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Second Level Agreements

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SECOND LEVEL AGREEMENTS

*Yafit Lev-Aretz**

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I. INTRODUCTION

Jill Peterson and Kevin Heinz got married in a Minnesota church and made a video of the wedding party dancing down the aisle to “Forever” by Chris Brown.¹ A video of this very entertaining march

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1. *JK Wedding Entrance Dance*, WIKIPEDIA, http://en.wikipedia.org/wiki/JK_Wedding_Entrance_Dance (last visited Nov. 18, 2011).

was uploaded to YouTube as the “JK Wedding Entrance Dance.”² Assuming that neither the happy couple nor their friends obtained a copyright license to use Brown’s song, it is somewhat befuddling that it has been over eighteen months, in which more than 61 million users have viewed this video, yet it has not been removed from YouTube. It is even more puzzling given the fact that this video is one of myriad examples of unauthorized uses of copyrighted content on user-generated content platforms.

The emergence of the Web 2.0 phenomenon has challenged existing copyright practice by offering users an opportunity to engage in activities previously reserved for professionals only and to distribute content to an inconceivable amount of people through User-Generated Content (“UGC”) platforms.³ While users have utilized this advancement to share many original works, UGC platforms are saturated with infringing content, either in the form of derivative works or as pure reproductions of copyrighted works.⁴ Nonetheless, and although platforms and end-users are exposed to copyright infringement suits, UGC platforms are remarkably prosperous in cyberspace.

Two developments in copyright practice, which have materialized as a response to the challenges posed by the Web 2.0 era, have allowed the outstanding success of UGC platforms. The first development, which has been already recognized in legal commentary, is tolerated use. Tolerated use occurs when a copyright owner knows about infringing activity but does not act to halt it or seek to be compensated for it.⁵ This Article claims that although tolerated use is fairly widespread in the UGC context,⁶ it cannot, by itself, explain the undisturbed presence of countless copyrighted works posted by users. The second advancement,

2. *JK Wedding Entrance Dance*, YOUTUBE, <http://www.youtube.com/watch?v=4-94JhLEiN0> (last visited Nov. 18, 2011).

3. The term Web 2.0 refers to collaborative, user-generated content space, which uses the Internet as a software platform. See Tim O’Reilly, *What is Web 2.0, Design Patterns and Business Models for the Next Generation of Software*, O’REILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>. UGC is often defined as content uploaded and sometimes created by Internet users, rather than produced by the website itself. For a comprehensive definition, see Steven Hetcher, *User-Generated Content and the Future of Copyright: Part one—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 870 (2008).

4. Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846-60 (2009).

5. Prof. Tim Wu, coined the term “tolerated use.” Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) [hereinafter Wu, *Tolerated Use*].

6. *Id.* See also Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1506 (2008) (arguing that informal copyright practices serve as significant gap-fillers in copyright law and referring to a range of reasons that have allowed UGC to thrive, including outright ratification of mass user practices).

which I term “Second Level Agreements,” has yet to be analyzed in depth by legal commentary, although it holds the key to the resolution of the said puzzle.

Second Level Agreements are preemptive licenses granted by copyright owners to platforms operators, with the purpose of ratifying the mass usage of copyrighted content by their users. Under such arrangements, copyright owners authorize the employment of particular works by platforms’ users in return for royalties, company stakes, or a share of advertising revenues. Many UGC networks, such as YouTube, Myspace, and Yahoo, have chosen this course to shelter themselves from secondary liability claims. The first Second Level Agreement was concluded in 2006, when YouTube announced a video distribution and revenue partnership with Warner Music Group.⁷ According to YouTube’s press release, under the “first-of-its-kind arrangement, YouTube users will be able to incorporate music from WMG’s recorded music catalog into the videos they create and upload onto YouTube.”⁸

While licenses for the purpose of pure reproduction are common in copyright practice,⁹ these agreements mark the first time in copyright history that a user creates a derivative work pursuant to a license that was not granted directly to her. Because the agreements are negotiated and concluded between copyright holders and UGC platforms’ owners, users end up employing copyrighted works under the terms of a license they were neither a part of designing, nor were fully aware of its details. Users can gather information as to the terms of these agreements only from the few press releases and the media. Moreover, users are legally bound only by the platforms’ terms of service, which do not reflect the existence of Second Level Agreements.¹⁰ Therefore, while in practice Second Level Agreements allow copyrighted materials posted by users on UGC platforms to remain online, the agreements should have no legal impact on the users’ legal status.

This Article analyzes in-depth a significant practice that has not been recognized in legal scholarship. Their unique structure and the way in which Second Level Agreements have developed within the relatively

7. Press Release, Warner Music Inc., Warner Music Group, Warner Music Group and YouTube Announce Landmark Video Distribution and Revenue Partnership (Sept. 18, 2006), <http://investors.wmg.com/phoenix.zhtml?c=182480&p=irol-newsArticle&ID=906153>.

8. *Id.*

9. For example, when a user purchases a track on iTunes, she is allowed to export, burn (if applicable), or copy (if applicable) the sound recording solely for personal, noncommercial use. *See iTunes Store Terms of Service, Section 10(b)(vii)*, APPLE INC., <http://www.apple.com/legal/itunes/us/terms.html#SERVICE> (last visited Nov. 18, 2011).

10. *See infra* notes 194-97 and accompanying text.

short time of their existence have important consequences for the various players in the copyright market. Accordingly, this study presents a detailed description of the practice, while using YouTube, the pioneer and exemplar of this phenomenon, as a case study to demonstrate the significance of Second Level Agreements. The YouTube case reveals two conflicting movements: the first is a movement toward standardization, and the second is a movement toward premium—as opposed to amateur—content partnerships. Platforms’ operators and copyright holders have worked to maximize efficiency and lower transaction costs by using content identification and filtering technologies, as well as standardizing Second Level Agreements’ terms. While this should have allowed for more Second Level Agreements to emerge, another development has occurred concurrently to trigger a contradictory affect: advertisers have found that original and derivative UGC is far less appropriate for commercials than premium content.¹¹ Consequently, platforms’ operators began to search for new revenue generators in the form of professionally produced content and the importance of UGC in the licensing priority has diminished.¹²

To conclude the doctrinal prong, this study maps out the sphere of the Second Level Agreements practice. While video and audio sharing platforms have widely embraced Second Level Agreements, other UGC platforms, such as blogs, image-sharing, and fan fiction websites have not. Several factors such as the ‘embed’ and ‘linking’ functions, technological difficulties of identification, and the non-concentrated nature of platforms operators and right holders are possible explanations for this disparity.¹³

The Article also offers a normative assessment of the benefits and shortcomings of the Second Level Agreements practice. Advantages like better information consumption, greater expression production, and broader infringement avoidance are juxtaposed against disadvantages such as the opacity surrounding the agreements, their non-inclusiveness and potential vulnerability, the lack of democratic ideals in this private self governance tool, the use of identification technologies that may lead to over-filtering, the advancement of a ‘clearance culture,’ and more.¹⁴

The prescriptive discussion commences by pointing to the legal and practical implications of Second Level Agreements. Legal defenses for

11. Brad Stone, *Brooks Barnes, MGM to Post Full Films on YouTube*, N.Y. TIMES (Nov. 9, 2008), http://www.nytimes.com/2008/11/10/business/media/10mgm.html?_r=1.

12. *Id.*

13. *See infra* section V.C.

14. *See infra* section V.D.

users, such as implied license and estoppel, are discussed to demonstrate that Second Level Agreements bear legal significance for users irrespective of their absence from the contractual relationship. Serving as an industry norm, Second Level Agreements have ample importance in the non-legal context as well. Derivatively, a normative assessment is proposed, arguing that Second Level Agreements represent a desired development of copyright practice, and offering some improvements to augment the benefits of these pacts. The Article then carefully looks at the future of Second Level Agreements while reviewing four potential catalysts—the shift towards premium content, the *Viacom v. Google* ruling,¹⁵ the move towards disintermediation, and the rise of non-commercial licensing system.

The remainder of this Article consists of seven parts. Part II discusses the emergence of the Web 2.0 age, and offers a useful classification of UGC content. Part III demonstrates the application of current copyright law to UGC platforms by reviewing theories of secondary liability and the Digital Millennium Copyright Act's ("DMCA") provisions. Part IV considers the practice of tolerated use and its contribution to UGC platforms' success and users' ability to generate derivative content. Second Level Agreements are described and studied thoroughly in Part V. Part VI offers a normative contribution and careful prediction of the future of Second Level Agreements and copyright in the digital realm. A conclusion follows in Part VII.

II. THE WEB 2.0 ERA AND THE INCEPTION OF UGC

The advancements in the Internet's capabilities are usually referred to as "Web 1.0," "Web 2.0," and "Web 3.0."¹⁶ Under the Web 1.0 stage, the Web functioned as a read-only medium through numerous 'static' websites. The following phase—Web 2.0—was defined as an "amalgam of 'participatory Web' applications," which turned erstwhile passive end users into active producers by allowing them to generate and share content of all types.¹⁷ The decentralization of the Web became apparent through a move from publishing to participation, which empowered the

15. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d. 514 (S.D.N.Y. 2010).

16. Web 3.0 (or "Semantic Web") is a future phrase, which is expected to be defined by the organization and classification of data collected from users' online activities. See Tanya M. Woods, *Working Towards Spontaneous Copyright Licensing: A Simple Solution for a Complex Problem*, 11 VAND. J. ENT. & TECH. L. 1141, 1160 (2009).

17. Eugene C. Kim, Note, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139 (2007).

Internet to operate as a platform rather than a mere data conduit.¹⁸ The Web 2.0 era has progressively shifted Internet business models into UGC.¹⁹ UGC is often defined as content uploaded and sometimes created by Internet users, rather than produced by the website itself.²⁰ Websites providing services like blogs, wikis, photo sharing, music sharing, and video sharing have become widespread. Virtual worlds, fan fiction websites, and social networking sites (e.g., Myspace²¹ and Facebook²²) have gained special popularity.²³ Some UGC is also available on websites owned by traditional content companies, where people provide unprofessional news reports, photos, and videos with no compensation.²⁴

To comprehend the effect that UGC has had on the copyright world, one must first differentiate between divergent types of UGC. The first kind is “Pure UGC,” which refers to original content created by users. Many blogs, for example, consist of original content created by the bloggers posting it on their blog. Another common example is original music posted by amateur artists on MySpace, YouTube, and other websites. Because pure content is original, and uploading it neither infringes nor violates any copyright ban, copyright law intends to encourage the production of such UGC.

The second type of UGC includes derivative content, which is created from adaptations of preexisting works. This group incorporates UGC that adds or alters copyrighted works, but does not qualify as fair use. “Fanvids”—user-made videos that edit together music and clips from television shows or movies—are a common example for such a use.²⁵ Another illustration can be found in a video of a family event with

18. TERRY FLEW, *NEW MEDIA* 13 (2005).

19. UGC is called “user-created content” overseas. See Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 *BERKELEY TECH. L.J.* 363 (2009).

20. Hetcher, *supra* note 3, at 870.

21. MYSPACE, <http://www.myspace.com>.

22. FACEBOOK, <http://www.facebook.com>.

23. Sawyer, *supra* note 19, at 364.

24. E.g., *CNN ireport*, CNN, iReport.com. UGC’s ability to displace traditional media has become known as “crowdsourcing”—“a method for using the public, typically via the Internet, to supply what employees and experts once did.” Sarah Kershaw, *A Different Way to Pay for the News You Want*, N.Y. TIMES (Aug. 23, 2008), <http://www.nytimes.com/2008/08/24/weekinreview/24kershaw.html>; Jeff Howe, *The Rise of Crowdsourcing*, WIRED (June 2006), <http://www.wired.com/wired/archive/14.06/crowds.html>.

25. Casey Fiesler, *Everything I need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 *VAND. J. ENT. & TECH. L.* 729, 733 (2008).

copyrighted music in the background.²⁶ Unless the copyright owner granted permission, derivative UGC constitutes copyright infringement.

The third category encompasses UGC, which employs preexisting works but does not amount to infringement under some limitation or exemption to the author's exclusive right. An example for such use can be found in the case of Corey Vidal. Vidal, an online video amateur provider, posted on YouTube an Acapella tribute to film composer John Williams.²⁷ The video displayed a four part harmony, in which the saga of the original Star Wars trilogy is recapped to a medley of Williams' celebrated scores. Notwithstanding the uncertainty surrounding the fair use defense, the video was considered by many as a clear case of fair use.²⁸ Thus, when YouTube took it down following a DMCA notice, wide criticism ensued until it was restored.²⁹

The fourth, and final, UGC classification consists of pure reproductions, such as time-shift recordings of popular TV shows, music sound recording and videos, etc.³⁰ This kind of content is consensually regarded as copyright infringement.

