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YouTube—The Next Generation of Infringing on Creative Works: What Can Be Done to Protect the Screenwriters?

Ashlee M. Knuckey



YouTube—The Next Generation of Infringing on Creative Works: What Can Be Done to Protect the Screenwriters?

By Ashlee M. Knuckey*

Prologue: The Unfortunate Life of a Screenwriter

¶1 The job of a screenwriter is often a lonely, depressing one, until he or she is discovered and breaks into the entertainment industry. The problem is that “breaking in” is a one in a million chance that most screenwriters never receive. Convincing an agent, a production company, or anyone for that matter, to read their beloved screenplay is nearly impossible. People in “the business” call in favors and will do just about anything to try to get their story read, hoping it will someday become “the next big thing.”

¶2 Since the advent of the Internet, some screenwriters have started taking a different approach to getting their creativity noticed. Screenwriters take out loans, borrow from friends, or seek small investors to help them make short, five minute clips of the story they are trying to sell. The screenwriter takes the best five minute sequence of the screenplay, borrows some money, and hires temporary workers to do the acting, make-up, lighting, and stunts for one or two scenes of the movie. Then, the screenwriter uploads this five minute clip to YouTube and starts praying that it will become popular. If it does become popular, then there is a greater chance that a movie executive will hear of it and decide to take a look. In the off chance that Mr. Executive likes it, that lowly little screenwriter might have just gotten the break of a lifetime.

¶3 But wait! Now imagine that Mr. Executive does not decide to track down our friend, the lowly screenwriter, to produce this fabulous movie. Instead, Mr. Executive decides to hire one of his staff writers to transform our screenwriter’s story into something different enough that courts will not find copyright infringement. Our screenwriter friend just missed the payout of his life, and every person he tells that Production Company X stole his story will just laugh. Most likely, they will believe the opposite, that the screenwriter stole the story from the production company.

¶4 The average reader may think this hypothetical situation would never happen or that large, successful companies do not steal from these screenwriters, but that is simply untrue. It is my opinion that this happens not only in the entertainment context, but also in the world of advertising. Imagine young advertising or marketing associates spending considerable time searching YouTube for their next big advertising campaign. Then, when they find something truly creative and novel, they submit it to their bosses as their own. It is again highly likely that if the creator of the video sued the advertising company, his lawsuit would be thrown out on summary judgment almost immediately,

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because without direct proof of access, courts will rarely find works similar enough to present them to a jury.

I. INTRODUCTION

¶5 Copyright protection has a long history, originating at common law with its first formal recognition in 1556 in the charter of the Stationers' Company, and with the first copyright act being passed in the eighth year of Queen Anne.¹ Despite its extended history, copyright law is constantly evolving as it tries to protect the ever changing forms of creative works. For example, the advent of the Internet has had an exorbitant impact on copyright law, leaving creators, infringers, and judges struggling to decide how past decisions and current laws will apply to this technological medium and how legislators will act to make laws more applicable to these changing forms.

¶6 Overall, this Comment will discuss the implications of the current state of copyright law, under various sections of the Copyright Act,² on people who upload their creative works to YouTube, much like our hypothetical struggling screenwriter. Part II will discuss the essential elements of proving a copyright infringement claim. Part III, with its numerous subparts, will discuss questions, implications, and suggestions for YouTube and its users, which are briefly summarized in the remainder of this Introduction.

¶7 Though millions of people upload their original movie clips onto the Internet, few have their original works properly protected. First and foremost, they should register their work with the Copyright Office before uploading it (or otherwise making it public). This would provide them with *prima facie* evidence of a valid copyright in a lawsuit against Mr. Executive's production company.³ If people fail to register their work within three months of uploading it onto the Internet, they will not be eligible to sue for any damages.⁴ Also, even if they register their work within the three-month period, they would not be eligible to recover damages for any infringement taking place prior to the copyright registration.⁵

¶8 Uploading the copyrighted work allows it to be seen by the people who may make the movie professionally; then again, it also allows it to be seen by the people who are looking for an idea to steal. Uploading the work to the Internet could imply "access," which is one vital step in proving copyright infringement. However, courts tend to define access narrowly, for fear of opening the door to millions of fraudulent copyright infringement claims.

¹ See *Holmes v. Hurst*, 174 U.S. 82, 84–85 (1899). In deciding the copyright protection available to the estate of Dr. Oliver Wendell Holmes for his book "The Autocrat of the Breakfast Table," the Supreme Court offered a background of copyright law stemming from England.

² Copyright Act, 17 U.S.C. §§ 101–1332 (2006).

³ See 17 U.S.C. § 410(c) (2006) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.")

⁴ See 17 U.S.C. §§ 411–12 (2006) (requiring registration for a copyright infringement suit and laying out certain timelines that must be followed in order to be eligible for statutory damages or attorney's fees).

⁵ *Id.*

¶9 YouTube, with the help of its parent company Google, could help protect their users who upload videos on their site. First, YouTube could verify registration of all users, so that if someone did infringe on another's original work, YouTube would have the name of the infringer. Secondly, YouTube could maintain archived viewing histories for each video. This would enable the users to subpoena YouTube's history when trying to prove access by the production companies that have stolen their precious works.⁶

¶10 The outcome of *Viacom International, Inc. v. YouTube, Inc.*⁷ could have extreme implications for YouTube. If the courts were to find in favor of Viacom and the other production companies, it would require YouTube to proactively seek out copyrighted videos to keep them off of their website.

¶11 On the other hand, the suggestions proposed here will not be nearly as costly for YouTube, beyond providing the extra space for the archiving histories. Overall, the benefits to their users greatly outweigh the costs for YouTube and Google, which is why they should seriously consider the suggestions posited by this Comment.

