s noninfringing uses will not be completely enjoined.

Id. at 1236. See also Transocean Offshore Deepwater Drilling Inc. v. GlobalSantafe Corp., 2006 WL 3813778, at *10 (S.D. Tex. 2006). The court would not grant a permanent injunction to stop all business because non-infringing uses would be affected as well. Id. Rather the court held “that the permanent injunction should require [defendant] to implement the structural modifications described . . . that would prevent future infringement with minimal disruption to [defendant’s] ability to fulfill its ongoing contracts . . .” Id.

134 See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (holding that the “innocent” infringer must suffer where they had an opportunity to put a stop to the infringement, but failed to exercise this opportunity and instead profited from the infringement); see also Gordon v. Nextel Commc’ns and Mullen Advertising, Inc. 345 F.3d 922, 925 (6th Cir. 2003) (stating the elements of vicarious liability in copyright infringement cases are broader than traditional employee-employer relationship).

135 239 F.3d 1004 (9th Cir. 2001).
advertisers, the profit prong of the Shapiro test is satisfied.\textsuperscript{136} It seems evident that the infringing content on YouTube’s servers attracts some users. Viacom points this out in its complaint by noting that infringing copies of its programming have been “viewed an astounding 1.5 billion times.”\textsuperscript{137} As YouTube tracks the hits that any one video gets, this number is most likely grounded in fact, and as the adage goes, 1.5 billion people don’t lie. In count IV of the complaint, Viacom ties this increase in user base to profitability by noting that “[d]efendants derive substantial advertising revenue tied directly to the volume of traffic they are able to attract to the YouTube site [via infringing videos].”\textsuperscript{138}

Turning to the control prong of the Shapiro test, the cornerstone of Viacom’s argument is that YouTube exercises its right to control content towards its partners who have granted YouTube licenses, but refuses to do the same to hold-outs like Viacom.\textsuperscript{139} Viacom asserts that this is tantamount to coercion and that it presents a catch-22; content owners must choose to grant licenses to YouTube below the fair market value or have their copyright continually infringed upon.\textsuperscript{140} As noted above, YouTube contends that the filtering technology is not yet up to par but plans to launch effective fingerprinting software, known as “Claim Your Content,” by September, 2008.\textsuperscript{141} Philip S. Beck, attorney for YouTube, says “the new technology [will] allow copyright holders to provide a unique ‘digital fingerprint’ on their product which [will] shut down playback ability

\textsuperscript{136} See supra text accompanying note 41 (noting that financial benefit exists where the availability of material acts as a draw for customers); see also Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996) (describing some types of substantial financial benefits one can reap where infringing performances enhance the attractiveness of the venue to potential customers).


\textsuperscript{138} Id. at ¶ 85.

\textsuperscript{139} See id. at ¶ 64 (claiming that YouTube engaged in practices to enforce content restrictions and protect the copyrighted works of its business partners, but withholds these same protections for the copyrights of persons, including Plaintiffs, who have not granted licenses to YouTube).

\textsuperscript{140} See id. at ¶ 7 (arguing that YouTube had deliberately withheld the application of available copyright protection measures in order to coerce rights holders to grant it licenses on favorable terms); see also Anne Broache and Greg Sandoval, Viacom sues Google over YouTube clips, CNET News, March 13, 2007, http://news.cnet.com/2100-1030_3-6166668.html (discussing Viacom’s accusations of selective filtering).

within “a minute or so” if the video[s] [are] illegitimately shared.”142 Thus, the issue of control and, in turn, vicarious liability probably turns on whether the finder of fact believes that YouTube has been attempting to implement this type of monitoring software sua sponte to comply with copyright law, or whether its implementation is a reactionary measure in response to potential injunction and/or monetary liability.143

B. The Sony Defense: Available, but Outmoded?

It is clear that YouTube.com offers a substantial amount of non-infringing activity on its website. Examples are legion; thousands of people upload their opinions, video-blogs, home-videos, user-generated music videos and video-art, to list a few examples.144 According to these uses and absent any active inducement per Grokster III, the Sony defense seemingly absolves YouTube of liability, since it applies to dual use devices that are capable of “substantial non-infringing [use].”145 However, to hang one’s hat on Sony as a viable defense is to misunderstand the convoluted and uncertain nature of the law of secondary liability. The concurring opinions in Grokster III suggest that the applicability of the Sony safe harbor in the digital age is anything but a foregone conclusion.146

Courts have been moving away from the safe harbor. A&M Records, Inc. v. Napster, Inc. again proves instructive.147 That court refused to apply Sony’s “staple article of commerce” doctrine due to Napster’s “ongoing control over its service,” noting that in Sony, “the defendant’s participation did not extend past the manufacturing and selling the VTRs”.148 The court contrasted this with the Napster service that “maintains and supervises an