It is hard to determine the exact percentage of every UGC type because the percentage of infringing UGC currently uploaded to platforms is unknown and probably fluctuates from one site to another. A 2007 study found that less than six percent of all views on YouTube, the most popular UGC video site, were of copyrighted material.³¹ By

26. For example, video clip featuring a slideshow of a couple's wedding day, in which Five for Fighting's song—*100 Years*—used as a background: <http://www.youtube.com/watch?v=ctQtU9jUZQ4&feature=fvw> (last visited Nov. 18, 2011). See also JK Wedding Entrance Dance, *supra* note 2.

27. *Star Wars (John Williams is the Man)*, YOUTUBE, http://www.youtube.com/watch?v=lk5_OSSawz4.

28. E.g., Greg Sandoval, *YouTube Users Caught in Warner Music Spat*, CNET NEWS (Jan. 27, 2009), http://news.cnet.com/8301-1023_3-10150588-93.html; Joe Windish, *A Warner Music/Corey Vidal Take Down Tale, The Moderate Voice* (Jan. 27, 2009), <http://themoderatevoice.com/25981/a-warner-musiccorey-vidal-take-down-tale/>; Julian Sanchez, *EFF Seeks Mashup Makers to Fight YouTube Filtering*, ARS TECHNICA (Feb. 3, 2009), <http://arstechnica.com/telecom/news/2009/02/eff-seeks-mashup-makers-to-fight-youtube-filtering.ars>.

29. On February 24, 2009, the original video returned after Vidal fought Warner's claim, citing the video as being protected under fair use. *Corey Vidal*, COREY VIDAL, available at http://en.wikipedia.org/wiki/Corey_Vidal (last visited Nov. 18, 2011).

30. For this reason, some commentators do not include the last type under the definition of UGC, because it resembles more of a peer-to-peer distribution than UGC. See, e.g., Lee, *supra* note 6, at 1506. For a different approach, see Kurt Hunt, *Copyright and Youtube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197, 202 (2007), and Gervais, *supra* note 4, at 860.

31. Bri Holt, Heidi R. Lynn & Michael Sowers, *Analysis of Copyrighted Videos on YouTube.com*, VIDMETER.COM (2007),

examining a random sample of online videos, another study learned that twelve percent of the videos posted on YouTube constituted infringement of copyrighted works.³² Either way it is safe to state that while many original expressions are distributed using UGC platforms, a considerable amount of uploaded UGC infringes copyrights.

To address this issue and to demonstrate the liability claims that lurk for UGC platforms and users, the next section reviews the application of copyright law to UGC. The sketched legal frame underscores the riddle—how a vast amount of infringing UGC can reside on UGC platforms without being removed, and how UGC platforms continue to prosper without powerful copyright owners rising up against them in the same way they fought erstwhile facilitators of online infringement.

III. APPLYING COPYRIGHT LAW TO USER-GENERATED CONTENT

Some forms of UGC constitute clear copyright infringement. Yet, locating end-users who infringe copyrighted works can be both difficult and expensive.³³ Thus, copyright owners have attempted to accumulate their legal claims by bringing suits for secondary liability against operators of platforms that facilitate copyright violations.³⁴ In the copyright context, therefore, the issues brought up by the rise of UGC platforms relate mainly to secondary liability. The following review delineates the secondary liability regime and its applicability in the case of UGC platforms.

A. *Secondary Liability*

For decades copyright litigation centered on direct infringement, as well as on theories of indirect copyright infringement, although the Copyright Act does not expressly provide for secondary liability.³⁵ The

http://uploadi.www.ris.org/editor/1176893367vidmeter_copyright_report.pdf. http://www.vidmeter.com/i/vcopyrightidmeter_report.pdf. However, the methodology of this study was criticized because it considers UGC as not copyrighted unless a DMCA take-down notice was issued. See Sawyer, *supra* note 19, at 364.

32. *YouTube Statistics*, DIGITAL ETHNOGRAPHY (2008), available at <http://ksudigg.wetpaint.com/page/YouTube+Statistics> (last visited Nov. 18, 2011).

33. Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1, 8 (2007).

34. *Id.*

35. Greg Jansen, *Whose Burden is it Anyway? Addressing the Needs of Content Owners in DMCA Safe Harbors*, 62 FED. COMM. L.J. 153, 157 (2010).

latter arose from judicial interpretation of the Copyright Act, and came to include contributory infringement and vicarious infringement.³⁶ Contributory infringement requires a defendant to have knowledge of the infringing material and to have induced, caused, or materially contributed to the infringing conduct.³⁷ Courts find vicarious liability when the defendant had the right and ability to control the direct infringer and received a financial benefit from the direct infringement.³⁸ With the rise of products and services that enabled users to infringe on copyright more easily, copyright owners attempted to prevent infringement at the offering of the products and services facilitating such infringement. The most prominent example is the legal battle over the VCR in *Sony Corporation of America v. Universal City Studios, Inc.*³⁹

Contributory liability may be especially relevant to UGC platforms, which risk potential liability based on the theory of being facilitators of direct infringements.⁴⁰ Indeed, most UGC platforms are not used only for infringing purposes, thus according to the Supreme Court's holding in *Sony*, secondary liability should not arise.⁴¹ Still, UGC platforms host a great amount of user-uploaded materials that often directly infringe a copyright. Some argue that notifications sent by copyright owners to UGC websites, alleging copyright infringement, could establish "knowledge" on the part of the platform's owner, thereby subjecting it to potential contributory liability.⁴² Moreover, the *Sony* Court held that in an ongoing relationship, the alleged secondary infringer is in a position to control the use of the copyrighted works by the primary infringer.⁴³ Because most UGC platforms require users to create an account to upload materials, it can be argued that they maintain ongoing relationships with their users, which may expose them to secondary liability as well. UGC platforms may also be found vicariously liable if they receive a direct financial benefit for infringing activities, such as advertisement revenue.

36. Lisa Veasman, 'Piggy Backing' on the Web 2.0 Internet: Copyright Liability and Web 2.0 Mashups, 30 HASTINGS COMM. & ENT. L.J. 311, 319 (2008).

37. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

38. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963)).

39. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

40. Darrow & Ferrera, *supra* note 33, at 17.

41. *Sony*, 464 U.S. at 440-42.

42. *Id.*

43. *Id.* at 437.

B. *The DMCA Safe Harbors and the Liability of OSPs*

The DMCA established safe harbors to protect online service providers (OSPs) from monetary liability for material that is transmitted over networks,⁴⁴ cached on a server,⁴⁵ residing on systems or networks at the direction of users,⁴⁶ or linking users to an online location containing infringing material or infringing activity, by deploying information location tools.⁴⁷ To qualify for the safe harbor protection, an OSP must fall under one of the aforementioned categories, and demonstrate the adoption and implementation of certain policies. First, an OSP is obligated to adopt and reasonably implement a stated policy “for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.”⁴⁸ Second, an OSP must also not interfere with “standard technical measures” employed by copyright owners to identify infringing content.⁴⁹ Additional criteria for qualifying for the DMCA’s safe harbor status are set forth in sections 512(c)(1) and 512(i), as each safe harbor has separate statutory requirements limiting its applicability.

Of the four DMCA safe harbors, section 512(c), which safeguards OSPs who have infringing content “Residing on Systems or Networks at Discretion of Users,” is at the center of attention in the UGC context. Many UGC websites such as YouTube, Myspace, Dailymotion,⁵⁰ Facebook, Flickr,⁵¹ and Vimeo⁵² qualify under section 512(c) to be considered hosts of such content. Still, these platforms would have to comply with the additional requisites in the section to enjoy the safe harbor status, which then places the burden of identifying infringing works squarely on copyright owners.⁵³ First, they are required to have no actual or constructive knowledge that infringing content is on their system.⁵⁴ If an OSP becomes aware of any infringing activity, it must

44. 17 U.S.C. § 512(a) (2000).

45. *Id.* § 512(b).

46. *Id.* § 512(c).

47. *Id.* § 512(d).

48. *Id.* § 512(i)(2)(A).

49. *Id.* § 512(i)(1)(B), § 512(i)(2).

50. DAILY MOTION, <http://www.dailymotion.com/us>.

51. FLICKR, <http://www.flickr.com>.

52. VIMEO, <http://vimeo.com>.

53. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) (“The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.”).

54. 17 U.S.C. § 512(c)(1)(A) (2000).

immediately remove or disable access to the material.⁵⁵ Moreover, an OSP cannot gain a direct financial benefit from any infringing activity.⁵⁶ A designated agent, whose contact information ought to be registered with the United States Copyright Office and accessible to the public, must be available to “receive notifications of claimed infringement.”⁵⁷ Upon encountering an allegedly infringing use, the copyright owner would locate the platform’s designated agent and send her a “written communication.”⁵⁸ When an OSP receives such notification, it is required to follow the procedure set forth in section 512(c)(3)—to “respond expeditiously to remove, or disable access to, the material that is claimed to be infringing.”⁵⁹ Failure to comply would cause the OSP to lose its safe harbor status, and enable the copyright owner to request a subpoena to identify the alleged infringer.⁶⁰

Two of the most recent cases to discuss the safe harbors provided by section 512(c) involved a video-upload site—Veoh, which was claimed to be contributorily and vicariously liable for copyright infringement in videos uploaded to its servers.⁶¹ In *IO Group, Inc. v. Veoh Networks, Inc.*, the Court held that when a video-sharing website could not locate infringing materials using simple text searches, the platform does not have a practical ability to control the infringing activity as content could be mislabeled.⁶² Moreover, the decision indicates that any actual or apparent knowledge of infringement may be mitigated if the platform expeditiously removes or disables access to infringing material.⁶³ Under the court’s interpretation, an OSP may utilize an automated process to facilitate a third party’s request to upload content without losing safe-harbor protections.⁶⁴

Another case against Veoh was decided in September 2009. In *UMG Recordings, Inc. v. Veoh Networks, Inc.*, Judge Matz of the Central District of California issued a summary judgment in favor of Veoh, holding that it had made reasonable efforts to follow section

55. *Id.*

56. *Id.* §512(c).

57. *Id.* §512(c)(2). Contact information includes the agent’s name, address, phone number, e-mail address, and any other information that the Register of Copyright deems appropriate.

58. *Id.* § 512(c)(3).

59. *Id.* § 512(c)(3).

60. *Id.* § 512(h).

61. *IO Grp. Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1092 (C.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1107 (C.D. Cal. 2009).

62. *See IO Group*, 586 F. Supp. 2d at 1153.

63. *Id.* at 1149.

64. *Id.* at 1147-48.

512(c) of the DMCA.⁶⁵ The court rejected UMG's arguments as to the implied knowledge of infringement imputed to Veoh, and found that Veoh lacked the right and ability to control infringements despite its technological control over the site.⁶⁶ Specifically, the court noted that Veoh properly complied with the notice-and-takedown procedure expeditiously,⁶⁷ and even implemented standard content filtering software, something it was not specifically required to do by law.⁶⁸

An appeal filed by UMG was recently rejected by the U.S. Court of Appeals for the Ninth Circuit.⁶⁹ The court stated that copyright holders are better able to efficiently identify infringing copies than service providers like Veoh,⁷⁰ and that § 512(m) of the DMCA did not impose investigative obligations on service providers.⁷¹ Furthermore, a service provider will be deprived of its safe harbor immunity only if it has specific knowledge of infringing content on its site and fails to take down that content.⁷² General knowledge that some infringing content has been posted is insufficient for that matter.⁷³ Notably, the court held that right holders can only rely upon a valid DMCA takedown notification to show specific knowledge of infringing material.⁷⁴

Another recent decision to analyze UGC platforms' status under the DMCA is *Viacom International Inc. v. YouTube, Inc.*⁷⁵ The \$1 billion lawsuit, which was filed by Viacom in March 2007, accused YouTube of widespread and willful infringement of Viacom's movies, TV shows, and other content, after YouTube knowingly allowed clips from Viacom-owned programs to run, although they were illegally posted.⁷⁶ YouTube maintained that while it was aware of copyrighted content being uploaded to YouTube, as long as it proactively acted to remove the infringing materials on their own or following the receipt of a DMCA takedown notice from Viacom, YouTube has complied with the

65. See *UMG Recordings*, 665 F. Supp. 2d at 1118.

66. *Id.* at 1112.

67. *Id.*

68. *Id.*

69. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 101 U.S.P.Q.2d 1001 (9th Cir. 2011).

70. *Id.* at 1010.

71. *Id.* at 1015.

72. *Id.* at 1010.

73. *Id.*

74. *Id.* at 1010-12.

75. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d. 514 (S.D.N.Y. 2010).

76. First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial, *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 1:07-cv-02103, 2008 WL 2062868 (S.D.N.Y. Apr. 24, 2008).