II. ESSENTIAL ELEMENTS IN PROVING COPYRIGHT INFRINGEMENT⁸

¶12 Under the 1976 Copyright Act, which remains in effect, copyright protection lasts for the life of the author plus seventy years.⁹ What many people do not know—and what makes protecting writers' works more difficult—is that “[i]n no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept . . . , regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹⁰ Instead, copyright protection is only available for the “expression” of an idea, through such things as literary works, musical works, motion pictures, sound recordings, and the like.¹¹ Therefore, a particular theme, outline, or plot is not copyrightable by a screenwriter, but an author's distinctive treatment of a certain theme or plot is copyrightable.

¶13 In order to prove copyright infringement, the plaintiff must show: (1) ownership of a valid copyright;¹² and (2) unauthorized copying by the defendant.¹³ As analogous to

⁶ There are obvious privacy issues with maintaining complete viewing histories for its users. A complete analysis of the privacy concerns is beyond the scope of this Comment. However, privacy issues would not likely create too much of a concern for this proposal, given the amount of personal information maintained by email providers, search engines, and photo providers to name a few. *See generally* Online Video: Facebook's Privacy Issues Force Policy Change, HULIQ NEWS, Feb. 19, 2009, <http://www.huliq.com/3478/facebooks-privacy-issues>.

⁷ *Viacom Int'l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (Viacom and other production companies sued YouTube for copyright infringement committed by YouTube users against the production companies.).

⁸ Ownership of a valid copyright and the access requirement are the subjects of this Comment. Therefore, each will be discussed in significant detail, *infra*.

⁹ 17 U.S.C. § 302 (2006).

¹⁰ *Id.* § 102(b).

¹¹ *Id.* § 102(a).

¹² *See* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976) (citing *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 419 (S.D.N.Y. 1971)); *see also* 17 U.S.C. §§ 410–12 (laying out the registration requirements of the Copyright Office, which must be met in order to have standing for a copyright infringement claim).

¹³ *See* *Reyher*, 533 F.2d at 90.

the situation discussed in the Prologue, the lowly screenwriter is the plaintiff, who would sue Mr. Executive’s production company—the defendant.

¶14 Direct proof of copying is often impossible for the plaintiff to show; thus, copying must often be inferred from proof that the defendant had access to the plaintiff’s work, as well as that there are “substantial similarities” between the two works.¹⁴ In analyzing the two works, a court will look to whether there are substantial similarities both extrinsically and intrinsically.¹⁵ The extrinsic test is objective and based on a legal judgment, not on the opinion of the trier of fact. The test “compares the individual features of the works; it looks to find specific, articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.”¹⁶ On the other hand, the intrinsic test is subjective, decided by the trier of fact, and depends “on the response of the ordinary reasonable person.”¹⁷ Now that the basics of copyright protection have been explained, this Comment will analyze how that protection can be used to both prevent and prove copyright infringement.

III. QUESTIONS, IMPLICATIONS, & SUGGESTIONS FOR YOUTUBE AND ITS USERS

¶15 This section first examines why YouTube users should register their creative works with the Copyright Office before uploading them to the Internet. Ownership of a valid copyright, established through this registration, is the first requirement for a person to have standing to sue in a copyright infringement lawsuit.¹⁸ Also, damages recoverable from copyright infringement are greatly limited by the guidelines of the Copyright Act, based on the timeframe of when a work is registered.¹⁹ Therefore, it only makes sense for YouTube users to register their works under those guidelines, before uploading them to the Internet.

¶16 Next, this section explores how uploading works to a worldwide domain will affect the access requirement of a copyright infringement action. The rest of this Comment is dedicated to investigating how the courts will likely react to the access requirement as it applies to creative works on the Internet, how YouTube and its parent company Google could help their users to be better protected from potential infringers, and how the current lawsuit that Viacom and several other plaintiffs filed against YouTube relates to the suggestions made by this Comment.

¹⁴ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (Without a defendant admitting that he or she copied a work, copying must be inferred through circumstantial evidence. Proof of access lowers the amount of similarity needed to infer copying, and vice versa, where there is no proof of access, the plaintiff must demonstrate a high amount of similarity.).

¹⁵ *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1166 (9th Cir. 1977).

¹⁶ *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985) (citing *Litchfield v. Spielberg*, 736 F.2d 1352, 1356–57 (9th Cir. 1984)).

¹⁷ See *Krofft*, 562 F.2d at 1164.

¹⁸ See 17 U.S.C. § 410(c) (2006).

¹⁹ *Id.* §§ 411–12.

A. *Why Should YouTube Users Make the Effort to Register Their Works Before Uploading Them to the Internet?*

¶17 As discussed above, the first requirement for any copyright infringement case is that the plaintiff must prove ownership of a valid copyright.²⁰ Essentially, proof of a valid copyright is required for a plaintiff to have standing to sue based on a copyright infringement claim.²¹ This standing requirement comes from sections 411 and 412 of the Copyright Act.²² Section 411 states that “no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.”²³ The courts have interpreted this provision to mean that “[o]ne need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.”²⁴ Therefore, in a case where the copyright has not yet been approved, evidence that a person has already applied for the registration is sufficient to have standing. In any event, a certificate of registration is *prima facie* evidence of a valid copyright according to section 410.²⁵

¶18 What this means for users uploading their videos to YouTube is that they cannot even commence an action against an infringer until they have applied for registration of their work. Also, given the fact that a certificate of registration is *prima facie* evidence of a valid copyright, in a dispute over who first created a particular work, the person holding the certificate would be given the benefit of a rebuttable presumption in their favor. Given the complexity and cost of litigating copyright infringement cases, it only makes sense that a person would take such a simple step to save his or her self in the future.