142 Licino, supra note 141.
143 See SEC v. Murphy, 626 F.2d 633, 656 (9th Cir. 1980) (stating that if future assurances of compliance alone could prevent compliance then all injunctions may be defeated); see also MGM Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1221 (C.D. Cal. 2007) (discussing the likelihood of continued infringement in the absence of an injunction due to StreamCast’s illegal objective).
145 See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that an injunction may be defeated by significant non-infringing uses which would be prevented by the injunction).
146 MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 962 (2005) (Ginsburg, J., concurring). It is important to remember that Sony was decided in an era that did not comprehend the ease and ubiquity of making near-perfect digital reproductions of copyrighted works on a massive scale as is done today.
147 114 F. Supp. 2d. 896 (N.D. Cal. 2000).
148 Id. at 916.
integrated system that users must access to upload or download files."\textsuperscript{149} The court elaborated: "[c]ourts have distinguished the protection \textit{Sony} offers to the manufacture and sale of a device from scenarios in which the defendant continues to exercise control over the device's use."\textsuperscript{150} It is abundantly clear that YouTube migrates more towards the Napster end of the spectrum than the VTR end; it continues to provide its web-service and video players to account holders and viewers alike.

Due to the uncertainty of the \textit{Sony} staple article defense, it is no wonder that litigators are turning towards the statutory defense penned by the legislature that was drafted with digital and internet technologies specifically in mind, the Digital Millennium Copyright Act of 1998.\textsuperscript{151} YouTube does in fact claim protection under both safe harbors, but most commentators agree that the YouTube/Viacom fight will be largely over the scope of the DMCA's protection.\textsuperscript{152}

\textbf{C. Applicability of the DMCA safe harbors to YouTube}

As noted in section I(C) of this note, eligibility under DMCA section 512(c) protection requires conformity to the threshold requirements found in section 512(i). This section requires a reasonably implemented policy that allows for the termination of repeat infringers.\textsuperscript{153} The service provider must communicate this policy to subscribers or account holders, and also

\textsuperscript{149} \textit{Id.} at 917.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} See 17 U.S.C. § 512(c) (outlining that a service provider shall not be liable for monetary relief for infringement of copyright by reason of storage); see also \textit{Answer, Viacom Int'l Inc. v. Youtube, Inc., 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (No. 1:07-cv-02103), 2007 WL 1724620 (arguing that Plaintiffs' claims are barred in whole or in part because Defendants are protected by one or more of the DMCA Safe Harbors).}

\textsuperscript{152} See \textit{Eric Goldman, MGM Studios, Inc. v. Grokster: An Analysis for Litigators and Business, CIPERATTI, Sept. 2005, http://www.abanet.org/buslaw/committees/CL320010pub/newsletter/0008/}.\textit{ The Court's characterization of \textit{Sony} as a "safe harbor" underscores that it affords a defense which - in addition to the safe harbor liability limitations of the Digital Millennium Copyright Act codified at 17 U.S.C. § 512 - potentially insulates legitimate technology developers and service providers from contributory or vicarious liability for third-party acts of infringe-ment. The uncertain contours of the \textit{Sony} safe harbor, however, could make it more difficult for defendants to avail themselves of this defense prior to development of a complete evidentiary record at trial. \textit{Id. See also \textit{Russ Versteeg, Viacom v. YouTube: Preliminary Observations, 9 N.C.L. & TECH. 43, 66.} "Given the complex nature of the factual and legal issues presented by Viacom's complaint, it seems most likely that the outcome of the case will center on the court's interpretation of the DCMA as to whether a website such as YouTube comes within the safe harbors designed for ISPs." \textit{Id.}}

\textsuperscript{153} See 17 U.S.C. § 512(i) (2009). "The limitations on liability established by this section shall apply to a service provider only if the service provider had adopted and reasonably implemented . . . a policy that provides for the termination . . . of . . . repeat infringers . . . ." \textit{Id.}
must accommodate and not interfere with copyright holders’ attempts to identify or protect their material.\textsuperscript{154}

YouTube’s Terms of Use provide that “YouTube will terminate a User’s access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.”\textsuperscript{155} Users must agree to the terms of use before becoming an account holder on the website.\textsuperscript{156} Only account holders may upload videos; therefore, only account holders are able to directly infringe via YouTube’s website.\textsuperscript{157} All account holders of YouTube are, therefore, put on notice of the repeat infringer account-termination policy. There is also evidence suggesting that YouTube actually terminates account-holders identified as repeat infringers.\textsuperscript{158}

Based on the rulings in \textit{Ellison}\textsuperscript{159} and \textit{Corbis Corp.},\textsuperscript{160} it appears that YouTube has reasonably implemented its policy. YouTube provides a clear channel through which copyright holders can contact the company to complain of user-uploaded infringing content. In fact, in its terms of use, YouTube delineates exactly how to provide DMCA-compliant notice and also provides the name, mailing address, email address, and fax number of the copyright agent designated to receive complaints.\textsuperscript{161}

\textsuperscript{154} See \textit{id.} “The limitations on liability established by this section shall apply to a service provider only if the service provider accommodates and does not interfere with standard technical measures.” \textit{Id.}

\textsuperscript{155} YouTube.com, Terms of Use, http://www.youtube.com/t/terms (last visited Mar. 18, 2008).


\textsuperscript{157} This syllogism excludes allegations of direct infringement against YouTube itself for public display and reproduction of these videos. Viacom’s direct infringement claims are not discussed in this note.