DMCA requirements, and thus was shielded under a safe harbor status.⁷⁷ U.S. District Court Judge Louis Stanton sided with YouTube, delivering a summary judgment that essentially endorses current practices. The court held that while YouTube certainly knew copyrighted content had been posted on its site, general awareness of infringement was not tantamount to “knowledge of specific and identifiable infringements of individual items.”⁷⁸ The court went on to say that because YouTube promptly removed the copyrighted materials upon receiving a notice from Viacom, YouTube was protected from liability under the DMCA.⁷⁹ Calling the decision “fundamentally flawed,” Viacom appealed the decision recently, so the last word is yet to be told.⁸⁰

Given that UGC involves many cases of copyright infringement, one would have expected copyright owners to rise up against UGC platforms in the same way they opposed previous facilitators of online infringing activity. Nonetheless, the Web 2.0 era was not accompanied by a tidal wave of major lawsuits. While several lawsuits have been brought against UGC platforms, it appears that the previous resort to litigation was somewhat enfeebled by the materialization of UGC platforms, which instead stimulated two developments of copyright practice—tolerated use and Second Level Agreements.

IV. TOLERATED USE

The prior discussion highlighted UGC dual complexion. On the one hand, UGC platforms follow the constitutional ambition to “promote the Progress of Science and useful Arts”⁸¹ by enabling free speech and spurring expression. On the other hand, UGC raises many copyright issues, such as originality, ownership, secondary liability, copyright infringements, fair use, and over-filtering of desired expression. Within this duality, UGC platforms keep operating successfully all over the Internet. This prosperity is not self-explanatory if one is mindful of the extensive infringement that constantly takes place on these platforms.⁸²

77. Defendants’ Answer to First Amended Complaint and Demand for Jury Trial, *Viacom Int’l, Inc. v. YouTube, Inc.*, No 1:07-cv-02103, 2008 WL 2260018 (S.D.N.Y. May 23, 2008).

78. *Viacom*, 718 F. Supp. 2d. at 519.

79. *Id.* at 528.

80. Opening Brief for Plaintiffs-Appellants, *Viacom Int’l Inc. v. YouTube Inc.*, 2010 WL 5066007 (Dec. 3, 2010) (No. 10-3270).

81. U.S. CONST. art. I, § 8, cl. 8 (defining legislative branch’s role regarding copyright and patent).

82. Edward Lee, *Developing Copyright Practices for User-Generated Content*, 13 No. 1 J. INTERNET L. 1, 8 (2009).

A possible explanation that was offered by legal scholarship is ‘tolerated use’—“infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about.”⁸³ This informal practice may be grounded in a copyright owner’s laziness, expansive enforcement costs, a desire to create goodwill, or a strategic decision to enjoy the benefit of the unauthorized use.⁸⁴

Tolerated use is notably present in daily UGC practice.⁸⁵ Even though many users freely use the copyrighted works of others without prior permission and beyond the conventional understandings of fair use, sometimes copyright holders do not seem to be particularly concerned with such uses, and sometimes even express their informal approval.⁸⁶ Fan fiction websites, where users make derivative works of popular copyrighted works and share them online, are a good example of tolerated use. To demonstrate, look at the “Leaky Cauldron,” an all-purpose site for the Harry Potter enthusiasts.⁸⁷ The site hosts, among other offerings, a comprehensive Potter news archive, images, videos, fan art galleries, downloadable widgets, a chat room, discussion forum, and various essay projects. As Professor Tim Wu puts it, the “Leaky Cauldron” represents “an orgy of copyright infringement.”⁸⁸ Surprisingly however, not only has the fan fiction site fully operated for several years now, but J.K. Rowling, the author of the Harry Potter books, has publicly referred to it as “my favorite fan site” and “a wonderfully well-designed mine of accurate information on all things Harry Potter” that “attracts a lot of knowledgeable and entertaining debate.”⁸⁹

Tolerated use is also evident in popular user-created, pseudo-movie trailers,⁹⁰ such as “The Evil Pinocchio,” a short trailer recasting

83. Wu, *Tolerated Use*, *supra* note 5.

84. *Id.* at 619.

85. Steven Hetcher briefly argues that so-called “cut-and-paste” creative works, as long as non-commercial, are to be tolerated by the entertainment industry. Steven Hetcher, *User-Generated Content and the Future of Copyright: Part two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829, 841 (2008).

86. Lee, *supra* note 6, at 1461.

87. THE LEAKY CALDRON, <http://www.the-leaky-cauldron.org>.

88. Tim Wu, *Tolerated Use: The Copyright Problem*, SLATE (Oct. 16, 2007), <http://www.slate.com/id/2175730/entry/2175731/>.

89. *A Brief (Believe It Or Not) History of The Leaky Cauldron*, THE LEAKY CALDRON, <http://www.the-leaky-cauldron.org/info/siteinfo> (last visited Nov. 18 2011). Moreover, even though fan fiction has existed on the Internet for years, no copyright holder has ever challenged it to a judgment in court. See Lee, *supra* note 6, at 1515.

90. Lee, *supra* note 6, at 1515.

Pinocchio into an evil creature that wishes to destroy the world.⁹¹ Photos and videos documenting trips to Disneyland or Universal Orlando Resort provide an additional example of tolerated use, as many of them constitute copyright infringement. Nonetheless, Disney and Universal have neither a stated policy against nor a formal approval for such uploads, so many vacation photos and videos can be found online.⁹²

By its nature, tolerated use is vulnerable as it may instantly turn into a licensing relationship or liability battle. Because the user has no costs to bear under this practice, she has no incentive to turn this status-quo into one of the other legal relationship forms. Hence, it is predominantly the copyright owner who determines the duration of the use, and a possible move into either licensing or liability courses.

While tolerated use is clearly present in copyright practice, it is not sufficient to explain the current state of UGC. Many copyright holders do not tolerate infringing usage, and exercise their right to ask for its removal pursuant to the DMCA.⁹³ Although users can send a counter notification under the DMCA if they believe that the material has been wrongly removed,⁹⁴ many of them are either not aware of this right⁹⁵ or are not willing to take the risk of litigating a copyright lawsuit with an anticipated expenditure of \$400,000 in litigation costs.⁹⁶ This intensifies the enigma—even though counter notifications are not very common, and tolerated use is not ubiquitous, UGC platforms are thriving notwithstanding the vast amount of infringing content they host. A suggested key to this puzzle is the practice of Second Level Agreements.

91. *The Evil Pinocchio Trailer*, YOUTUBE, <http://www.youtube.com/watch?v=GZBjtYkl0vE> (May 24, 2006).

92. Jason Cochran, *Legal limbo: Disney could go after you for posting vacation videos online*, WALLET POP (Jan. 19, 2010), <http://www.walletpop.com/blog/2010/01/19/legal-limbo-disney-could-go-after-you-for-posting-vacation-vide/5> (“It’s tough to get an exact number of vacation videos already online, but YouTube a search for ‘Disney World vacation’ pulls about 67,500 hits, while individual attractions got smaller numbers: It’s a Small World claims 4,230 and Splash Mountain offers 2,160.”).

93. 17 U.S.C. § 512(c)(3).

94. *Id.* § 512(g)(2)(C).

95. See Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006) (showing that minimal evidence of counter notices and putback has been found).

96. According to Intellectual Property Law Institute, a survey of the average costs of copyright litigation is \$400,000. See MICHAEL L. LOVITZ, *ALI-ABA COURSE OF STUDY: LITIGATING TRADEMARK, DOMAIN NAME & UNFAIR COMPETITION CASES, STRATEGIES FOR FUNDING IP LITIGATION: INSURANCE AND OTHER AVENUES 1* (2006).

V. SECOND LEVEL AGREEMENTS

A. *Definition and Background*

A Second Level Agreement can be defined as a preemptive license obtained by UGC platforms owners in order to ratify the mass usage of copyrighted content by their users. A copyright owner authorizes the use of specified works by the platform's users in return for royalties, company stakes, or ad revenue share. While a First Level Agreement involves the copyright owner on the one hand and the user on the other, Second Level Agreements are negotiated and executed by copyright owners and platform operators. In other words, Second Level Agreements authorize unidentified uses of copyrighted content by users in UGC platforms.

The practice of Second Level Agreements has developed within the relatively short time of its existence. The first agreements were negotiated individually and represented a specific solution for UGC copyright infringements. Any information as to the financial arrangements, the agreed enforcement course, and the place of UGC in these pacts, could be obtained solely from the few press releases and the media. As time went by, the agreements became more standardized, and were usually based on identification technologies that platforms began to employ.⁹⁷ Thanks to such technologies, copyright owners can now identify their works and choose to block, track, or monetize them.⁹⁸ When a copyright holder takes the blocking path, the alleged infringing content will be immediately removed. Under a monetization policy, the unauthorized use will remain available on the website, and ads will appear in conjunction with the content. The tracking option acts as an intervening or ancillary phase, which enables the owner of the copyright to follow statistics about her work before deciding on or along with blocking or monetizing.

Second Level Agreements represent a new phenomenon in copyright practice. Throughout the history of copyright, a provider of copyrighted content—as opposed to a passive consumer—has always operated under some agreement to which she was a party. At first, the author who offered the work negotiated the terms of the granted license with the user. Later, intermediaries emerged, acting as providers of

97. YouTube was the first to offer this multi-choice regime, but many UGC platforms have followed suit. See *Block, Monetize, or Track Viewing Metrics—It's Automated, and It's Free*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Nov. 18, 2011).

98. *Id.*

content themselves, and accordingly enjoyed the privity of contract with both the end user and copyright owner.⁹⁹ Because the role of intermediaries is based on economies of scale, they could not have effectively interceded when the user is itself a provider of content, and especially when derivative use is involved. In such case, the user's employment of a copyrighted work usually requires a deviation from standard licensing terms. Without a valid defense, such as fair use, the user-provider must have individually negotiated the terms of her license with the copyright owner to lawfully use the copyrighted work. Because individual negotiations between users-providers and copyright holders entail high transaction costs and often involve unequal bargaining power, they cannot be expected to enable mass creation of content by users.

Nevertheless, the Web 2.0 era and the dawn of UGC have enabled, for the first time, a group of creative users to enjoy and potentially utilize economies of scale. UGC platforms allow creative users to become providers of content, which is distributed for free and in great numbers through the platforms' facilities. In this sense, UGC represents not only a potential for mass copyright infringement but also a prospect of mass creation. While mass infringement has led to the development of secondary liability in copyright law, no equivalent legal doctrine was introduced to capture the promise of mass creation—that is, not until recently. Recently, amid concerns about the effect of secondary liability on the operation of platforms, and a desire to unlock the vast marketing potential on the rights holders' end, Second Level Agreements were born. By de-facto allowing mass production by users, Second Level Agreements act as the missing facilitator of lawful mass creation.

The first to employ Second Level Agreements as a business model was YouTube, which has entered several contracts in the United States and worldwide for authorizing the use of copyrighted works by its users.¹⁰⁰ While YouTube is the undeniable pioneer of the Second Level

99. Wu named it a "gatekeeping regime." Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 711 (2003) ("The gatekeepers were book publishers at first; later gatekeepers included record manufacturers, film studios, and others who produced works on a mass scale. Their role resembled that of doctors with respect to prescription drugs—they prevented evasion of the law by blocking the opportunity to buy an infringing product in the first place.").

100. For a list of YouTube's U.S. deals, see *infra* notes 119, 129 and accompanying text. YouTube has also reached licensing agreements with copyright owners all over the world, e.g., the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC), see Tomohisa Takei, *JASRAC-protected Songs Becomes Available on YouTube*, TECH-ON (Oct. 24, 2008), http://techon.nikkeibp.co.jp/english/NEWS_EN/20081024/160039/; SBS Broadcasting Group (SBS Netherlands), see Editors' Comment, *Content Deals with SBS and UMG Widens Reach YouTube*,

Agreements practice, other UGC platforms signed similar licensing deals. Yahoo! entered a Second Level Agreement with Sony BMG in 2007.¹⁰¹ The Social networking site, MySpace, stroke a comparable deal with Sony BMG in 2007,¹⁰² and with Viacom-owned MTV Networks in 2008.¹⁰³ Another social networking site, imeem, which was shut down after MySpace acquired it in December 2009,¹⁰⁴ entered content deals with Warner Music Group,¹⁰⁵ Sony BMG,¹⁰⁶ EMI,¹⁰⁷ and Universal Music Group.¹⁰⁸ Dailymotion, a video sharing service website based in France, has also entered a series of revenue-sharing partnerships with French and international content owners. Among its content partners are the SPPF (Société Civile des Producteurs de Phonogrammes en France),¹⁰⁹ Warner Music,¹¹⁰ EMI,¹¹¹ and Universal Music Group.¹¹² In

SEARCHCOWBOYS.COM (Sept. 28, 2009), <http://www.searchcowboys.com/socialmedia/1050>; Britain Channel 4, see Mark Sweney, *YouTube Signs Landmark Deal to Screen Channel 4 Shows*, THE GUARDIAN (Oct. 15, 2009), <http://www.guardian.co.uk/media/2009/oct/15/youtube-channel-4-google-deal>; Irish Music Rights Organisation (Imro) and the Mechanical Copyright Protection Society Ireland (MCPSI), see Mark Tighe, *Musicians to Get a Cut from YouTube*, TIMES ONLINE (Mar. 28, 2010), <http://www.timesonline.co.uk/tol/news/world/ireland/article7078948.ece>; and the French broadcaster Lagardère Active, see Ruth Bender, *YouTube Signs Online Video Agreement*, SMART MONEY (Apr. 12, 2010), <http://www.smartmoney.com/news/on/?story=ON-20100412-000264>.