¶19 More importantly, section 412 severely limits the remedies that a plaintiff can seek in a copyright infringement action.²⁶ Section 412 states:

In any action under this title, . . . no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for—

- 1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
- 2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.²⁷

Therefore, this section bars recovery of damages for infringement of works that are not registered with the Copyright Office within three months of uploading them to the

²⁰ See 17 U.S.C. §§ 410–12; *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976).

²¹ See generally *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984) (to establish proof of a valid copyright, the plaintiff must at least show registration, payment of fees, and deposit of the work with the Copyright Office.).

²² See 17 U.S.C. §§ 411–12 (2006).

²³ *Id.* § 411.

²⁴ *Apple Barrel*, 730 F.2d at 386–87.

²⁵ See 17 U.S.C. § 410(c).

²⁶ *Id.* § 412.

²⁷ *Id.*

Internet.²⁸ Also, even if the work is registered within the three-month time limit, no damages may be recovered for infringement that occurred before the registration.²⁹ The court in *Mason v. Montgomery* determined:

By enacting sec. 412, Congress sought to establish registration as a prerequisite to the extraordinary remedy of statutory damages and provided that this remedy is to be denied where infringement commences before registration. The only exception Congress provided was to allow for a grace period to take care of newsworthy or suddenly popular works which could be infringed before the copyright owner has a reasonable opportunity to register his claim.³⁰

Therefore, it is essential for users (i.e. screenwriters) to copyright their works before uploading them to YouTube. Should users fail to take this essential step to protect their creative works, they could be barred from all (or substantially all) statutory damages from the infringement by Mr. Executive's production company, leaving them with no restitution and little protection.

B. How Does Uploading Creative Works on a Worldwide Domain Affect the Access Requirement?

¶20 This section explores how uploading works to a worldwide domain will affect the access requirement of a copyright infringement action. It examines: (1) the access requirement of a copyright infringement case; (2) how the courts will likely react to the access requirement, as it applies to creative works on the Internet; and (3) how the current lawsuit filed by Viacom and several other production companies against YouTube relates to the suggestions made by this Comment.

1. The Access Requirement of Copyright Infringement

¶21 In most normal copyright infringement cases, the only person possessing any evidence that the defendant viewed the work or copied it *is* the defendant. Obviously, the defendant will not voluntarily provide that evidence to the plaintiff, hence, the need for inferences in many of the elements of infringement claims and the overall difficulty in trying to prove copyright infringement. Though the access and substantial similarity elements are used to infer copying, since direct evidence of copying is nearly impossible to establish, the access element is essentially just as difficult to prove as the direct evidence would be to find.

¶22 In order to prove access, a few circuits require that the plaintiff offer direct evidence that the defendant actually read, saw, or had knowledge of the plaintiff's work.³¹ However, most circuits now only require that there be evidence allowing the

²⁸ See *Disney Enters., Inc. v. Delane*, 446 F. Supp. 2d 402, 407 (D.Md. 2006) (holding that Disney was not entitled to statutory damages for infringement on television show that was not registered within the three-month time limit).

²⁹ See *Mason v. Montgomery Data, Inc.*, 741 F. Supp. 1282, 1286 (S.D. Tex. 1990).

³⁰ *Id.*

³¹ *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1249 (11th Cir. 1999) (referencing the following circuits that require this heightened proof: *Bradbury v. Columbia Broad. Sys., Inc.*, 287 F.2d 478 (9th Cir. 1961); *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270 (S.D. Cal. 1945); *Christie v. Harris*, 47 F. Supp.

reasonable person to infer that the defendant had a “reasonable opportunity” to view or copy the work.³² This “reasonable opportunity” cannot be based on mere speculation or conjecture.³³ Furthermore, establishing nothing more than the “bare possibility” of access will not give rise to an inference of copying.³⁴ In fact, the plaintiff must do more than simply assert access; he or she “must offer ‘significant, affirmative and probative evidence.’”³⁵

¶23 Additionally, it is important to note that the proof required in showing access and substantial similarities is inversely related, meaning that the amount of proof required for either element is lessened or heightened depending on the amount of evidence of the other.³⁶ For example, if no similarities exist between two works, then no amount of access will be sufficient to prove copying.³⁷ However, if the works are so strikingly similar that there is no way that the works were created independently, access may be easily inferred.³⁸ What this means for lowly screenwriters is that the more evidence of access that they can provide to the court, the lower the standard for direct similarities will be. Additionally, since infringers (like Mr. Executive’s production company) commonly make a few changes to an original work, so as to try to avoid being caught for infringement, evidence of actual access will provide users with a much stronger case on the whole, in a circumstance where they often have almost no evidence at all.

2. Applying the Access Requirement to Creative Works Uploaded to the Internet

¶24 After gaining a basic understanding of the access requirement of proving a copyright infringement claim, the question that users, infringers, and courts alike would then want answered is: How does uploading a creative work onto the Internet affect the access requirement of proving copyright infringement?

¶25 One can argue that placing your work on the Internet provides anyone the opportunity to observe the copyrighted work. Any person, anywhere in the world, has the ability to view any video uploaded to YouTube. In fact, if a person was struggling to

39 (S.D.N.Y. 1942), *aff’d*, 154 F.2d 827 (2d Cir. 1946); *Roberts v. Dahl*, 1971 WL 16617 (Ill. Ct. Cl. 1971), *aff’d*, 286 N.E.2d 51 (1972); *Cantor v. Mankiewicz*, 203 N.Y.S.2d 626 (N.Y. Sup. Ct. 1960)).