\textsuperscript{159} 357 F.3d 1072, 1080 (9th Cir. 2004) (holding that AOL’s failure to close its old email account or forward emails from the old account to the new account allowed for potential copyright infringement notices to go unnoticed, thus, the district court erred in concluding as a matter of law that AOL had reasonably implemented a policy against repeat infringers).

\textsuperscript{160} 351 F. Supp. 2d 1090, 1103-04 (W.D. Wash. 2004) (noting that Amazon reasonably implemented a repeat infringer policy despite the reappearance of certain vendors under different user names, that reasonability, not perfection, is the measure of a sufficient policy, and that Amazon did not have to actively investigate alleged infringements).

\textsuperscript{161} YouTube.com, Terms of Service, http://www.youtube.com/t/terms (last visited Apr. 22, 2010) (providing Copyright Agent contact information and stating that DMCA notification requires providing
Viacom's principal contention regarding section 512(i)'s threshold requirement is that YouTube interferes with efforts by copyright owners to identify their works on YouTube's servers. As noted in section II (A), plaintiffs allege that YouTube interferes with their ability to find their copyrighted works by allowing account holders to designate that only "friends" may view their videos and by limiting search results to 1,000 returns. This argument has some teeth to it, as the alleged interference prevents Viacom and other copyright holders from effectively searching for their content. However, it seems to be at odds with the DMCA's requirement that service providers not "interfere with standard technical measures" used by copyright holders to identify their proprietary works. The same argument applies to YouTube's decision to return only 1,000 results per search. It is difficult to predict the weight that a court will give these contentions. On one hand, from a common sense standpoint, it is clear that YouTube did not institute either of these policies in order to thwart attempts by copyright holders to find their protected works. Undoubtedly the "friends" feature was developed to enhance user enjoyment of the service. For instance, many users may hesitate to post a compromising, embarrassing, or private home-video only to have it subjected to the vitriolic and insensitive commentary of YouTube users at-large, preferring instead to share it with a small group of online friends. The limit on search returns may have an even more pragmatic origin: server efficiency.

It is likely that a court will look to YouTube's intent behind instituting the Copyright Agent with the following information in writing: a physical or electronic signature of a person authorized to act on behalf of an allegedly infringed right, identification of the infringed copyrighted work, identification of the infringing material or activity, reasonably sufficient contact information, a good faith statement expressing the belief that the use of the material is not authorized by the owner, its agent, or the law, and a statement that information provided is accurate and under penalty of perjury.

162 YouTube.com, YouTube Help, http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=157177 (last visited Apr. 22, 2010) (stating that videos set to private can only be viewed by the account holder and invited friends, and will not show up in search results).


164 See Foenix's Channel, YouTube.com, http://www.youtube.com/user/foenix (last visited Apr. 22, 2010) (decrying insensitive comments made about the user's videos and requesting that subscribers to user's channel refrain from posting such comments); see also Akeerah27's video, Youtube.com, Army, Chris Daughtry (Home), http://www.youtube.com/watch?v=vwsILkAsgE (last visited Apr. 22, 2010) (requesting that viewer's not post rude comments to user's tribute video to the user's brother).

165 See Posting of Eloy Lafuente to Tracker, http://tracker.moodle.org/si/jira.issueviews:issue-html/MDLSITE-570/MDLSITE-570.html (Sept. 9, 2007, 16:23:07 WST) (suggesting that limiting search results to 1,000 would free up, and speed up, the server during queries and forum searches at moodle.org).
the “friends” and “limited search” policies. The effects on copyright holders’ ability to search for their proprietary works seem incidental and fairly insignificant compared to the utilitarian value of such service features, at least without further data showing a large impact on identification of infringement. On these facts, it appears that YouTube satisfies the threshold requirements of 17 U.S.C. § 512(i).

Moving on to the actual safe harbors under section 512(c)(1), Viacom contends that YouTube has knowledge of infringing content on its servers through DMCA compliant notification as well as through the overwhelming volume and prevalence of infringing videos, which it claims raises “red-flags” to even a “casual observer.” Since YouTube openly admits to receiving take-down notices, they are almost certain to be deemed to have actual knowledge of infringement per section 512(c)(1)(A)(i). This should be enough to shift the burden to YouTube to prove that they have responded “expeditiously” to remove infringing content. However, it would be useful for Viacom to prove that “red flags” have constructively alerted YouTube to infringement, because, if proven, it places the onus on YouTube to remove such content without requiring a DMCA take-down notice from the copyright holder. This is one of the end-goals of production companies in this type of suit, but current precedent makes this a burdensome task.