101. Barry Levine, *Yahoo and Sony BMG Team on User-Generated Content*, NEWS FACTOR (Nov. 22, 2007), http://www.newsfactor.com/story.xhtml?story_id=12300BAYD9TL.

102. Yinka Adegoke, *MySpace in Ad-supported Music Deal with Sony BMG*, REUTERS UK (Oct. 16, 2007), <http://uk.reuters.com/article/idUKWNAS648120071016>.

103. Steve O'Hear, *MTV and MySpace Partner to Monetize Pirated Content*, ZD NET (Nov. 3, 2008), <http://blogs.zdnet.com/social/?p=602&tag=col1;post-602#more-602>.

104. See *imeem*, WIKIPEDIA (Feb. 2011), <http://en.wikipedia.org/wiki/Imeem>.

105. *Warner Music drops Imeem suit, forms partnership*, REUTERS (July 12, 2007), <http://www.reuters.com/article/idUSN1226729920070712>.

106. Press Release, Sony Music, *Imeem Announces Content Agreement with Sony BMG Music Entertainment* (Sept. 28, 2007), <http://press.sonymusic.com/2007/09/28/imeem-announces-content-agreement-with-sony-bmg-music-entertainment/> (<http://www.sonymusic.com/posts/50-imeem-announces-content-agreement-with-sony-bmg-music-entertainment>).

107. Erick Schonfeld, *Imeem Adds EMI to Its Stable*, TECH CRUNCH (Oct. 27, 2007), <http://techcrunch.com/2007/10/29/imeem-adds-emi-to-its-stable/>.

108. Press Release, SMP, *imeem Strikes Deal with Universal Music Group* (Dec. 10, 2007), <http://www.socialmediaportal.com/PressReleases/2007/12/imeem-Strikes-Deal-withUNIVERSAL-MUSIC-GROUP.aspx>.

109. A one-year "experimental agreement," signed in December 2006, where the SPPF acts directly with Dailymotion on behalf of all its users. See Jondet Nicolas, *The Silver Lining in Dailymotion's Copyright Cloud*, JURISCOM.NET (Apr. 19, 2008), available at <http://ssrn.com/abstract=1134807>.

110. Press Release, Warner News, *Warner Music Group and Dailymotion Announce Video Content Partnership* (Mar. 5, 2010), <http://www.wmg.com/newsdetails/id/8a0af8122718229f01272fda125d0f97>.

111. *EMI Music and Dailymotion Announce a Global Music Video Partnership*, DAILYMOTION BLOG (Feb. 11, 2010),

October 2007, Dailymotion signed additional revenue-sharing deals with Turner Broadcasting Europe (a subsidiary of Time Warner) and USPA (L'Union Syndicale de la Production Audiovisuelle), which represents producers of television shows.¹¹³

B. *YouTube's Content Partnerships as a Case Study*

YouTube was initiated in February 2005, when three ex-PayPal employees were looking for a way to easily share videos from a dinner party with a small circle of friends.¹¹⁴ “When we registered the YouTube domain on February 14, 2005, we set out to create a place where anyone with a video camera and an Internet connection could share a story with the world,” Chad Hurley, YouTube’s co-founder and current CEO, wrote on the company’s blog a few months ago.¹¹⁵ YouTube grew at an astounding rate as users kept uploading personal videos to share with friends. In November 2006, within a year of its launch, YouTube was purchased by Google Inc. for \$1.65 billion in stock.¹¹⁶ Today, YouTube is the world’s largest repository for video clips on the Internet, with over 48 hours of video uploaded to YouTube every 60 seconds¹¹⁷ and hundreds of millions of videos watched every day.¹¹⁸ YouTube’s popularity in its first years was mainly due to the copyrighted material users uploaded to the site. Because the site’s acquisition by Google provided copyright holders a deep pocket to target, some of them, led by Viacom, which sued the site for more than \$1 billion, started suing YouTube for copyright infringement.¹¹⁹ Attempting to avoid lawsuits and to make YouTube a better source for

<http://blog.dailymotion.com/index.php/page/2/http://blog.dailymotion.com/en/index.php/2010/02/11/emi-music-and-dailymotion-announce-a-global-music-video-partnership/>.

112. Jondet, *supra* note 110.

113. *Id.*

114. Ernie Smith, *20 Highlights From YouTube's First Five Years*, AOL NEWS (Feb. 17, 2010), <http://www.aolnews.com/tech/article/20-highlights-from-youtubes-first-five-years/19362101>.

115. Chad Hurley, *YouTube & the Online Video Revolution*, BROADCASTING OURSELVES ;) THE OFFICIAL YOUTUBE BLOG (Feb. 14, 2010), <http://youtube-global.blogspot.com/2010/02/youtube-online-video-revolution.html>.

116. Paul R. La Monica, *Google to buy YouTube for \$1.65 Billion*, CNN MONEY (Oct. 9, 2006, 5:43 PM), http://money.cnn.com/2006/10/09/technology/googleyoutube_deal/index.htm?cnn=yes.

117. *Thanks, YouTube community, for two BIG gifts on our sixth birthday!*, BROADCASTING OURSELVES ;) THE OFFICIAL YOUTUBE BLOG (May. 25, 2011), <http://youtube-global.blogspot.com/2011/05/thanks-youtube-community-for-two-big.html>.

118. *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Nov. 18, 2011).

119. Don Reisinger, *In just five years, YouTube became the go-to video site*, L.A. TIMES (Feb. 15, 2010), <http://latimesblogs.latimes.com/technology/2010/02/youtube-fifth-birthday.html>.

profit, Google has entered into content partnerships with various music and entertainment companies.

The first Second Level Agreement took place in 2006, when YouTube announced a video distribution and revenue partnership with Warner Music Group.¹²⁰ According to YouTube's press release, under the "first-of-its-kind arrangement, YouTube users will be able to incorporate music from WMG's recorded music catalog into the videos they create and upload onto YouTube."¹²¹ Less than a month later, YouTube formed similar arrangements with Sony BMG Music Entertainment,¹²² Vivendi's Universal Music Group,¹²³ and CBS Corporation.¹²⁴ After signing another agreement with EMI on May 2007, YouTube succeeded in licensing content from all four major music conglomerates in the United States.¹²⁵ Additional pacts were made with the NBA,¹²⁶ Chelsea Football Club,¹²⁷ Sony Pictures, Lionstage, Starz,¹²⁸ and more.¹²⁹

The first set of Second Level Agreements involved months of negotiations, and focused by and large on user uploaded content (original materials, derivative works and reproductions). The press release following the first YouTube-Warner pact emphasized the role of users and their benefits under the new arrangement. The same tendency was noticeable in the following agreement with Universal Music Group:

120. Press Release, *supra* note 7.

121. *Id.*

122. Press Release, YouTube, Sony BMG Music Entertainment Signs Content License Agreement with YouTube (Oct. 6, 2006), <http://www.marketwire.com/press-release/sony-bmg-music-entertainment-signs-content-license-agreement-with-youtube-697542.htm>.

123. Press Release, YouTube, Universal Music Group and YouTube Forge Strategic Partnership (Oct. 9, 2006), <http://www.marketwire.com/press-release/universal-music-group-and-youtube-forge-strategic-partnership-697518.htm>.

124. *CBS and YouTube Strike Strategic Content and Advertising Partnership*, CBS CORPORATION (Oct. 6, 2006), available at <http://www.cbcorporation.com/news-article.php?id=23http://www.thefutoncritic.com/news/2006/10/09/cbs-and-youtube-strike-strategic-content-and-advertising-partnership-22498/20061009cbs01/> (last visited Nov. 18, 2011).

125. Press Release, YouTube, EMI Music, Google and YouTube Strike Milestone Partnership (May 31, 2007), <http://www.marketwire.com/press-release/EMI-Music-Google-and-YouTube-Strike-Milestone-Partnership-737984.htm>.

126. Eric Bangeman, *YouTube, NBA Sign Content Deal*, ARS TECHNICA (Feb. 27, 2007), <http://arstechnica.com/old/content/2007/02/8930.ars>.

127. Rhys Blakely, *Chelsea Signs YouTube Deal*, TIMES ONLINE (Feb. 16, 2007), http://business.timesonline.co.uk/tol/business/industry_sectors/media/article1396564.ece.

128. Greg Sandoval, *YouTube Signs Sony, Preps Site for Studio Content*, CNET NEWS (Apr. 16, 2010), http://news.cnet.com/8301-1023_3-10221459-93.html.

129. Miguel Helft, *Google Courts Small YouTube Deals, and Very Soon, a Larger One*, N.Y. TIMES (Mar. 2, 2007), http://www.nytimes.com/2007/03/02/technology/02google.html?_r=1.

In addition, under this agreement, *UMG broadly embraces the power and creativity of user-generated content, allowing users to incorporate music from UMG's recorded music catalog into the videos they create and upload onto YouTube.* UMG and its artists will be compensated not just for UMG produced videos *but also for the unique, user created content that incorporates UMG music.*¹³⁰

The licensing agreement with Sony BMG deviated slightly from the depicted course, and did not explicitly include UGC as part of the deal. Instead the parties agreed to “work together to develop new and exciting opportunities which allow users to include certain SONY BMG sound recordings in their own uploads, adding to the Internet’s most vibrant video entertainment destination.”¹³¹ Derivatively, it was also stated that Sony BMG will “work with YouTube to expeditiously remove certain copyrighted materials which are not available for exhibition on the site.”¹³²

The following partnership with EMI also underlined the use of copyrighted materials in UGC, tagging the pact as “a landmark agreement which will give YouTube users unprecedented access to authorized videos and recordings from EMI Music artists, *including those featured in user generated content*”.¹³³ However, a new, more standardized method for Second Level Agreements emerged as the press release specifically referred to “YouTube’s industry-leading content management tools, which feature a content identification and reporting system that will help EMI track and monetize its content and compensate its artists.”¹³⁴ Similar to the arrangement in the YouTube-Sony partnership, and most likely pursuant to the new content identification technology, EMI would be able to “request the removal of EMI’s copyrighted content from YouTube.”¹³⁵

In 2007, YouTube also launched AudioSwap, a feature that allows users to easily replace audio in a clip with musical tracks from a library being built with help from artists with whom YouTube has content distribution deals.¹³⁶ The most notable deal in this context was YouTube’s partnership with the sonic branding and music-licensing

130. Press Release, *supra* note 124 (emphasis added).

131. Press Release, *supra* note 123.

132. *Id.*

133. Press Release, *supra* note 126 (emphasis added).

134. *Id.*

135. *Id.*

136. *YouTube AudioSwap*, YOUTUBE, http://www.youtube.com/audioswap_main. See Pete Cashmore, *YouTube Launches AudioSwap—Keeping the RIAA Happy?*, MASHABLE-THE SOCIAL MEDIA GUIDE (Feb. 23, 2007), <http://mashable.com/2007/02/23/youtube-audioswap/>.

agency Rumblefish.¹³⁷ The AudioSwap option, however, is limited to adding the audio track as is to the video, with no option of editing the video (e.g., slowing the music at some points, cutting irrelevant segments, etc.).¹³⁸ In this sense, the AudioSwap agreements heralded a drift towards standardizing Second Level Agreements.

Another expression of the said standardization tendency is the development of content identification technology—usually referred to as “Content ID.” While it appears that YouTube still negotiates individually with major content owners, the Content ID system makes the licensing process shorter, clearer, and more efficient. To enjoy the system’s advantages, rights holders must deliver YouTube reference files (audio-only or video) of their content, metadata describing that content, and policies on what they want YouTube to do in case of a match.¹³⁹ The system then compares videos uploaded to YouTube against those reference files, automatically identifies the copyrighted content, and applies the preferred policy: monetizing through ad revenue share, track, or block. The move into a standard process through YouTube’s Content ID has panned out to be a successful business model, with every major U.S. network broadcaster, movie studio, and record label using it.¹⁴⁰ Over 1,000 content owners have uploaded to the system more than 1 million reference files (more than 100,000 hours of material).¹⁴¹ The vast majority of copyright holders elect not to remove infringing content, but to monetize it by linking to official content or overlaying it with ads.¹⁴²

Common UGC, however, has turned out to be a poor source for advertisement revenue. While people are prepared to view commercials and ads when watching professional content, they are for the most part

137. *YouTube Taps Rumblefish for Music Catalog Access*, RUMMBLEBLOG (Mar. 12, 2008), http://rumblefish.com/blog/2008/12/03/youtube-taps-rumblefish-for-music-catalog-access/http://pressrelease.omani.ac/submit/youtube_taps_rumblefish_for_music_catalog_access.