³² See *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003); *Herzog*, 193 F.3d at 1249; *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 3 (1st Cir. 1996); *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978).

³³ See *Ferguson*, 584 F.2d at 113.

³⁴ See *Jorgensen*, 351 F.3d at 51; see also *Silberstein v. Fox Entm’t Group, Inc.*, 424 F. Supp. 2d 616, 626 (S.D.N.Y. 2004) (a brief discussion at a party with employee who lacked connection to creative process constituted “bare corporate receipt” insufficient to establish access); *Hoch v. MasterCard Int’l*, 284 F. Supp. 2d 1217, 1221–22 (D. Minn. 2003) (receipt of videotapes by people in a corporation with no relationship to anyone involved in creating the infringing advertisement shows only “barest possibility” of access).

³⁵ See *Jorgensen*, 351 F.3d at 51 (citing *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.D.C. 1978), *aff’d*, 607 F.2d 494 (D.C. Cir. 1979)). Neither court, however, gives any guidance as to what would be sufficient to constitute “significant, affirmative and probative evidence.”

³⁶ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); see also *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977) (discussing 2 Nimmer §143.4, at 634).

³⁷ See *Arnstein*, 154 F.2d at 468; see also *Krofft*, 562 F.2d at 1172 (discussing 2 Nimmer §143.4, at 634).

³⁸ See *Arnstein*, 154 F.2d at 468; see also *Krofft*, 562 F.2d at 1172 (discussing 2 Nimmer §143.4, at 634).

think of creative things to add to the screenplay he or she is trying to write, YouTube would be an excellent place to look for ideas. One could simply type in some keywords on the subject of the screenplay that he or she is writing and retrieve hundreds of movies made by YouTube users on that very subject.

¶26 Does this mean that posting clips of a screenplay or show on YouTube will automatically catapult screenwriters past this often insurmountable hurdle of access? This is highly doubtful. In the area of copyright law, courts are extremely cautious about inferring anything. They often fear that if they allow one copyright infringement win by a screenwriter against a production company, then their court will be flooded with fraudulent copyright infringement cases from people just trying to get rich quick.³⁹ This is why there are so many multi-pronged tests applied in proving a copyright infringement claim. It seems that as soon as a person manages to jump through one hoop, the courts lay out two more.

¶27 Since a plaintiff is required to offer “significant, affirmative and probative evidence”⁴⁰ of access, courts will likely find that a video available on YouTube creates only a “bare possibility” of access if the plaintiff does not offer further evidence. The plaintiff would still need some evidence of the “reasonable opportunity” of access, which it seems would again be nearly impossible for the plaintiff to find. The only way a YouTube user could have proof of the “reasonable opportunity” of access by the defendant production company would be if the uploaded video had gained such expansive popularity that a court would be willing to infer access. In a rare instance, access was inferred in this way in *Warner Bros. v. American Broadcasting*.⁴¹ In that case, the court found that the “apparent worldwide popularity of the Superman character” allowed access to be inferred,⁴² though the defendant claimed that he had not viewed the film “Superman, The Movie,” prior to creating the infringing work.⁴³

¶28 So, what does this mean for aspiring screenwriters who upload clips of their work, hoping to gain an audience that will make production companies take notice? Essentially, they can either hope that their uploaded video gains such popularity across the United States that courts will be able to infer access, or there will have to be a better way for them to find evidence of access by other users.

¶29 a) *YouTube should require verified registration for all users.*—Maybe the answer to these questions is that Google, which acquired YouTube in 2006, should make use of some of its information collection and storing technology to help the screenwriters in proving the access requirement of copyright infringement claims.⁴⁴ Instead of allowing

³⁹ It makes sense for courts to fear this outcome, since many of the cases filed against production companies today, alleging copyright infringement, probably are not truly infringement. The problem that has arisen is that now it is nearly impossible for a person whose work truly has been stolen by these companies to even make it past summary judgment in court. This issue, however, is a topic for an entire Comment in and of itself.

⁴⁰ See *Jorgensen*, 351 F.3d at 51.

⁴¹ 654 F.2d 204, 208 (2d Cir. 1981).

⁴² *Id.*

⁴³ *Id.* at n.2. This is the only case that was found where a court had inferred access. This leaves one to believe that only for items of *extreme* popularity will the court infer access.

⁴⁴ Press Release, Google, Inc., *Google to Acquire YouTube for \$1.65 Billion in Stock* (Nov. 20, 2006), available at http://www.google.com/intl/en/press/pressrel/google_youtube.html [hereinafter *Google Press Release*] (Google acquired YouTube in 2006 for \$1.65 billion. Though YouTube operates independently, it uses and benefits from Google technology, as well as the Google affiliation.).

anyone to view the videos contained on YouTube, YouTube should require registration from *all* users, not just users who wish to upload videos. Moreover, simple registration, using just an email address, will not be sufficient to help users whose videos are infringed upon. This is because under YouTube's current registration system, people can make up email addresses and user names without any verification of their identity. One way to ensure proper registration by traceable entities would be to require users to register with a credit card, thereby confirming their identity.

¶30 Obviously, forcing people to register with credit cards opens an entirely new set of issues, such as not allowing users who do not have credit cards to register and limiting the site to people who feel comfortable providing their credit card information online. However, there are fairly simple ways to deal with these issues. One remedy, to ease the minds of people using their credit cards online to verify their identity, would be for YouTube to require verification by users and then completely delete that information from the databases and storage areas.