169 Production companies and other copyright holders feel that they should not be required to constantly devote resources to finding infringing content and issuing take-down notices, especially when any individual YouTube user can simply re-upload the video at issue, alter a single frame of an infringing video to get around YouTube’s primordial filtering technology, or create new accounts with slightly altered names. The pending litigation seeks to place more of a burden on the service provider to ensure that their service is not a conduit for infringement. Complaint at ¶ 36, Viacom Int’l Inc. v. Youtube, Inc., 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (No. 1:07cv-02103), 2007 WL 775611. The complaint alleges that “copyright holders are required to police YouTube on an hourly basis to ensure that they have issued take-down notices for all of their proprietary content.” Id. See Robert Tur v. Youtube, Inc., 2007 U.S. Dist. LEXIS 50254, at *9-10 (C.D. Cal. 2007). The court noted that the “right and ability to control” infringing activity has been held to mean “something more” than just the ability of a service provider to remove or block access to materials posted on its website in the context of DMCA. Id.
170 Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1114 (9th Cir. 2007) (noting that it needs to “be apparent that the website instructed or enabled users to infringe another’s copyright,” and finding
Most recently, the Court of Appeals for the 9th Circuit ruled, in *Perfect 10, Inc. v. CCBill LLC*, that a service provider did not have to police its websites for infringing pictures absent DMCA compliant notification under section 512(c)(3) based on its provision of service to websites called “illegal.net” and “stolencelebritypics.com.” Most precedent corroborates the view that service providers are not required to affirmatively police their servers for infringing content. An interesting facet of this case is that it is alleged that YouTube does police its servers to remove violent and pornographic material. YouTube has not admitted to any such affirmative policing in a press release, but it does invite users to flag content that they feel is inappropriate. Nevertheless, if the court finds that YouTube does take it upon itself to police its servers for such content, as Viacom alleges, the court may infer that they have raised their own red flags and could potentially impose an affirmative duty to take down infringing content without having received section 512(c)(3) notices. This would be a startling interpretation of the DMCA from the viewpoint of service providers and may be better dealt with by an amendment to the statute.

YouTube argues that they respond expeditiously to remove infringing content once they receive DMCA-compliant take-down notices. There is no precedent for what it means to respond “expeditiously,” but it is clear that YouTube does indeed respond by removing such videos and that the burden of determining whether passwords on a website “enabled” infringement could be not on the service provider).

171 *Id.*

172 *Id.* at 1109 (holding that these domain names were intended to entice users based on their “salacious” appeal, and that CCBill was not required to police its servers to discover the presence of infringing content); see also *Arista Records, Inc. v. Mp3Board, Inc.*, 2002 WL 1997918 (S.D.N.Y. 2002) (finding a letter sent by record companies' trade organization to Internet service provider insufficient to put Internet site operator on notice of any alleged copyright infringement under the Digital Millenium Copyright Act, because letter solely listed recording artists’ names).

173 See supra note 85 and accompanying text.


175 See YouTube.com, YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited Mar. 31, 2008) (explaining that the users can flag content that they feel is inappropriate and once it is flagged, YouTube reviews the content and removes it from the system within minutes if it violates their Terms of Use).

terminating accounts. Unless Viacom can show an undue delay in such removal, YouTube should carry this issue at trial.

Viacom’s next argument is that YouTube is not eligible for section 512(c) protection because they control and directly profit from the infringing content on their servers. Turning first to the issue of control, Viacom uses a myriad of facts to show that YouTube exerts control over infringing content on its servers. They point out that YouTube actually performs the videos via its website and through its embeddable players. Also, as noted when discussing the so-called “red flag” constructive notification, it is alleged that YouTube seeks to proactively control pornographic and violent content by searching out and removing such content. This is a formidable argument for control. Plaintiffs essentially argue that if YouTube polices its servers for these types of content, it should do so for obviously infringing content as well. Plaintiffs extend this argument to say that YouTube does not remove infringing content because such content is the cornerstone of its business. Viacom contends that the infringing content acts as a huge draw for users, which, in turn acts as a huge draw for advertisers.

As to the required “direct financial benefit,” Viacom will have difficulty convincing a court that advertising revenue generated as a result of direct infringement by account holders constitutes such a direct benefit. The House Report issued with the DMCA instructs that “where the infringer makes the same kind of payment as non-infringing users of the provider’s

179 See id. at ¶4 (claiming that it is YouTube that knowingly reproduces and publicly performs the copyrighted works uploaded to its site).
180 See id. at ¶ 38 (explaining that YouTube proactively reviews and removes pornographic videos from its library, but refuses to do the same thing for videos that obviously infringe Plaintiffs’ copyrights).
181 See id. (noting that YouTube proactively reviews and removes pornographic videos from its library, but refuses to do the same thing for videos that obviously infringe Plaintiffs’ copyrights).
182 See id. at ¶ 5 (arguing that YouTube deliberately built up a library of infringing works to draw traffic to the YouTube site, enabling it to gain a commanding market share, earn significant revenues, and increase its enterprise value).
service” there will be no direct financial benefit.\textsuperscript{183} No YouTube account holders pay any fee, so it is difficult to see a financial benefit that is directly attributable to the infringing activity in this case. Viacom will need to urge the court to broaden its conception of this language, urging an interpretation more akin to common law vicarious liability, where infringement need only act as a draw for users to satisfy its “profit” prong.\textsuperscript{184} Viacom is likely to emphasize the vast amount of website traffic that is due to the viewing of infringing content, and the corresponding advertising premiums generated by such high-volume traffic, in order to sway a court that YouTube profits directly from infringement.\textsuperscript{185}