138. *See Music tracks in my video*, YOUTUBE HELP FORUM (Apr. 18, 2010), http://www.google.com/support/forum/p/youtube/thread?tid=13d5fbc81b1ec530&hl=en&search_impression_id=39ffb07e000b57f1%3A1283ae2f862&search_source=related_question (“Fair enough there is a feature called AudioSwap—which enables you to choose from a fair selection of music and overwrite your audio track with whatever track you pick from their AudioSwap library. But how are you supposed to edit your video clips, especially where I want the clips to change in time to the music?”).

139. *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Nov. 18, 2011).

140. Kyle Harrison, *Over 1,000 content owners now using Content ID*, YOUTUBE BIZ BLOG (Sept. 16, 2009), <http://ytbizblog.blogspot.com/2009/09/over-1000-content-owners-now-using.html>.

141. *Id.*

142. Liz Gannes, *From Monitor to Monetize: The Evolution of YouTube Content ID*, NEW TEE VEE (Sept. 28, 2009), <http://newteevee.com/2009/09/28/from-monitor-to-monetize-the-evolution-of-youtube-content-id/>.

unwilling to do so when it comes to UGC.¹⁴³ Furthermore, advertisers have found that user-created videos of pet pratfalls and oddball skits are largely incompatible with commercials for cars and other products.¹⁴⁴ With the costs of bandwidth and storage to stream more than 5 billion clips a month far exceeding YouTube's revenue from advertising, YouTube has been striving to attract more professionally produced videos to lure higher-priced advertisements.¹⁴⁵

The imperative of making YouTube profitable brought about a shift from centering on authorized UGC to offering a vast library of professionally-produced videos. YouTube entered deals to provide on-demand premium short clips, e.g., the partnerships with BBC,¹⁴⁶ Channel 4,¹⁴⁷ Disney,¹⁴⁸ and Time Warner.¹⁴⁹ YouTube has also signed pacts to broadcast full episodes of popular TV shows and even full length films,¹⁵⁰ to stream live events (e.g., major sporting events,¹⁵¹

143. Yonatan Sela, *Should a Video Website Include UGC?*, TVINCI BLOG (July 1, 2009), <http://www.tvinci.com/blog/?p=10>.

144. Brad Stone, *Brooks Barnes, MGM to Post Full Films on YouTube*, N.Y. TIMES (Nov. 9, 2008), http://www.nytimes.com/2008/11/10/business/media/10mgm.html?_r=1.

145. Brian Stelter & Miguel Helft, *Deal Brings TV Shows and Movies to YouTube*, N.Y. TIMES (Apr. 16, 2009), <http://www.nytimes.com/2009/04/17/business/media/17youtube.html> [hereinafter Stelter & Helft].

146. Press Release, BBC, *BBC and YouTube Partner to Bring Short-Form BBC Content to Online audiences* (Mar. 2, 2007), http://www.bbc.co.uk/pressoffice/pressreleases/stories/2007/03_march/02_you_tube.shtml.

147. See YouTube-Channel 4 Partnership, *supra* note 101.

148. Press Release, Disney, *DISNEY/ABC Television Group and ESPN Reach Landmark Agreement* (Mar. 30, 2009), http://corporate.disney.go.com/news/corporate/2009/2009_0331_you_tube.html.

149. Time Warner Newsroom, *Time Warner and YouTube Reach Agreement to Post Huge Array of Short-Form Clips From Movies, Television Shows and News Reports*, TIME WARNER (Aug. 19, 2009), <http://www.timewarner.com/corp/newsroom/pr/0,20812,1917436,00.html>http://www.timewarner.com/newsroom/press-releases/2009/08/Time_Warner_YouTube_Reach_Agreement_to_Post_Huge_Array_08-19-2009.php.

150. YouTube reached an agreement with HBO to stream full length episodes of HBO's original series, "In Treatment" on HBO YouTube Channel. See Press Release, YouTube, *It's Not TV; It's HBO . . . On YouTube; HBO Launches Official YouTube Channel* (Feb. 25, 2008), <http://www.fiercewireless.com/press-releases/its-not-tv-its-hbo-youtube-hbo-launches-official-youtube-channel>. YouTube also announced an agreement to show some full-length television shows and films from Metro-Goldwyn-Mayer Studios (MGM). See Press Release, YouTube, *MGM Partners with YouTube to Launch Several New Channels Featuring Fan-Favorite Clips, Full-Length Clips, Full-Length TV Shows and Films* (Nov. 10, 2008), <http://www.pressreleasepoint.com/mgm-partners-youtube-launch-several-new-channels-featuring-fanfavorite-clips-fulllength-tv-shows-and>.

151. In January 2009, YouTube announced its first worldwide sports deal to stream Indian Premier League (IPL) cricket matches live online. The agreement enabled YouTube to have the rights to broadcast the cricket matches all over the world, not just in markets where the IPL has not sold TV rights. See Mark Sweney, *YouTube Confirms Worldwide Deal for Live Indian Premier*

concerts,¹⁵² etc.), and to offer video rentals.¹⁵³ All these agreements are not Second Level Agreements for they target the passive end-users rather than the users-providers addressed by Second Level Agreements.

The YouTube case has demonstrated the progression of the Second Level Agreements practice through two, somewhat conflicting, market developments. On the one hand, the gradual shift towards an efficient standard licensing process (enabled by identification and filtering technology and the AudioSwap library) has curtailed transaction costs and consequently encouraged the growth of the Second Level Agreements practice. On the other hand, the inadequacy of UGC to provide an appropriate advertising medium has incentivized platforms to seek alternative revenue generators, thus moving down the place of UGC in the platform's licensing priority.¹⁵⁴

While YouTube is a befitting representation of the depicted movements, one could also find them in other UGC platforms. Social networking website, MySpace, has employed content identification technologies to enable copyright owners to monetize their content.¹⁵⁵ At the same time, MySpace recognized that although UGC accounts for a majority of videos consumed in the United States, the bulk of revenues comes from premium content. MySpace's video vice president stated "we have seen big increases in premium intent viewing over UGC.

League Cricket, GUARDIAN UK (Jan. 20, 2009), <http://www.guardian.co.uk/media/2010/jan/20/youtube-live-indian-premier-league>. The deal turned out to be a major success for YouTube as YouTube's IPL Cricket has currently over 49.5 million views. See Jason Kincaid, *YouTube's IPL Cricket Streams Near 50 Million Views, Blow Away Internal Expectations*, TECH CRUNCH (Apr. 23, 2010), <http://techcrunch.com/2010/04/23/youtubes-ipl-cricket-streams-near-50-million-views-blow-away-internal-expectations/>.

152. See Jarrett Martineau, *YouTube to Stream Live Concert Event*, YOUTUBE (Mar. 10, 2008), <http://www.nowpublic.com/tech-biz/youtube-stream-live-concert-event> [YouTube Live Channel Account Closed].

153. Rosemary Black, *YouTube's Video Rental Service Debuts Tomorrow with Five Indie Films*, NY DAILY NEWS (Jan. 21, 2010), http://www.nydailynews.com/money/2010/01/21/2010-01-21_youtubes_video_rental_service_debuts_tomorrow.html. See also *YouTube Store*, YOUTUBE.COM, <http://www.youtube.com/store> (last visited Nov. 18, 2011).

154. Some are expecting this tendency to increase in the future: "By 2011, ad-funded free to view TV shows will account for 10 times more consumption than paid. By 2012, premium TV programming will have 10% more consumers than user-generated." Matt O'Hern, *User Generated Content is Dead*, MARKETING SHIFT—ONLINE MARKETING BLOG (Dec. 9, 2008), <http://www.marketingshift.com/2008/12/user-generated-content-is-dead.cfm>.

155. Jason Kincaid, *MySpace, Auditude, and MTV Have just Figured out how to Monetize Online Video*, TECH CRUNCH (Nov. 2, 2008), <http://techcrunch.com/2008/11/02/myspace-auditudo-and-mtv-have-just-figured-out-how-to-monetize-online-video/>.

Premium content views probably close to doubled in the last year.”¹⁵⁶ The leading European UGC platform, Dailymotion, also went through the same process, as it employs identification technologies and has entered several content partnerships with copyright owners to broadcast various kinds of content to their users.¹⁵⁷ Another example is the social networking site imeem, which announced in March 2007 a partnership with SNOCAP, a music technology company. The parties agreed to launch a content identification registry system to enable artists to monetize their works when shared on imeem.¹⁵⁸ From its early days, imeem permitted users to interact with each other by streaming, uploading, and sharing music and music videos. However, in June 2009, imeem announced they were “simplifying” their website and deleting all user-generated photos and videos, because of costs and concerns over their return on investment.¹⁵⁹ With virtually no return of imeem’s investment, as advertisers aren’t interested in seeing their content next to amateur videos, there wasn’t any reason left for hosting UGC.¹⁶⁰

C. *The Sphere of Second Level Agreements*

Although Second Level Agreements have turned out to be a common practice within the operation of UGC platforms, a clear distinction must be made between different types of platforms. While audio and video UGC are widely governed by Second Level Agreements, image-sharing, blogs, and fan fiction websites are not. Even though complaints about mass infringement on photo-sharing websites are widespread, there have been no reported content partnerships involving photo-sharing hosts.¹⁶¹ The same applies to

156. Erick Schonfeld, *Visible Measures Now Tracking Videos at MySpace*, TECH CRUNCH (Apr. 14, 2009), <http://techcrunch.com/2009/04/14/visible-measures-now-tracking-videos-at-myspace/>.

157. Jondet, *supra* note 110.

158. Press Release, *supra* note 109.

159. Frederic Lardinois, *imeem Wants to Simplify Its Service - Deletes All User-Generated Photos and Videos*, READ WRITE WEB (June 26, 2009), http://www.readwriteweb.com/archives/imeem_wants_to_simplify_its_service_deletes_all_photos_videos.php.

160. *Id.*

161. *E.g.*, Mary Tafoya, *Shame on Picasa*, MARY TAFOYA BLOG (May 15, 2008), <http://seriousbeader.blogspot.com/2008/05/shame-on-picasa.html> (describing the case of a Picasa user who uploaded 53 public albums, all of which are full of scans of copyrighted books); Ian L. Sitren, *Flickr Member Copyright Infringement (theft)*, SPORTS SHOOTER MEMBER MESSAGE BOARD (Nov. 15, 2007), http://www.sportshooter.com/message_display.html?tid=27195 (complaining about a Flickr member who posted on his account 193 of Ian’s photos).

blogs, where copyright infringements occur all the time.¹⁶² Fan fiction websites, by their nature, invite extensive copyright infringements.¹⁶³ Still, no agreements have been reported between fan fiction platforms and copyright owners.¹⁶⁴

Not only have Second Level Agreements been employed exclusively by certain types of platforms, these agreements have also covered only certain types of content. This is why copyright infringement in photographs is omnipresent on websites like YouTube and MySpace, regardless of their engagement in many content partnerships.¹⁶⁵ Images are currently not included in any Second Level Agreement for several reasons. First, it is possible that Second Level Agreements do not offer identification of images within a video because, while contemporary technologies can enable right owners to identify and locate images used on the Internet,¹⁶⁶ images currently cannot be

162. In October 2006, Paparazzi photo agency, X17, sued celebrity gossip blogger Mario Lavandeira (aka Perez Hilton) for allegedly posting its photographic images without permission. In January 2008, the parties reached a settlement and on April 21, 2008, the court dismissed the case without prejudice. For a full description of the case, see *X17 Inc. v. Lavandeira*, CITIZEN MEDIA LAW PROJECT (Sept. 10, 2007), <http://www.citmedialaw.org/threats/x17-inc-v-lavandeira#description> (case discussed on the website is: *X17 Inc. v. Lavandeira*, 563 F. Supp. 2d 1102 (C.D. Cal., 2007)).

163. While many scholars advocate recognizing fan fiction as fair use, fan fiction is generally considered copyright infringement. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997) (calling to recognize certain types of fan fiction as fair use); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 598-601 (2007); Rachel L. Stroude, *Complimentary Creation: Protecting Fan Fiction as Fair Use*, 14 MARQ. INTELL. PROP. L. REV. 191 (2010).

164. While some authors invite and encourage fan fiction (e.g., Star Trek creator Gene Roddenberry and Paramount Pictures, who publicly approved noncommercial Star Trek fan fiction), some authors (such as Anne Rice) have publicly asked fans to refrain from writing fan fiction. See Lee, *supra* note 6, at 1532-33.

165. For example, Richter Scales, a San Francisco-based choral group made a video named "Here Comes another Bubble," where the group mixed original imagery with photos found online, and set satirical lyrics about the Silicon Valley lifestyle to Billy Joel's "We Didn't Start the Fire." The video quickly became a hit on YouTube, generating over one million views. However, photographer Lane Hartwell, whose photograph appeared in the video, got the video removed from YouTube based on a claim of copyright infringement. See Lewis Wallace, *Why Lane Hartwell Popped the 'Bubble' Video*, WIRED (Dec. 14, 2007), <http://www.wired.com/entertainment/theweb/news/2007/12/photographers>. Following Hartwell's complaint, the offending image was removed and the video is now back on YouTube. See *Here Comes Another Bubble v.1.1—The Richter Scales*, YOUTUBE (Dec. 17, 2007), http://www.youtube.com/watch?v=l6IQ_FOCE6I.