¶31 There is another option, which would likely be more appealing to YouTube because it could help Google's profitability. Google already has safe credit card storage technology and devices, which it uses for its Google Checkout service.⁴⁵ With each new service that Google makes available to Internet users, Google creates further synergy between its services. Google continually strives to make itself a "one-stop-shop" for all Internet and personal computer searching, emailing, word processing, planning, and now shopping.⁴⁶ Google acquired YouTube in 2006 because of the synergism it offered with its search engine technology. In a press release available on Google's website, the company explained:

The acquisition combines one of the largest and fastest growing online video entertainment communities with Google's expertise in organizing information and creating new models for advertising on the Internet. The combined companies will focus on providing a better, more comprehensive experience for users interested in uploading, watching and sharing videos, and will offer new opportunities for professional content owners to distribute their work to reach a vast new audience.⁴⁷

The fact that Google acquired YouTube with the thought in mind of combining Google's expertise with YouTube illustrates that Google would likely be quite receptive to combining its Google Checkout service applications with YouTube's registration process. Additionally, all of Google's applications and services are currently linked to the same

⁴⁵ Google Checkout, <https://checkout.google.com> (last visited Dec. 30, 2008) ("Stop creating multiple accounts and passwords. With Google Checkout™ you can quickly and easily buy from stores across the web and track all your orders and shipping in one place. Shop with confidence. Our fraud protection policy covers you against unauthorized purchases made through Google Checkout, and we don't share your purchase history or full credit card number with sellers. Control commercial spam. You can keep your email address confidential, and easily turn off unwanted emails from stores where you use Google Checkout.").

⁴⁶ Jordan McCollum, *Google Market Share Up (Again)*, MARKETING PILGRIM, May 9, 2007, <http://www.marketingpilgrim.com/2007/05/google-market-share-up-again.html>. Google's market share as of April 2007 was at 65.26% and is the only search engine that continues to grow, with Yahoo, MSN, and Ask.com all slowly losing market share.

⁴⁷ See *Google Press Release*, *supra* note 44.

username and password. This allows Google's users to sign up for only one of its applications, yet have access to *all* of its applications as they are needed. For example, upon signing up for Google's email application, called Gmail,⁴⁸ Gmail users can access Google's calendar application,⁴⁹ documents application,⁵⁰ photo application,⁵¹ and Google Checkout, without the need to register for another username and password. Also, Google makes its users aware of all of these services, upon signing up for use of their first application.

¶32 Requiring credit card verification for user registration on YouTube, simply to watch and upload videos, may not, at first, seem appealing to either users or YouTube. However, after further thought, all parties involved (aside from the infringer) will realize that the benefits significantly outweigh the costs.

¶33 The benefit to YouTube is that it would offer copyright protection for its users, by ensuring that they could find infringers through the archived histories; however, more importantly, the benefit to Google is that it would promote/force more people to register with its Google Checkout service, which would likely cover any associated costs. Then, as more people register and use Google Checkout, Google will continue gaining market share in the online purchasing market.⁵² People will likely prefer to use the Google Checkout service that they have already signed up for while registering for YouTube, rather than signing up for or continuing to use alternate online purchasing services.⁵³

¶34 YouTube users may be skeptical of registering with credit card information at first; however, the rapid rise in Internet shopping, banking, and gaming is proof that consumers are becoming more and more comfortable with entering their information online and becoming more confident in the abilities of these companies to keep their data secure. If nothing else, the rise in Internet consumption is proof that consumers are not letting their fears of identity theft stop them from transacting online. The same response can be used against critics who claim that parents will not provide credit card information in order to

⁴⁸ Gmail, <http://www.gmail.com> (last visited Dec. 30, 2008) (Google's free email application).

⁴⁹ Google Calendar, <http://calendar.google.com> (last visited Dec. 30, 2008) (Google's free calendar application allows users to share their calendar with others, add public events to their calendar, as well as add events directly from emails in Gmail to their calendar.).

⁵⁰ Google Docs, <http://docs.google.com> (last visited Dec. 30, 2008) (Google's free document application allows importing word documents, spreadsheets, and presentations directly from Gmail, from the web, or from your own hard drive, as well as sharing and making simultaneous edits with friends.).

⁵¹ Picasa Web Albums, <http://picasaweb.google.com> (last visited Dec. 30, 2008) (Google's free photo application allows importing photo albums online, in space provided by Google, and sharing them with friends.).

⁵² Google Checkout has not had much early success. Jacqui Cheng, *Google Checkout Sees Poor Customer Satisfaction*, ARS TECHNICA, Jan. 19, 2007, <http://arstechnica.com/news.ars/post/20070119-8661.html>. Problems seem to be lack of brand awareness and trouble competing with PayPal. *Id.* Both of these problems could be helped dramatically by the simultaneous sign up of Google Checkout and YouTube accounts. Users would immediately be aware that Google even offers a Checkout service. (Out of twenty Gmail users surveyed, only three of them knew about Google Checkout). Also, connecting Checkout with the success of YouTube could help with some of its branding issues. Of course, Google Checkout will have to aggressively promote itself in other avenues, but that is beyond the scope of this discussion.

⁵³ This assumption is based on the fact that people like to have as few credit card accounts online as possible. Instead of providing credit card information to each vendor from whom a person wishes to buy products, users will be able to store their information in one safe place, especially as Google Checkout continues to contract with an increasing number of online stores.

allow their children to register with YouTube. Where are all of these children getting access to credit cards, in order to join online virtual worlds, if not from their parents?

¶35 One of the benefits YouTube users would gain from this registration system would be only registering for both YouTube and Google Checkout in one process.⁵⁴ The users would be able to keep track of less online account information. Also, as discussed above, through one registration process, users would gain access to all of Google's applications.