YouTube denies both that they have an ability to control infringement and also that they derive any direct financial benefit from such infringement.\textsuperscript{186} Likely, YouTube will characterize its removal of pornographic and violent content as an action taken solely in response to user-generated complaints as opposed to an affirmative policing of its servers.\textsuperscript{187} Additionally, YouTube will argue that its performance of user-uploaded, infringing content is an automated service, and is provided to any video uploaded by users, without respect to its proprietary character. Therefore, defendants will argue that they do not “have the right and ability to control” the infringing activity.\textsuperscript{188} There is support for this proposition in case law. In Corbis Corp. v. Amazon.com, Inc., Amazon was held not to

\textsuperscript{184} See supra text accompanying note 43.
\textsuperscript{185} See Posting of Fred Wilson to AVC, http://avc.blogs.com/a_vc/2006/09/youtubes_potent.html (Sept. 7, 2006) (opining that YouTube could generate as much as $440 million dollars from advertising revenue annually); see also Jessica E. Vascellaro & Emily Steel, Google Deal Blows by Departure – With Armstrong Gone, Search Giant Loses Executive With Big Connections, WALL ST. J., Mar. 16, 2001, at B7 (noting that YouTube has a projected net revenue of $500 million dollars from advertising in 2009).
\textsuperscript{187} See YouTube Pulls Some Pornography, Bans Children 'Under 13,' THINK & ASK, http://www.thinkandask.com/news/030206-utube2.html. “We sent six IDs (of which were in violation of YouTube policy) to Julie Supan, and the technical support staff at YouTube. After four attempts to get YouTube to ban (at least) one ID in particular (THORO) after he posted explicitly sexual videos, YouTube removed the first video on 26 February.” \textit{Id.} This is indicative of YouTube responding to users flagging content rather than YouTube proactively and affirmatively policing its servers to remove content based on its own investigative efforts. \textit{But see} Virginia Heffernan, Image in a Haystack, N.Y. TIMES, June 7, 2009, at M14. “Scott Rubin, a YouTube spokesman, explained to me that the site does supplement its community-flagging system with proprietary screening technology. This technology somehow vets videos that have been flagged and helps the human reviewers prioritize which ones to watch.” \textit{Id.} While YouTube supposedly does add to its flagging system, it is unclear just how intensive their program is.
\textsuperscript{188} 17 U.S.C. § 512(c)(1)(B).
have the right and ability to control infringing activity occurring on its servers where they simply “provided [a] forum for an independent third party seller to list and sell [their] merchandise.”189 Such passive and automated “assistance” to infringement may not be regarded by the judiciary as an ability to control the infringement. There is a fine line, however, between passivity and “willful blindness.”190 This is another point at which YouTube’s efforts to institute effective fingerprinting technology may be brought under close scrutiny to determine whether they are actively seeking to curtail the infringing content appearing on their servers or whether the identification technology is a liability-absolving façade.

Regarding the direct profit sub-prong, YouTube will rely on the House Report issued alongside the DMCA191 as well as persuasive authority from the 4th Circuit.192 From a plain language standpoint, YouTube will point out that since advertisers themselves are not infringing, there is no way that they are profiting directly from infringement. It is conceivable that a court will make an exception in this case and broaden the acceptable definition of “direct financial benefit,”193 but following the black letter law and current authority will result in YouTube carrying this issue as well.

Finally, YouTube responds expeditiously to the take-down notices it receives per § 512(c)(1)(C).194 Viacom does not contest this point.195

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189 351 F. Supp. 2d 1090 at 1109 (W.D. Wash. 2004); Costar Group Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688 at 704 n.9 (D. Md. 2001). “A finding that the ‘right and ability ‘right and ability to control’ standard could be met merely by the ability to remove or block access to materials would render the DMCA internally inconsistent. The result would be that the very policy mandated by the DMCA in § 512(c)(1)(C) to remain in the safe harbor, terminating infringers and blocking access, would force service providers to lose their immunity by violating § 512(c)(1)(B).” Id.

190 See BLACK’s LAW DICTIONARY 768 (2nd Pocket ed. 2002) (defining “willful blindness” as “[d]eliberate avoidance of knowledge of a crime, esp. by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable”).


192 See Costar, 164 F. Supp. 2d at 704-05 (D. Md. 2001) (relying on the House Report’s interpretation of “direct financial benefit”); see also ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 622 n.1 (4th Cir. 2001) (clarifying that the plaintiff’s claims were more properly classified as contributory infringement, rather than direct infringement claims).