166. E.g., PICSCOUT—EVERY IMAGE GETS ITS CREDIT, <http://www.picscout.com/> (PicScout is an information company that maintains a large index of fingerprinted and owner identified images, and enables its clients to protect and promote image usage across digital platforms and devices by using the company's image recognition fingerprinting technology.).

detected under existing video identification technologies. Second, supposedly following the lack of relevant identification technologies, a relatively small amount of infringement is being reported. With rather few cases of detected copyright infringement in images, there is virtually no incentive for platforms to engage in Second Level Agreements with copyright holders. In addition, when compared to music and motion pictures, images were never too expansive due to their limited popularity. With the web offering a vast amount of free images, the average unit cost per image has decreased even more, making it a less desirable product for platforms' users.¹⁶⁷

The absence of Second Level Agreements for image use has mainly two consequences. First, Second Level Agreements have shifted the burden of paying for the identification technology and monitoring UGC from the copyright owner to the platform's operator. For example, music labels have employed identification technologies long before Second Level Agreements became a ubiquitous practice. Between 2002-04, Universal Music Group¹⁶⁸ and EMI¹⁶⁹ signed agreements with Audible Magic, a provider of content management and anti-piracy services, to provide audio fingerprinting services to identify copyrighted music on the Internet. Notwithstanding these pacts, when the labels formed Second Level Agreements with platforms owners, the burden to initiate and maintain identification and filtering systems was imposed on the latter. Because operators of photo-sharing platforms never entered any Second Level Agreement, no similar shift of burden occurred, thus right holders in images still bear the costs of tracking their content over the Web. Second, image right holders often choose the course of either Creative Commons licensing¹⁷⁰ or tolerated use. Many of them post their photographs on photo-sharing platforms with full awareness of the likely possibility that others will use these photos.

The centralization of the Second Level Agreements practice in video and audio content can be grounded in two additional explanations.

167. OECD, PARTICIPATIVE WEB AND USER CREATED CONTENT—WEB 2.0, WIKIS AND SOCIAL NETWORKING 61 (2007).

168. Press Releases, Audible, Magic Forms Agreement with Universal Music Group to Support its RepliCheck Anti-Piracy System (Aug. 12, 2003), <http://www.audiblemagic.com/news/press-releases/pr-2003-08-12.asp>.

169. Evan Hansen, *EMI, Audible Magic ink anti-piracy deal*, CNET (Apr. 21, 2001), <http://news.cnet.com/2100-1023-963756.html>.

170. For example, in March 2010, the estimated number of Creative Commons licensed images on Flickr was 135 million. For detailed statistics, see Mike Linksvayer, *Creative Commons licenses on Flickr: many more images, slightly more freedom*, CREATIVE COMMONS NEWS (Mar. 10, 2010), <http://creativecommons.org/weblog/entry/20870>.

The first is the linking and embedding options, offered by many content websites, and the second is the nature of non-audio and video UGC platforms and copyright owners. Linking and embedding are common in certain social networks sites (like Facebook), where the use of copyrighted materials is omnipresent. Many bloggers also usually embed photos and videos to illustrate their posting. The code that embeds an element is merely a text guiding the computer's Internet browser to the location of the specified file.¹⁷¹ Recently the embedding function has been enhanced, as some major blogging platforms have come to facilitate the reproduction of content from other websites by offering a "reblog" feature.¹⁷² "Reblogging" is much the same as embedding; it enables the blogger to compose a new post housed on the blog suffixed with the headline, description, thumbnail, and link to the source material.¹⁷³

Major video streaming sites, including YouTube, allow most of their files to be embedded in other websites.¹⁷⁴ Some photo-sharing websites also offer embedding features, although only the account holder, usually the person who uploaded the photographs, is authorized for such use.¹⁷⁵ Twitter,¹⁷⁶ a social networking and micro blogging

171. Jason J. Lunardi, *Guerrilla Video: Potential Copyright Liability for Websites that Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1077, 1081 (2009).

172. TUMBLR, <http://www.tumblr.com/> (pioneered the reblog concept, enabling its users to repost content from another blog). WordPress, the top host of blogs, added a "reblog" feature in June 2010. *We All Like to Reblog*, WORDPRESS, <http://en.blog.wordpress.com/2010/06/01/we-all-like-to-reblog/>. The makers of Movable Type offer a reblog feature. *reBlog*, MOVEABLE TYPE, <http://plugins.movabletype.org/reblog/>. Google Blogger provides a BlogThis extension, which can be added to the browser's toolbar, to create a mini-interface to Blogger, presented with a link to the web page the blogger is visiting. *What is BlogThis?!*, GOOGLE, <http://www.google.com/support/blogger/bin/answer.py?hl=en&answer=41469>.

173. Mark Milian, *Reblog this at your own legal risk*, L.A. TIMES (June 9, 2010), <http://latimesblogs.latimes.com/technology/2010/06/reblog-copyright.html>.

174. YouTube, however, also allows its users to disable the embedding feature on videos they post, at their discretion. See *Can I enable or disable the option to embed my videos?*, GOOGLE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=74648>. This is also true as to YouTube's content partners. EMI decided to block embedding functions on YouTube because the embedded videos could not be monetized. See Liz Ohanesian, *Why EMI's YouTube Policy Is Short-Sighted*, LA WEEKLY BLOGS (Jan. 20, 2010), <http://blogs.laweekly.com/westcoastsound/synthful/emi-youtube-ok-go/>.

175. Flickr, for example, allows users to upload photos to their account and then embed them either as individual images or as a slideshow. See Brian Herzog, *Embedding Content in Websites*, SWISS ARMY LIBRARIAN (June 17, 2008), <http://www.swissarmylibrarian.net/2008/06/17/embedding-content-in-websites>.

176. TWITTER, <http://twitter.com>.

platform, also put into practice a “retweet” (“RT”) feature, which allows its users to instantly repost messages with credit to the originator.¹⁷⁷

The legal status of linking, embedding, reblogging, and retweeting is unclear. While uploading copyrighted content to a video hosting site by unauthorized users may strike one as an obvious copyright infringement, it does not seem as obvious if a site merely links to content that is already available on the Internet elsewhere.¹⁷⁸ While the legality of embedding content exceeds the boundaries of this discussion, it is safe to argue that in cases of linking to infringing content without authorization, and absent a fair use defense, the secondary liability potential is fairly high.¹⁷⁹ Yet, probably due to the practice of tolerated use as well as current Second Level Agreements covering some of the embedded content, embedded content is boundless over the Internet. With the ability to embed, which rarely encounters any demand of removal by the copyright owner, blog operators have little incentive to engage in Second Level Agreements.

The practice of Second Level Agreements has also not extended to photo-sharing, blogs and fan fiction websites due to the non-concentrated nature of the potential parties. Photographers, fan fiction writers, and other authors, though they may be joined under some organization,¹⁸⁰ often distribute their works as individuals or through small companies. When a platform wishes to license the use made by its users, it is easier and cheaper to do so with one representative of several

177. *What Is Retweet? (RT)*, TWITTER (Nov. 10, 2009), <http://help.twitter.com/forums/10711/entries/77606-what-is-retweet-rt>.

178. Bloggers started debating the legality of embedding back in 2007. The Blog Herald suggested that bloggers could be held liable for embedding and infringing video on their sites. Jonathan Bailey, *Copyright Risks in Embedding YouTube Clips*, THE BLOG HERALD (July 9, 2007), <http://www.blogherald.com/2007/07/09/the-copyright-risk-of-embedding-youtube-clips/>. Fred von Lohmann argued that an embedded YouTube video is just a link so “there is no reason to be concerned about potential liability.” Fred von Lohmann, *YouTube Embedding and Copyright*, ELECTRONIC FRONTIER FOUNDATION DEEPLINKS BLOG (July 9, 2007), <http://www.eff.org/deeplinks/2007/07/youtube-embedding-and-copyright>. Another post on Techdirt made a similar observation, stating that “[a]ll you’ve done is put a single line of HTML on your page.” Mike Masnick, *Is it Copyright Infringement to Embed an Infringing YouTube Video on Your Blog?*, TECHDIRT (July 3, 2007), <http://www.techdirt.com/articles/20070703/144358.shtml>. Nonetheless, academic study of this issue is sparse, as only two law review articles discussing the question could be found: Seth A. Metsch, *Embedded Media: Apps, Widgets, RSS and Embedded Content*, 978 PLI/PAT 235 (2009), and Lunardi, *supra* note 172. While Lunardi focuses on websites with embedded copyrighted video through in-line links, what he refers to as “indexing websites,” he does not analyze users embedded. His review is helpful in the latter embedding context too.

179. See Metsch, *supra* note 179, at 245-47, and Lunardi, *supra* note 172, at 1116-25.

180. *E.g.*, PPA—PROFESSIONAL PHOTOGRAPHERS OF AMERICA, <http://www.ppa.com/>; APA—ADVERTISING PHOTOGRAPHERS OF AMERICA, <http://www.apanational.com/>; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, <http://www.nppa.org/> (last visited Nov. 18, 2011).

copyright owners, rather than to negotiate each license separately. In this sense, the fact that many of the copyrights in music and motion pictures belong to a small number of companies enabled the practice of Second Level Agreements to flourish. The same applies to the platforms; while it seems that blogs, fan-fiction, and photo-sharing websites adhere to a model of many small-scale websites,¹⁸¹ video and audio platforms operate within a much larger scale.¹⁸² The practical outcome of this observation is that video and audio platforms can offer exposure to a larger audience composed of both users-consumers and users-providers, which makes them more attractive partners for Second Level Agreements.

In the following sections, I attempt to analyze the positive and negative aspects of the Second Level Agreements practice, offer some suggestions to ameliorate the practice to enhance certainty and transparency, and provide a prediction as to the agreements' future.

D. Second Level Agreements—Virtues and Vices

Second Level Agreements are new creatures in copyright practice. They clearly indicate that cyberspace is moving toward a model of consensual self-governance against a backdrop of enforceable legal framework. While these agreements represent many opportunities for copyright holders, users-consumers, and users-providers, they also involve some disadvantages that have to be considered. It seems that in their never-ending relationship with technology, copyright owners have learned some lessons from the past, and rather than fighting the advent of UGC platforms as a distribution method, they have chosen to join forces with these platforms. The Second Level Agreements practice evidences a preference of an agreement model over a culture of litigation and copyright infringements.

Although Second Level Agreements cannot offer compensation similar to that provided by traditional distribution models, they benefit copyright owners in several ways. First, copyright holders have a clear financial incentive to enter these agreements. Even though the precise monetary terms of current Second Level Agreements are not disclosed, it was made public that copyright owners receive consideration in the form

181. Of course, there are big and popular websites such as Flickr and Picasa, and Google itself offers a Blogging platform. Still, the popularity and success of these websites are far from YouTube or MySpace's magnitude.

182. This can be explained by the relatively expensive cost of storing videos and audio, compared to texts (blogs and fan-fiction) and images (blogs, fan-fiction, and photo-sharing platforms).

of company stakes, ad revenue share, or royalties.¹⁸³ Second, the practice of Second Level Agreements lowers monitoring costs for copyright owners with respect to content on UGC platforms, thereby enabling them to economize on enforcement costs (e.g., sending DMCA notices, litigation costs, etc.).¹⁸⁴ Because near-perfect enforcement of the widespread copyright infringement over the Internet is virtually impossible, Second Level Agreements not only reduce enforcement costs, but also monetize uses that otherwise would not be generating revenues.¹⁸⁵ The practice also lessens transaction costs, as copyright holders do not need to negotiate and execute individual licenses for a great number of users. Third, on top of their role as content distributors, UGC platforms are an excellent promotion means. Thanks to UGC platforms, copyright owners enjoy vast exposure and easy access to the copyrighted works of consumers and fans. Studies show that currently content owners are badly deficient in media progression, and that UGC platforms provide an excellent way for them to distribute their content extensively to old and new viewers.¹⁸⁶ Therefore, Second Level Agreements bestow upon copyright holders a form of “benefit basket”—an opportunity to save previously spent costs, and to gain further compensation for uses of their works.

Second Level Agreements are also advantageous to users. From a user-consumer perspective, the total of available works to consume accelerated dramatically with the rise of UGC platforms. Second Level Agreements boosted the said expansion, offering additional free content in better quality. The variety of works has broadened too, as Second Level Agreements involve not only professionally produced content, but also amateur works and derivative adaptations. Creative users enjoy the

183. For example, YouTube-WMG press release, states that: “YouTube and WMG will share revenue from advertising on both WMG music videos and user uploaded videos that incorporate audio and audiovisual works from WMG’s catalog.” *Supra* note 7.

184. For example, NBC Universal used to employ a staff of three to police the copyright violations made possible by YouTube and to send over one thousand notice and takedown requests. See Branwen Buckley, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 238-39 (2008).