¶36 Above all, YouTube users (i.e., the lowly screenwriter) would also benefit by being further protected in copyright infringement cases. Once a user realizes that his or her video is being infringed upon, he or she can determine who may be infringing on the creative work. The problem is that the user would ordinarily have no way of proving that the infringer ever had access to the work (i.e., the production company who made the film or commercial that infringed on the work). Yet, if YouTube maintained complete viewing histories of each video, which is proposed in its entirety *infra*, the user could subpoena YouTube for a list of the viewing history on his or her video during a lawsuit. The viewing history would not be nearly as beneficial if the users listed on it were under fake names and email addresses. However, if all users are verified by credit card information, the user, whose work has been infringed, will know exactly who viewed his or her video prior to the infringement. Once again, acquiring evidence in these types of copyright infringement cases is the most difficult task. Verified registration would not negate this issue; however, it would make it easier and more cost efficient for the plaintiff to gather evidence, in these otherwise extremely costly lawsuits.

¶37 *b) YouTube should archive complete viewing histories for uploaded videos.*—Once people are properly registered, YouTube could keep track of who views which videos, helping to prove who had access to the infringed video. YouTube already has this feature installed on its website in a basic sense under “Viewing History.”⁵⁵ However, users have the ability to clear their viewing history, if they would like.⁵⁶ Additionally, the “Viewing History” is only available during the current session, meaning that as soon as the user closes the browser, the viewing history is not available the next time he or she visits YouTube. This feature is the beginning of what would be needed to prove access for an infringement claim. However, in order to actually prove access, YouTube would have to keep archival records of each user that viewed a particular video.

¶38 Once again, YouTube could look to its parent company, Google, for assistance in this area. The availability of the technology and data warehousing capabilities of Google is apparent from some of the other features that Google offers. For example, this system would closely match Google's “Google Desktop Search”⁵⁷ application, which is “a small free downloadable application for locating one's personal computer files (including email, work files, web history, and instant message chats) using Google-quality search.”⁵⁸

⁵⁴ Obviously, details of this one-time registration process would need to be worked out by YouTube and Google Checkout, especially since the companies operate as separate entities. It should be a fairly straightforward process, merely requiring added language to the user agreement explaining the extra use of the information gathered.

⁵⁵ YouTube—Broadcast Yourself, Viewing History, http://www.youtube.com/recently_watched (last visited Dec. 30, 2008) (YouTube allows registered users to access a list of the videos they have viewed by clicking on “History” after having signed in.).

⁵⁶ *Id.*

⁵⁷ Google Desktop, <http://desktop.google.com> (last visited Dec. 30, 2008).

⁵⁸ Google, Inc., Corporate Information—Google Milestones,

If Google has the ability to archive a person's entire web history and hard drive information for use in its "Google Desktop Search" application, it can surely apply the same technology to YouTube's viewing history.

¶39 One might wonder why YouTube and Google would want to maintain and provide this archiving information, especially since all costs in this instance would come out of their pockets. The answer must be to protect their users and offer peace of mind. Since YouTube is a *relatively* new phenomenon, there have not been any major publicized instances of copyright infringement of the kind that are discussed in this Comment.⁵⁹ However, there is no doubt that lawsuits will follow as more and more creative original videos are uploaded to YouTube. People currently post YouTube videos on their Facebook⁶⁰ pages, MySpace⁶¹ pages, personal websites, blogs, and people even send them via email notifications. Popular videos are passed amongst friends and family at an amazing rate. Gaining YouTube fame is the desired outcome of most users who post their videos. However, the payoff of turning their videos into multi-million dollar feature length films is the undeniable secret aspiration of each user. As these types of lawsuits are publicized in the near future, the cry for protection will no doubt follow. Therefore, it would again be in everyone's best interest, except the infringers' of course, to provide protection now, rather than after the damage is done. In fact, offering this protection to YouTube users would be yet another selling point that could encourage people to upload their videos to YouTube rather than another service that may come along.

¶40 An additional benefit to YouTube from archiving all viewing history could come from using this information to more efficiently place advertisements, which is how YouTube makes money. Advertisers pay YouTube money to place their advertisements on certain YouTube pages. Currently, YouTube only places advertisements on certain videos' pages, which include videos that are uploaded by corporate affiliated "Channels"⁶² or videos in "The YouTube Screening Room."⁶³ Once a user clicks on a

<http://www.google.com/intl/en/corporate/history.html> (last visited Dec. 30, 2008).

⁵⁹ A reason for this could be the amount of time it takes for a production company to take an idea, turn it into a full length film, shoot the movie, and release it, at which time the YouTube user would first become aware of the infringement.

⁶⁰ Facebook, About Facebook, <http://www.facebook.com/facebook> (last visited Dec. 30, 2008) ("Facebook gives people the power to share and makes the world more open and connected." It provides the ability to "upload an unlimited number of photos, share links and videos, and learn more about the people they meet.").

⁶¹ MySpace, <http://www.myspace.com> (last visited Dec. 30, 2008) (MySpace is a free network, similar to Facebook, that allows creating a profile that includes pictures, videos, blogs, etc., searching others' profiles, and inviting friends to join.).