Instead, Viacom decries the unfairness of the burdensome task of continually searching YouTube for infringing videos and having to issue take-down notices, only to have the very same videos uploaded minutes later by other users.196

III. SHOCKWAVES IN THE ENTERTAINMENT AND TECHNOLOGY INDUSTRIES

When drafting the DMCA, the legislature was clearly not considering a service provider with such a high volume of user-uploaded content as YouTube.197 YouTube presents a unique case because of the site’s substantial non-infringing uses coupled with the rampant disregard of copyright laws by many users. By enacting the DMCA, the legislature intended to shield service providers from liability where they were not profiting from infringing material and were not aware that such material had been uploaded onto their servers.198 Although YouTube has arguably complied with this legislation, to allow service providers to escape liability simply by responding to take-down notices, while turning a blind eye to a huge amount of infringing content, is to put a far too onerous burden on owners of intellectual property. Copyright holders, many of whom have limited financial resources, would be forced to spend countless hours and dollars patrolling the Internet in order to issue take-down notices and gain the full proprietary value of their works.199 Fortunately for copyright holders, however, there are potential solutions to this dilemma other than the ultimate decision in this lawsuit. The final section of this note suggests

196 See id. at ¶ 6 (asserting the unfairness of burdening copyright owners with monitoring YouTube on a daily or hourly basis in order to detect infringements and issue take-down notices, only to have the same infringements remain on the site because other users upload the same videos).
197 See generally S. REP. NO. 105-190, at ¶ I-II (1998) (outlining the purpose of enacting WIPO treaties); see also Samantha Schmidt, What Does YouTube Know?, 14 UNIV. OF WASH. CASRIP NEWSL. 1 (2007), available at http://www.law.washington.edu/Casrip/Newsletter/Default.aspx?article=newsv14i3Schmidt (stating that at the time the DMCA was crafted, Congress did not anticipate the proliferation of creative content on “user-generated content” websites).
198 The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary, 11 (Dec. 1998), available at http://www.copyright.gov/legislation/dmca.pdf; Schmidt, supra note 197, at 8 (highlighting that the DMCA requires a service provider to not have the requisite level of knowledge of infringing activity and to not have received a financial benefit from such activity in order for the provider to be eligible for the “safe harbor” limiting its liability).
199 See Miguel Helft & Geraldine Fabrikant, WhoseTube?: Viacom Sues Google Over Video Clips on Its Sharing Web Site, N.Y. TIMES, Mar. 14, 2007, available at http://www.nytimes.com/2007/03/14/technology/14viacom.html (noting Viacom CEO Philippe Dauman’s complaint that having to “scour the entirety of what is available on YouTube” is “very difficult” and “places an enormous burden” on the content owner); see also Schmidt, supra note 197 (noting that content owners of copyrighted works “argue that they should not bear the sole burden for policing websites for copyrighted material”).
a pair of likely candidates for such a solution.

A. YouTube Shoved by the Invisible Hand: The Free Market Solution

Production companies have already began to compete directly with YouTube via their own video-on-demand websites. Such competition benefits these companies in a multitude of ways: (1) they are able to potentially out-compete pirate sites by controlling the quality of their output, (2) they are getting a head-start on the trend towards consolidating the mediums through which different entertainment sources are viewed, and (3) they are able to generate advertising revenue and promote their products more efficiently by responding to consumer demand.

For illustrative purposes, this note will use the example provided by Hulu.com, perhaps the first major example of such a service designed to vie against YouTube for online-video supremacy. “Hulu” was launched on March 12, 2008 and represents a joint venture between NBC Universal and News Corporation. Hulu focuses exclusively on professional content and does not take on YouTube directly as a viral video destination. However, Hulu does provide licensed content from a variety of sources, which might also be available in unlicensed form on YouTube. Hulu has sole control over the access point of its content and can ensure that all uploads are high-definition. This is in direct contrast to YouTube, where users upload content of widely contrasting video quality and content.

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203 Users of YouTube are able to upload any content they have digitized whether or not they are directly infringing by reproducing such content. See David R. Wetzel, YouTube: Why Is it So Popular?, SUITE101, Apr. 20, 2008, http://social-networkingtagging.suite101.com/article.cfm/youtube_why_is_it_so_popular.

204 Again, YouTube does not discriminate based on the quality of user videos and has adopted a hands off approach to user-uploaded content provided that it is not flagged for removal. See YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines (last visited Apr. 22, 2010).
Hulu is ad-supported and requires viewers to watch limited commercials throughout the broadcast. The service also offers full-length movies and episodes and is not constrained by YouTube's ten minute time limit. Undoubtedly, these features will allow Hulu to draw away some viewers that would have otherwise visited YouTube to view the content from an infringing source.

Websites like Hulu.com also continue a trend of consolidating entertainment sources within an on-demand internet based realm. This has been heralded within the music industry by the enormous popularity of mp3 files and iTunes. Companies which are able to harness a financially sustainable strategy for the provision of video and music content via on-demand internet-based services will be the forerunners of the entertainment industry. Web services like Hulu.com represent a step in this forward-looking direction. History has shown, from McDonald’s to Wal-mart, that consumers overwhelmingly choose speed and convenience. There is no reason to expect otherwise from the entertainment industry.

Finally, the benefit to a media company from generating advertising revenue is obvious. As more viewers move away from the television set to watch content online, so too will advertisers begin to divert their funds towards that medium. Websites like Hulu.com that can first establish themselves as the forerunners of such service providers will command the highest advertising premiums.