185. Before Second Level Agreements were in play, many unauthorized uses were not even discovered by the copyright owner. Even when a copyright owner found her work being used in a user-created work, she could either ask for the removal of the content through a notice and takedown procedure, or tolerate the use. In neither of these choices could the copyright owner financially benefit from the use. Second Level Agreements added another choice by allowing right holders to monetize such uses.

186. See Steve Ragan, *YouTube Making Waves with Content Protection Offers*, MONSTERS AND CRITICS (Feb. 26, 2007), http://www.monstersandcritics.com/tech/news/article_1269205.php/YouTube_making_waves_with_content_protection_offers.

new practice as well because they may draw inspiration from a greater array of works, as more content is free and legally accessible. Their opportunities for creation also grew considerably in view of the fact that users can now borrow protected elements of previously existing works, and employ them in new works without the burdensome obligation to negotiate a license or compensate the right holder. Because many UGC platforms have to remove suspected infringing content pursuant to a DMCA notice, without Second Level Agreements, creative users had no creation alternatives and a great amount of speech would have been concealed. Second Level Agreements made a long progress towards alleviating this problem, as much of the derivative UGC currently remains online. Furthermore, Second Level Agreements have provided a unique opportunity for some creative users to disseminate their works on a larger scale, and even become professional providers of content.¹⁸⁷

Second Level Agreements, however, are not a panacea for all copyright dilemmas in the age of UGC. They involve some difficulties that must be seriously considered. First, Second Level Agreements have a significant effect on the legal state of users-providers, as they operate under a license to which they were not a party, and of whose terms they are not fully aware. Although users may learn some details as to the terms of the agreements through the media, users cannot get full disclosure of what they are allowed to do pursuant to a Second Level Agreement. Moreover, even though in practice UGC employing copyrighted content in accordance with an agreement will remain online, Second Level Agreements supposedly involve no legal consequences for users. Users are legally bound only by the platform's terms of service, which have not changed in accordance with the agreements. For example, even YouTube, the most common signatory of Second Level Agreements, states in its terms of service: "In connection with User Submissions, you further agree that you will not submit material that is copyrighted . . . unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein."¹⁸⁸ Under these terms of service, Second Level Agreements purportedly have no legal

187. Cory Williams made his break in 2007 when he uploaded a music video parody, which has been viewed more than 15 million times. With more than 80,000 subscribers to his videos, Williams earns \$17,000 to \$20,000 a month via YouTube. See Brian Stelter, *YouTube Videos Pull In Real Money*, N.Y. TIMES (Dec. 10, 2008), available at http://www.nytimes.com/2008/12/11/business/media/11youtube.html?_r=2 (last visited Nov. 18, 2011).

188. *YouTube Terms of Service 6(D)*, YOUTUBE, <http://www.youtube.com/t/terms> (last visited Nov. 18, 2011).

influence over users, as the latter are still required not to submit copyrighted materials, regardless of the fact that such content may be permitted under an existing pact.¹⁸⁹

The depicted state sends a mystifying message to UGC platforms' users. Active UGC website participants are usually well informed and generally familiar with the existence of Second Level Agreements. Such users normally understand that their infringing materials have not been removed pursuant to some copyright license acquired by the platform. Common unaware users, however, in a better scenario employ copyrighted materials believing that their infringement is not being detected or enforced, and in a worse scenario do not even realize that their actions may constitute copyright infringement.¹⁹⁰

In addition to the detrimental educational effect, the agreements' opacity has further consequence. Because Second Level Agreements do not involve users at any stage of the legal relationship, these pacts—formally speaking—only protect the platform. It is not clear, thus, what is the legal status of platforms' users under these agreements. Because a

189. MySpace Terms of Use Agreement follow the same path, in spite of their content deal with MTV: "MySpace respects the intellectual property of others, and requires that our users do the same. You may not upload, embed, post, email, transmit or otherwise make available any material that infringes any copyright, patent, trademark, trade secret or other proprietary rights of any person or entity." *Terms of Use Agreement*, MYSPACE, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (last visited Nov. 18, 2011).

190. *E.g.*, a question posted on YouTube's Help Forum by a user named amydiane197831 on September 2009: "I tried to upload a video w/ Bette Midler's song Wind Beneath My Wings and YouTube came back saying that I violated a copyright law with the song. I can't have a song on here by a famous artist that has a copyright. BUT i see SEVERAL YOUTUBE USERS WITH VIDEOS WITH SONGS THAT HAVE COPYRIGHTS! Some of them might've gotten permission by the record label, but not all of them had to. I see that they give credit on their video to the artist. I could do that, but how do I do that??" *Help forum*, YOUTUBE (Sept. 15, 2009), <http://www.google.com/support/forum/p/youtube/thread?tid=6d94739c48265476&hl=en>. See also a post on the same forum by missk on October 2009: "I don't understand why it is okay for some users to post material from other sources (i.e. TV shows, films, etc.) and not others. I will admit, I posted a show from another source [MTV-Viacom]. After a few days, my videos were taken down for copyright infringement, but there are other users with the same exact videos up and theirs are still there and have been for weeks. If it is copyright infringement for me, should it not be for them? I seriously doubt any of them got permission from Viacom to post that material." *Help forum*, YOUTUBE (Oct. 30, 2009), <http://www.google.com/support/forum/p/youtube/thread?tid=13ecbd1b27983fc0&hl=en>. See also post on YouTube Help forum by the user "djmambito": "My video blocked . . . same video not blocked 1000 others (Shakira—Waka Waka)." *Help forum*, YOUTUBE (June 13, 2010), <http://www.google.com/support/forum/p/youtube/thread?tid=737e8ba495e8d80d&hl=en>. Last, see a user complaint about YouTube's allegedly "discriminating" removal policy, posted by the user missk: "Why is YouTube so inconsistent with their 'so-called' copyright infringement rules?" *Help forum*, YOUTUBE (Oct. 30, 2009), <http://www.google.com/support/forum/p/youtube/thread?tid=13ecbd1b27983fc0&hl=en>.

claim of secondary liability cannot be established without direct infringement, the facilitator of the alleged infringing activity is immune from liability when the original user acts lawfully (e.g., pursuant to a license, in compliance with the fair use defense, etc.). Second Level Agreements, however, involve a license granted to the facilitator of the infringing activity, which is not formally conveyed to direct users through the platform-users agreement. Besides users' inability to know the authorized boundaries of their actions, copyright owners could theoretically demand to retain the right to sue individuals for direct infringements. In such case, it is unclear whether an exemption for a secondary infringer necessarily entails an exemption for the direct infringer. Although platforms' users would probably have a valid defense in cases of individual lawsuits,¹⁹¹ the absence of any formal indication of Second Level Agreements in the platforms' terms of use leaves users in a legal status akin to the one they have under tolerated use—unknown, unstable, and uncertain.

Second Level Agreements can also be criticized for hindering any potential illumination of current uncertainty surrounding a fair use analysis for uploaded UGC. When applying fair use standards to UGC, as well as to any other use, the outcome may vary greatly due to the context-dependent character of this defense.¹⁹² As a result, it is complicated for legal counsels, and for unprofessional users all the more so, to determine whether a certain uploaded content amounts to fair use. The obscurity is greater in the UGC context as currently there is no case law analyzing fair use for cases of uploaded UGC.¹⁹³ The field's relative

191. See *infra* Section VIII.i and accompanying text.

192. Sawyer, *supra* note 19, at 377.

193. This refers to February 2011. Most of the cases that scrutinized UGC uploads within the copyright sphere did so in the context of secondary liability. In December 2009, EMI Music imprints Capitol, Caroline, Virgin, and EMI Music Publishing filed a suit against Vimeo.com, alleging that the site infringes the plaintiff's copyrights by encouraging its users to post videos employing copyrighted music. This suit also centers on "lip dubs," homemade videos of fans lip-synching various songs. While the lawsuit is expected to revolve around secondary liability issues and DMCA safe harbors, it will also have to involve a decision as to whether "lip dubs" and similar mash-ups of amateur and professional content are infringing. The case is still in a very initial stage. Complaint for Direct, Contributory, and Vicarious Copyright Infringement, Inducement to Infringe Copyright, Misappropriation, and Unfair Competition, Capitol Records, LLC., v. Vimeo LLC., 2009 WL 4918771 (S.D.N.Y. Dec. 10, 2009) (No. 09 CV 10101). In *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), Stephanie Lenz was sent a takedown notice for posting a home video of her toddler stumbling through her kitchen, then hearing and bobbing to Prince's *Let's Go Crazy* on YouTube. Lenz then sent YouTube a DMCA counter-notification demanding that the video be re-posted because she claimed that the video constituted fair use of the song and, thus, did not infringe Universal's copyright. Lenz also brought suit against Universal, asking for a declaratory judgment that Lenz's home constitutes fair use, as well as damages, and

immaturity is not the only explanation for this scarcity. The liability discussion shifts to the platform's liability rather than to individual liability also because copyright owners target the facilitators of the violations. The basis for such lawsuits would usually be secondary liability, while fair use defense is attributed to a direct infringer. This course prevents cases of uploaded UGC from being litigated, and does not allow any judicial guidelines as to the application of the fair use defense to be developed.

Still, one could argue that Second Level Agreements enable users to avoid burdensome dilemmas as to the fairness of their use and save an unpleasant (and very costly) confrontation with powerful copyright holders. This argument, however, disregards two attributes of Second Level Agreements—their non-inclusiveness and their potential vulnerability. As previously demonstrated, Second Level Agreements are not inclusive for several reasons.¹⁹⁴ When platforms sign Second Level Agreements, it usually would not include all the works owned by the contracting copyright owner. The agreement may also refer only to some of the copyrighted elements of a work.¹⁹⁵ Moreover, copyright owners usually retain the right to demand the removal of content in specific cases. Consequently, an unknown amount of content is subject to pre-Second Level Agreements practice, i.e., tolerated use and DMCA procedure.

The non-inclusiveness issue raises another concern. So far, Second Level Agreements have involved contracting parties of certain characteristics only—top UGC platforms, major record labels, dominant media companies, etc. These characteristics can be encapsulated in three words—big, popular, and powerful. Aiming at minimizing transaction costs, economies of scale come once again into play. Platforms' owners are basically motivated to contract with big record labels, big media companies, and big copyright owners of all kinds. In order to employ

injunctive relief restraining Universal from bringing further copyright claims in connection with the video. However, the court did not analyze Lenz's use, and thus provided no guiding rules on the application of this defense to UGC upload.

194. See *supra* Section V.C.

195. The agreement between Google (YouTube) and Japan Rights Clearance Inc. exemplifies such a situation. Because this agreement involves only the copyright of lyrics and music, YouTube users are allowed to post videos of themselves or their friends performing karaoke or doing a cover of a popular song. They are not permitted, however, to deploy original sound recording or footage of a musical show on TV, because such acts would violate the copyrights of record companies and TV networks. See Asahi Shimbun, *Google to Pay Royalties to Japanese Firm for YouTube Uploads*, CHANNEL NEWS ASIA (Mar. 27, 2008), <http://www.channelnewsasia.com/stories/technologynews/view/337593/1.html>.

reasonable bargaining power to negotiate and execute such agreements without financially collapsing, the platform must be comparatively attractive. The platform must be able to offer sufficient benefits (i.e., demonstrate high potential revenue) or represent a considerable threat (i.e., create opportunities for mass infringement), so that conglomerates would have an incentive to form content partnerships with it. Hence, small copyright owners and small platforms are unlikely to engage in Second Level Agreements. Because Second Level Agreements involve the big players only, the smaller players may justifiably fear that the practice will be reserved for the elites only, systematically reinforcing their power in the market. While YouTube includes smaller content owners in its Partners Program,¹⁹⁶ where it pays people with a history of successfully viewed videos, the difficulty remains, for this program isn't tantamount to a Second Level Agreement. YouTube Partners Program applies mainly to users-providers.¹⁹⁷ Because YouTube does not allow other users to use copyrighted materials belonging to the partner, the Partner Program resembles an agreement with a premium content owner, which is aimed at offering content for consumption only.

Apart from their non-inclusiveness, Second Level Agreements also suffer from a crucial vulnerability pertaining to their duration, as the YouTube-Warner pact demonstrates. This agreement was about to expire two years after YouTube obtained the license.¹⁹⁸ The parties had renegotiated for a while, but breakdown in talks led to the removal of the entire Warner catalog from the website, including many creative user-generated videos.¹⁹⁹ It was only nine months later that the parties managed to agree and bring Warner's catalog back onto YouTube.²⁰⁰ Chris Maxcy, Director of YouTube Partner Development, provided some information about the new deal in a blog post on YouTube Blog: "Under this new, multi-year global agreement, you will be able to discover, watch, and share Warner music on the site. The partnership

196. *Partners with YouTube*, YOUTUBE, <http://www.youtube.com/partners>.