⁶² YouTube—Broadcast Yourself, Channels, <http://www.youtube.com/members> (last visited Feb. 17, 2009) (Channels may be created by individuals or by corporate affiliations. Individuals' channels do not contain advertising, whereas channels affiliated with broadcasting networks do contain advertising. For example, TheCWSource Channel uploads videos of interviews and promotions related to shows airing on The CW Television Network. YouTube—Broadcast Yourself, The CWSource, <http://www.youtube.com/user/TheCWSource> (last visited Feb. 17, 2009). Advertisements pop-up during the videos uploaded by channels and are also contained next to the video. See, e.g., *Sophia Bush—Press Q&A—Teen Choice '08* (The CWSource Aug. 4, 2008), <http://www.youtube.com/watch?v=Qu6fKf0o-ts&feature=rec-HM-rev-rn>).

⁶³ YouTube—Broadcast Yourself, The YouTube Screening Room, <http://www.youtube.com/ytscreeningroom> (last visited Feb. 17, 2009) (The YouTube Screening Room is YouTube's own channel with featured videos based on a theme, as well as videos from the current advertiser for the Screening Room.).

video uploaded by an individual with no “Channel” or corporate affiliation, no advertisements appear on that page. However, this means there are still millions of pages that YouTube has with available advertising space. Using the viewing history, YouTube could start selling advertising space on the pages of individual videos. YouTube could cross-reference the users frequenting specific Channels with the individual videos those same users visit. Then, YouTube could place advertisements, similar in target demographic, on those individual videos’ pages as those being placed on the Channel’s pages. This additional advertising revenue may even be enough cover the costs spent by YouTube on tracking and archiving all video viewing histories, though the full financial analysis of this is beyond the scope of this Comment.

3. Policy Considerations of Maintaining Complete Viewing Histories of Uploaded Items.

¶41 This section will provide information on how the *Viacom* lawsuit will affect what is required of YouTube in protecting copyrights, as well as how the lawsuit relates to and is different from the copyright infringement discussed in this Comment (i.e., Viacom and other production companies are suing YouTube for copyright infringement committed by YouTube users against the production companies, whereas this Comment examines the reverse situation, where copyright infringement is committed by production companies against YouTube’s users).

¶42 a) *Impact of the Viacom lawsuit.*⁶⁴—YouTube and Google are currently being sued by Viacom International, Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corp., and Black Entertainment Television, LLC for “multiple causes of action for direct, contributory[,] and vicarious copyright infringement arising out of YouTube’s unauthorized use of Viacom’s copyrighted entertainment materials.”⁶⁵ Viacom is basically arguing in the alternative that YouTube is guilty of one or more of these types of copyright infringement. Viacom must prove the following, in order to succeed on one or more of its claims:

In order to successfully bring a claim for direct copyright infringement, Viacom must establish that the defendant copied, reproduced or distributed Viacom’s copyrighted works. In order to establish contributory copyright infringement, Viacom must prove YouTube’s knowledge of the infringing activity and actual assistance in or inducement of the infringement. Vicarious liability is found where an operator has the right and ability to control users and obtains a direct financial benefit from allowing the acts of infringement. Under the doctrine of vicarious liability, one may be found liable without specific knowledge of the infringing act.⁶⁶

Viacom is claiming that YouTube must be held liable for the copyrighted videos that are uploaded to their website without the consent of or payments to the plaintiffs. Though there are multiple plaintiffs joined in this case, the outcome of this lawsuit could open the

⁶⁴ *Viacom Int’l, Inc. v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2007).

⁶⁵ David P. Miranda, *Copyright Infringement Lawsuit Against YouTube*, 79 N.Y. ST. B.J., July/Aug. 2007, at 46 (discussing *Viacom v. YouTube*).

⁶⁶ *Id.*

door for a whole host of other lawsuits, especially if damages are awarded. However, the copyright infringements alleged in the Viacom lawsuit differ from the type of copyright infringement discussed in this Comment, especially in what it would take for YouTube to remedy the issue, because Viacom is a production company suing YouTube for the infringement by its users, whereas this Comment discusses copyright infringement *by* production companies *against* YouTube users.

¶43

Though the parties are still in the relatively early stages of what is likely to be a several-year litigation process, it is still possible to evaluate the various claims on the limited evidence currently available. It seems doubtful that Viacom will succeed on the contributory copyright infringement claim, since Viacom will not be able to prove YouTube's knowledge of and actual assistance in or inducement of the infringement.⁶⁷ In fact, there are several places in YouTube's "Terms of Use" policy, where YouTube warns users against infringing on people's copyrighted material.

5. Your Use of Content on the Site

In addition to the general restrictions above, the following restrictions and conditions apply specifically to your use of content on the YouTube Website.

A. . . . Content on the Website is provided to you AS IS for your information and personal use only and may not be downloaded, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners.

. . .

E. You agree to not engage in the use, copying, or distribution of any of the Content other than expressly permitted herein, including any use, copying, or distribution of User Submissions of third parties obtained through the Website for any commercial purposes.

. . .

6. Your User Submissions and Conduct

. . .

B. You shall be solely responsible for your own User Submissions and the consequences of posting or publishing them. In connection with User Submissions, you affirm, represent, and/or warrant that: you own or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service.

⁶⁷ *Id.*

...

D. In connection with User Submissions, you further agree that you will not submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein.

...

F. YouTube does not endorse any User Submission or any opinion, recommendation, or advice expressed therein, and YouTube expressly disclaims any and all liability in connection with User Submissions. YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another's intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice.⁶⁸

These paragraphs repeatedly warn that YouTube does not endorse nor allow posting of copyright infringing material.