205 See generally Hulu, http://www.hulu.com (last visited Apr. 22, 2010) (showing that after a user watches a program, Hulu forces that individual to watch limited commercials during the video stream).
206 See Posting to The Write News, http://www.writenews.com/wnews.php?zone=330061 (Mar. 30, 2006) (quoting a YouTube press release: “We did some analysis of the videos in our system over 10 minutes in length, and we found the overwhelming majority of them were full length, copyrighted videos from TV shows and movies.”).
209 A sustainable strategy necessarily includes giving respect to intellectual property rights.
B. Fingerprinting Technology May Allow for the Coexistence of YouTube alongside Noninfringing Sites

YouTube claims that it is developing "FBI-quality" fingerprinting software that will identify and automatically remove infringing videos within one minute of upload.211 Apart from its application to the Viacom v. YouTube lawsuit, such technology, if effective, will allow the noninfringing uses to be exclusive or near-exclusive uses, thus allowing YouTube to coexist with fully licensed sites like Hulu.com. The system requires that data from copyright holders be provided to YouTube so that the ID software can recognize such material as copyrighted and disable it.212 Some content owners are unhappy with this solution because it requires copyright holders to spend their time and resources to provide these digital fingerprints to YouTube.213 They are displeased that the burden of stopping infringement has not shifted from the content owner to the YouTubes of the world.214 They complain that instead of drafting take-down notices, they will now be spending time and resources providing digital fingerprints to every site employing filtering technology for each and every video they create, not to mention their back catalogues.215


214 See Peter Burrows, Nabbing Video Pirates: Who Needs Google?, BUSINESS WEEK, Oct. 16, 2007, http://www.businessweek.com/technology/content/oct2007/tc20071016_876447.htm (noting that some content owners are displeased, claiming that providing digital fingerprints to the user-uploaded video sites "wouldn't be good for the studios because [they']d have to be pumping out fingerprints all over the place"); Bill Rosenblatt, Google Launches Video Fingerprinting for YouTube, DRM WATCH, Oct. 18, 2007, http://www.drmwatch.com/ocr/article.php/3706016 (commenting on whether content owners or YouTube bear responsibility for keeping copyrighted material off YouTube).

The problem with such systems is that content owners need to submit high-quality digital copies (or, in some cases, digital fingerprints) of their works to every video sharing site that operates a similar filtering system. Plenty of third-party companies... are also developing similar systems, but the very proliferation of these filtering tools means more work for the copyright holder. No central database for such works appears to be on the horizon, so content owners will simply have to deal with the hassle for now.216

Other than placing an affirmative duty on YouTube and its ilk to police their own servers for infringing content (a proposition that most case law rejects),217 this fingerprinting system seems to be the most reasonable alternative. There is also talk of plans to direct viewers to content owners’ sites when viewers request a proprietary video.218 This is an attractive option for both service provider and content owner as it could include ad-revenue sharing between referrer (YouTube) and referee (content holder).219

Following the Supreme Court’s remand of Grokster III, the district court for the Central District of California has already discussed the potential for such fingerprinting technologies to prevent the non-infringing uses of dual-use products from ending up on the cutting-room floor due to permanent injunction.220 There, the court, citing the Ninth Circuit in A&M Records, Inc. v. Napster, Inc., elaborated that copyright holders would be required to provide notice of the presence of their copyrighted works to Streamcast (the dual-use service provider) before Streamcast would be required to

216 Anderson, supra note 213 and accompanying text.
217 See supra note 189 and accompanying text.
218 See Anderson, supra note 213. “Owners can use the system to block videos, but they can also choose to let such videos be uploaded for promotional use. Content owners can also choose to split ad revenue with YouTube on video clips of material that they own.” Id. See also ALEX WEPRIN, ONSCREEN MEDIA SUMMIT: YOUTUBE’S HOFNER SAYS MONETIZATION IS COMING, Broadcasting & Cable, Dec. 2, 2008, http://www.broadcastingcable.com/article/print/160175-OnScreen_Media_Summit_YouTube_s_Hoffner_Says_Monetization_is_Coming.php (announcing that YouTube is trying to work with content owners to try to monetize YouTube for both parties).
219 See Anderson, supra note 213 (explaining that YouTube’s new filtering system could provide the content owner and YouTube the opportunity to share in the revenue from the videos); see also TERRENCE RUSSELL, YOUTUBE’S NEW FILTER MAKES PRIVACY PROFITABLE... FOR GOOGLE, Wired, Oct. 16, 2007, http://www.wired.com/epicenter/2007/10/youtube-launch/ (discussing the possibility of revenue sharing between YouTube and the content owner).
220 See MGM Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1236 (C.D. Cal. 2007) (explaining that a solution allowing periodic re-briefings to the court based on technological filtering advances for the Morpheus software would allow plaintiff’s copyrights to be protected while not enjoining Morpheus’ noninfringing uses).
filter out the works from their service.\textsuperscript{221} This rule, if adopted in a majority of jurisdictions, may serve to silence complaints by copyright holders regarding the fingerprinting technology’s requirement that digital fingerprints be provided before the technology can recognize and filter them out.\textsuperscript{222} A mitigating solution to the burden placed on copyright holders to provide digital fingerprints to all filtering service providers could come in the form of a legislatively mandated, centralized database where content owners are required to place fingerprint-copies of the works that they wish to be filtered from dual-use sites. This would shift the burden to YouTube-like sites to visit the database and ensure that the works therein are filtered from their service.\textsuperscript{223} Obviously, this is only one of many potential solutions and only time will tell how the various burdens associated with fingerprinting technology will be shouldered.