¶44

On the vicarious liability claim, Viacom will have to prove that YouTube has the ability to control the infringement.⁶⁹ In order for YouTube to stop the types of copyright infringement alleged by Viacom, YouTube would have to proactively review every item of content uploaded to the website for possible copyright infringement.⁷⁰ In order to accomplish this task, YouTube would either need some sort of visual recognition software that could cross reference practically every item of copyrighted visual data of both movies and television, or it would have to hire actual people to personally scan every video being uploaded for copyrighted scenes. Either of these options would no doubt be an extremely expensive and laborious task. Currently, "there has been no indication of the court's inclinations on the matter[.]"⁷¹ However, when making decisions with such astronomical implications, courts tend to do similar cost-benefit analyses to those done *supra*, when discussing why YouTube should take proactive action of the types suggested by this Comment. In this case, the cost to YouTube would be enormous, and it is not clear that the benefits would be able to outweigh them.

¶45

Conversely, the archiving of viewing histories of videos proposed by this Comment would not require much additional effort or resources from YouTube. It is clear, as discussed *supra*, that Google presently has all of the technology required to implement the complete archival system. All that would really be needed in addition to what YouTube/Google already has would be extra servers to store the data. However, as is apparent from the continuously increasing amount of space available to Gmail users,

⁶⁸ YouTube, Terms of Use, <http://youtube.com/t/terms> (last visited Feb. 6, 2009).

⁶⁹ See Miranda, *supra* note 65.

⁷⁰ *Id.*

⁷¹ *Id.*

Google is hardly lacking in data storage space. In fact, exorbitant amounts of space are exactly what Google prides itself on.⁷²

¶46 If the *Viacom* court finds in favor of YouTube, it would essentially mean that copyright holders have the duty of discovering each circumstance of copyright infringement, at which time they must ask that that material be removed from YouTube's website. This suggestion would also allow YouTube to maintain a passive role, aside from logging viewing history. The copyright owner would have to discover the copyright infringement. Then, he or she would go to YouTube for *help* finding the perpetrator. This requires no affirmative action by YouTube.

¶47 b) *Would archiving viewing history affect infringers of Viacom's copyrights?*—Some people may fear that keeping track of complete viewing histories would put all YouTube users at risk of being sued by companies, like Viacom, for copyright infringement in situations similar to those discussed in the Viacom lawsuit. However, archiving viewing history would not have an impact in this way. The people who simply view a work that is the product of copyright infringement are not liable for that infringement. It is the people who actually copy and reproduce the copyrighted work who are the ones infringing.

¶48 Currently on YouTube, a person has to register in order to upload a video clip. Therefore, those people who are currently infringing are already taking the risk of being caught and sued by companies like Viacom. Granted, Viacom, through YouTube, may not be able to find the actual perpetrator because of the problem of fake registration material discussed *supra*. However, this just means that production companies should actually be behind the idea of forcing verified registration. In essence, this would force them to pick a side. Would they rather YouTube leave its registration process alone so that they could not be implicated as infringers by YouTube users? Or, would they rather have the ability to track down and sue people infringing on their work? (This is assuming they would even want to go through the expense of trying to sue each individual infringing user).

IV. CONCLUSION

¶49 More and more people are uploading their original movies onto the Internet, without having them properly protected. First and foremost, they should take the simple step of registering their work before uploading it. This provides them with the *prima facie* evidence of a valid copyright. If they do not register their work within three months of uploading it onto the Internet, they will not be eligible to sue for any damages. Even if they do manage to register their work within the three-month period, they would not be able to recover damages for any infringement that takes place prior to copyright registration.

¶50 Uploading the copyrighted work allows it to be seen by the people who may make the movie professionally; then again, it also allows it to be seen by the people who are looking for an idea to steal. Uploading the work to the Internet could imply access, which is one vital step in proving infringement, but it is doubtful that the courts would

⁷² *Id.* On the Gmail homepage, Google boasts the amount of space available to users by having a continuously upward scrolling amount of megabytes available for free storage of information. Gmail: Email from Google, <http://www.gmail.com> (last visited Feb. 6, 2009).

allow implying access this broadly, for fear of opening a Pandora's box and because the bare possibility of access is not enough.

¶51 There are some things that YouTube and Google could collaborate on to help protect their users (like the lowly screenwriter) who upload their videos. First, YouTube could require all visitors to register, using a credit card, before viewing any videos. Though this could scare some users away, for fear of putting their credit card information on the Internet, Google has already proven it has the technology capable of keep people's information safe through its Google Checkout service. Also, allowing simultaneous registration would provide further synergy between YouTube and Google, which is why YouTube was acquired in the first place.

¶52 Secondly, YouTube could maintain archived viewing histories for each video. This would enable the users to subpoena YouTube's history in trying to prove access by production companies that have 'stolen' their precious works. Again, Google already has the technological capability to do this, as shown through its Google Desktop application. Also, providing assurances to its users is in YouTube's best interest because it will strengthen brand loyalty and further compliment Google's other services.

¶53 The outcome of the Viacom lawsuit could have extreme implications for YouTube. It will be outlandishly costly for YouTube if it is forced to proactively seek out copyrighted videos to keep them from their website.

¶54 On the other hand, the suggestions proposed here will not cost YouTube much, besides providing the extra space for the archiving histories. Overall, it seems clear that the benefits greatly outweigh the costs for YouTube and Google, which is why they should seriously consider the suggestions posited by this Comment.

¶55 Though there are no current lawsuits alleging the type of copyright infringement discussed in this Comment—the case of production companies stealing the creative works of screenwriters who have uploaded them to YouTube and making them into huge box office hits—cases such as this are inevitable in the near future. Why wait for the backlash to occur before taking action? Screenwriters and simple everyday YouTube users should know the affirmative steps they must take to protect their works before uploading them, and YouTube and Google should take the affirmative steps to help protect their users *before* they are taken advantage of by Mr. Executive and his big bad production company!