\textbf{CONCLUSION}

The digital age has allowed for the near-perfect duplication of copyrighted video and audio files using inexpensive and easy-to-use technologies. Such technology has led to an explosion in copyright infringement and the law has struggled to find a standard of protection that both encourages the development of new technologies capable of non-infringing uses while simultaneously respecting the proprietary nature of copyright.\textsuperscript{224} Foreseeing such problems, Congress enacted the Digital

\textsuperscript{221} \textit{See id.} at 1237 (citing A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004,1027 (9th Cir. 2001)) (noting “[W]e place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content”).

\textsuperscript{222} \textit{See Burrows, supra} notes 215-16 and accompanying text (outlining content owners’ complaints regarding the provision of digital fingerprints); \textit{see also}, Kevin M. Lemley, \textit{Protecting Consumers From Themselves: Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry}, 13 Alb. L.J. Sci. & Tech. 613, 627 (2003) (citing Napster \textit{II}, 239 F.3d at 1096-97) (discussing what copyright holders gain from the rule of providing notice).

\textsuperscript{223} This speculative solution begs a host of questions that will not be dealt with here. To name a few: 1) Who will have access to these databases? 2) How will the fingerprinting technologies interface with them? 3) Who will police the databases so that users are not simply using the digital copies on the database to pirate copyrighted works?

\textsuperscript{224} \textit{See Brad Polizzano, Grokster Not the “Spirit in the Sky” Innovators Long For: Uncertain Protection Forever Young Since the Birth of Peer-to-Peer, 83 St. John’s L. Rev. 635} (2009)(“[D]evelopers [assert] that they should not be liable for an end-user’s behavior because if they were, future innovators would be significantly deterred from creating new and improved technologies due to fear of third-party liability.”); \textit{see also}, Deborah A. Coleman, \textit{Antitrust Issues in the Litigation and Settlement of Infringement Claims}, 37 Akron L. Rev. 263, 266 (2004) (citing Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1349 (3d Cir. 1999)) (discussing the issue of balancing intellectual property rights with fair competition and the antitrust laws).
Millennium Copyright Act in 1998, which, among other things, provides limitations on liability for service providers that unwittingly host infringing content provided that they remove such content upon becoming aware of its presence. The scope of the statute has received little interpretation by courts, and Viacom wishes to test the limit of the available protections in its upcoming suit against defendants YouTube.

Viacom alleges all forms of secondary infringement and seeks clarification of the scope of the DMCA's protection afforded to a website that contains a vast amount of infringing content. Viacom seeks to use this lawsuit to maintain control over its proprietary works and to decry the unfairness of having to continually scour YouTube (and the rest of the web) for its copyrighted content and continually issue take-down notices for such content, only to have it re-uploaded by another direct infringer. YouTube contends that it goes above and beyond what the DMCA requires and that it is also protected by the safe harbor provided by the Supreme Court in Sony.

The lawsuit has the potential to shape the future for media and entertainment providers as well as for YouTube and other similar websites. Depending on the outcome of the lawsuit, content owners will have to choose between using their own licensed, high-quality websites and services to out-compete services that provide infringing copies of their video, or rely on filtering technologies employed by user-uploaded sites to screen out and remove their content. The outcome of the suit may also determine the direction of the flow of advertising revenues, as where the viewers go, the advertisers are sure to follow.

Ultimately, the determination of who will control the dissemination of content (the copyright holders or the YouTube-like service providers) will determine where the world turns to obtain entertainment, music, news and

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226 This note's author also believes that Viacom's lawsuit may be motivated by other factors such as, but not limited to: (1) the recovery of claimed or statutory damages, (2) the potential for settlement, (3) gaining negotiating leverage in order to secure a better price for licensing its content to YouTube, (4) crippling YouTube in order to leave the market open for a Viacom-controlled service.
228 Content owners may also license their content to other such online service providers.
229 Content owners may also arrange revenue-sharing agreements with such user-uploaded websites. See Anderson supra note 218. See also Elliot M. Zimmerman, Entertainment, Arts and Sports Law: P2P File Sharing: Direct and Indirect Copyright Infringement, 78 FLA. BAR. J. 40, 44 (2004) (discussing the lack of clarity of distributing software, and how the outcome of lawsuit will result in a large impact on user-uploaded cites and their listeners).
other information. Indeed this issue goes to the heart of the incentives involved in creating proprietary works. If copyright holders are not able to control and profit from their own creative works, will the quantity and quality of such works begin to decline as a result? The courts and potentially the legislature will have to give pause to these concerns when interpreting the scope of the DMCA’s protections against secondary copyright infringement in an ever-evolving and increasingly digital world.