197. *What is the YouTube Partner Program?*, YOUTUBE, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=72851> (last visited on Nov. 18, 2011) (emphasis added) ("Our Partnership Program is a revenue-sharing program that allows creators and producers of original content to earn money from their popular videos on YouTube").

198. Peter Kafka, *Warner Music Group Disappearing From YouTube: Both Sides Take Credit*, THE WALL STREET JOURNAL (Dec. 20, 2008), <http://mediamemo.allthingsd.com/20081220/warner-music-group-disappearing-from-youtube-both-sides-take-credit/>.

199. *Id.* See also Greg Sandoval, *YouTube users caught in Warner Music spat*, CNET NEWS (Jan. 27, 2009), http://news.cnet.com/8301-1023_3-10150588-93.html.

200. Eliot Van Buskirk, *Warner's Music Returns to YouTube Following Nine Month Hiatus*, WIRED (Sept. 28, 2009), <http://www.wired.com/epicenter/2009/09/warner-music-group-signs-youtube-deal/#ixzz0n6jAWEAh>.

covers the full Warner catalog and includes user-generated content containing WMG acts.”²⁰¹ Nonetheless, it is not clear whether UGC incorporating Warner’s content is always allowed on YouTube, or if Warner retains the right to ask for the removal of videos at its discretion. Users’ discussions on various forums indicate that, regardless of YouTube’s license, Warner demands taking off UGC videos from time to time.²⁰²

Second Level Agreements are in force for a specific period, which is determined by the parties, and not always disclosed. Previous cases proved that neither renewing negotiations nor continuation of an old agreement are guaranteed.²⁰³ The reasons for not renewing an expired agreement can vary from lack of profitability or change in popularity, to a desire to equalize financial terms to those offered to other Second Level Agreements participants. Renegotiating Second Level Agreements can also lead to changing their terms in accordance with market demands. For example, a platform can choose to forego UGC and move into a premium content model, or to allow only pure reproductive UGC while forbidding derivative UGC.

Second Level Agreements can also be criticized for changing the governing regime of copyright practice without offering users, who are materially affected by such agreements, or other affected players,²⁰⁴ any opportunity to debate or participate in this reform. Acting as tools of self-regulation, contracts are the means by which the parties govern themselves, in a democratic way.²⁰⁵ Because this “law” binds only its makers, contractual relationship represents a democratic ideal of

201. Chris Maxcy, *Warner Music Comes Back to YouTube*, BROADCASTING OURSELVES ;) THE OFFICIAL YOUTUBE BLOG (Sept. 29, 2009), <http://youtube-global.blogspot.com/2009/09/warner-music-comes-back-to-youtube.html>.

202. For example, a thread on Ukulele Underground forum, Sebi, Posted *Ukulele covers on YouTube being removed by Warner Music Group*, UKELELE UNDERGROUND (Jan. 20, 2010), <http://www.ukuleleunderground.com/forum/showthread.php?25142-Ukulele-covers-on-Youtube-being-removed-by-Warner-Music-Group>; Spongeyday, Posted *Who is WMG and why are they claiming certain songs to be “Unauthorized?”*, YOUTUBE HELP FORUM (Feb. 19, 2010), <http://www.google.com/support/forum/p/youtube/thread?tid=33696a3b74bf2bf3&hl=en>.

203. For example, 600 videos by the members of the German collecting society (“GEMA”) were removed from YouTube after contract renewal talks broke down and were never renewed. See Wolfgang Spahr, *GEMA Talks with YouTube Break Down*, BILLBOARD.BIZ (May 10, 2010), http://www.billboard.biz/bbbiz/content_display/industry/e3i327b3ab8972bdc8e06c3f112824ccce8.

204. Such as small UGC platforms that may have to enter Second Level Agreements to conform to industry standards.

205. E. FARNSWORTH, CONTRACTS § 1.2, at 7 (1982) (“[T]he terms of such direct bilateral exchanges are arrived at voluntarily . . . Each party to an exchange seeks to maximize his own economic advantage on terms tolerable to the other party.”).

government, based on the consent of those governed by it.²⁰⁶ When this self-governance tool controls someone other than its makers, a troubling aspect arises. These ‘laws’ are the product of private ordering, as opposed to a public democratic process.²⁰⁷ The contracting parties are akin to private legislatures, who impose significant rules without contemplating the broader public interest that informs democratic rule making.²⁰⁸ Although Second Level Agreements virtually dominate the practice of mass production, they do not follow democratic ideals, for users neither have an option to democratically influence this private law, nor they are fully aware of its content. Not only does it mean that affected parties did not assent to existing Second Level Agreements, rendering them less legitimate, but it also implies that the interests of these effected parties may not have been considered or protected at all. As the motivation of UGC platforms has changed from maximizing users’ traffic to generating a shared revenue source based primarily on premium content, the economic interests of UGC platforms have moved closer to those of copyright owners and away from their users’ interests. Against this backdrop, there is a good reason to believe that while Second Level Agreements significantly influence many individual users, none of the parties have been concerned with the interests of these users. Hence, Second Level Agreements can be argued to inadequately protect the liberties and interests of other effected players.

Another flow of Second Level Agreements is their reliance on filtering technology. As previously described, a clear shift towards standardization of Second Level Agreements has occurred. One expression of this standardization is the increasing use of content identification technology by UGC platforms. Filtering technologies, however, have been widely criticized for being both under-inclusive by

206. Being common and impacting a vast amount of people, this model bears some resemblance to standard form contracts. Standard forms contracts were often characterized as private lawmaking—“If by making law we mean imposing officially enforceable duties or creating or restricting officially enforceable rights, then automobile manufacturers make more warranty law in a day than most legislatures or courts make in a year.” W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971). See also Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1139-42 (2006).

207. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 537 (1971).

208. For a broader discussion of cyberspace self governance, see Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395 (2000) (critiquing claim that a self-governing cyberspace would more fully realize liberal democratic ideals).

failing to identify all unlawful content,²⁰⁹ and over-inclusive, by failing to appropriately accommodate fair use.²¹⁰ Filtering systems are not equipped to produce the sort of balancing decisions called for by the fair use doctrine, as technology cannot apply itself to the qualitative character of a fair-use analysis, to contemplate external information into such analysis, or to appropriately handle the separable nature of mixed media (e.g., original video with copyrighted background music).²¹¹ This state raises several concerns. First, transformative use of copyrighted content that is a key cultural fount for creative expression is expected to be impaired. Such an outcome greatly contradicts the constitutional purpose of copyright law and harms free speech. Second, conditioning content partnership with the implementation of identification technologies shifts the monitoring burden to UGC platforms. This, again, confines the Second Level Agreements practice to major UGC platforms only, as smaller and less wealthy UGC platforms may not be able to follow suit due to the high costs associated with the deployment of a filtering system.²¹²

Content identification systems may also lead to “digital sharecropping,” in which the copyright owner enjoys licensing revenues on works that should not warrant it.²¹³ When fair use is identified as infringement, the copyright owner choosing to monetize the use enjoys the fruits of the second author’s work, while the latter will be denied opportunities to obtain any of the revenue generated by her work.

The need to submit copyrighted materials to the UGC platform, in order to ensure protection by their filtering systems, was also accused of creating a two-tiered copyright system—right owners that have the means and the willpower to “register” their works with the platform will enjoy copyright privileges, whereas those who fail to do so will receive no protection.²¹⁴

209. E.g., Liz Gannes, *Does Digital Fingerprinting Work?: An Investigative Report*, NEWTEEVEE (June 8, 2007), <http://newteevee.com/2007/06/08/does-digital-fingerprinting-work-an-investigative-report/>; Cory Doctorow, *Why a Rights Robocop Will Never Work*, GUARDIAN UNLIMITED (Oct. 30, 2007), <http://www.guardian.co.uk/technology/2007/oct/30/copyright>.

210. See Sawyer, *supra* note 19, at 387.

211. *Id.*

212. For instance, YouTube and Google stated that their Content ID system is the result of “approximately 50,000 man hours of engineering time and millions of dollars of research and development costs.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 260-61 (S.D.N.Y. 2008).

213. See Sawyer, *supra* note 19, at 386.

214. Tony Bates, *The Perils of YouTube Filtering: Part 1*, MICHIGAN TELECOMMUNICATIONS AND TECHNOLOGY LAW REVIEW BLOG (Dec. 1, 2007), <http://blog.mttl.org/2007/12/perils-of-youtube-filtering.html#bateslink17>.

Another disruptive consequence of content filtering involves the increasing proclivity to block automated identified content before it is publicly available. While this was and still is the stated will of existing media companies,²¹⁵ this course eliminates the power of the public to review the fairness of content removal, and protest when such removal was unjustified. Previous cases demonstrate clearly that amiss removal of UGC provokes headlines.²¹⁶ An example for such public reaction involves the removal of the “Downfall” parody videos from YouTube. “Downfall,” a German film portraying Hitler's last days, has been adopted for YouTube parodies featuring Hitler ranting in German to his staff, with modern subtitles covering various issues, from the mortgage meltdown and playing Xbox video games to Kanye West and Apple’s new iPad.²¹⁷

In April 2010, these clips, many of which had generated millions of views, began disappearing from YouTube as Constantin Films, the company that owns the rights to the “Downfall” film, asked for them to be removed.²¹⁸ The removal of the “Downfall” videos engendered wide public disapproval in professional media, blogs, and users’ posts.²¹⁹ The thunderous public attention to the removal immediately occasioned a response from YouTube, which submitted in a blog post that its Content ID system was designed to allow copyright owners to account for fair uses, and that “Rights holders are the only ones in a position to know

215. See Gannes, *supra* note 210 (“content owners said they wanted all content fingerprinted before it ever got posted. ‘This was a religious point for some studios,’ said King.”).

216. Sawyer, *supra* note 19, at 392.

217. E.g., *Hitler tries to solve the Gulf Oil Spill Crisis*, YOUTUBE, <http://www.youtube.com/watch?v=dc1623pWjwU>; *Hitler rants about the Hitler Parodies*, YOUTUBE, <http://www.youtube.com/watch?v=cqxxRPZdfvs&feature=related>; *Hitler is informed Santa Claus doesn't exist*, YOUTUBE, <http://www.youtube.com/watch?v=yxXpF328r8w&feature=related>.

218. Lewis Wallace, *Hitler Downfall Videos Being Pulled from YouTube*, WIRED (Apr. 20, 2010), <http://www.wired.com/underwire/2010/04/hitler-downfall-youtube-purge/>.

219. E.g., MG Siegler, *Hitler is Very Upset that Constantin Film is Taking Down Hitler Parodies*, TECHCRUNCH (Apr. 19, 2010), <http://techcrunch.com/2010/04/19/hitler-parody-takedown/>; Corynne McSherry, *Everyone Who's Made a Hitler Parody Video, Leave the Room*, EFF DEEPLINKS BLOG (Apr. 20, 2010), <http://www.eff.org/deeplinks/2010/04/everyone-who-s-made-hitler-parody-leave-room>; Jacqui Cheng, *Attack on Hitler Parodies Now Newest Front in Copyright Wars*, ARS TECHNICA (Apr. 2010), <http://arstechnica.com/tech-policy/news/2010/04/attack-on-hitler-parodies-now-newest-front-in-copyright-wars.ars>; Mike Melanson, *YouTube Weighs In on Hitler, Parodies, Mashups & Fair Use*, READ WRITE WEB (Apr. 22, 2010), http://www.readwriteweb.com/archives/youtube_weighs_in_on_hitler_parodies_mashups_fair.php; Aaron Barnhart, *Why The Take-Down of the 'Hitler' Parodies on YouTube was Illegal*, TV WEEK (Apr. 25, 2010), <http://www.tvweek.com/blogs/2010/04/why-the-take-down-of-the-hitler-parodies-on-youtube-was-illegal.php>.

what is and is not an authorized use of their content,” and YouTube “require(s) them to enforce their policies in a manner that complies with the law.”²²⁰ The public discussion also induced some users to challenge the removal through a DMCA counter notification.²²¹ Had Constantin Films submitted the content to YouTube’s system earlier, and chose to block any match, there is a good chance none of these parodies, although some of them arguably qualify as fair use, would have appeared online.

An additional shortcoming of requiring identification technology as a prerequisite for Second Level Agreements is that by doing so, platforms and copyright owners can greatly disrupt the DMCA takedown and counter-notification balance.²²² When the filtering system automatically blocks matching content, copyright owners are no longer in need to send takedown notices to ask for the removal of infringing content. Because a takedown notice was never filed, users cannot send a counter notification or sue the copyright owner, because they were not part of the removal process. A suit against the platform can also be avoided easily through a contractual stipulation in the platform’s terms of service. Most terms-of-use agreements state that the platform may remove any content at any time for any reason.²²³ Because there is no

220. Shenaz Zack, *Content ID and Fair Use*, BROADCASTING OURSELVES—THE OFFICIAL YOUTUBE BLOG (Apr. 22, 2010), <http://youtube-global.blogspot.com/2010/04/content-id-and-fair-use.html>.

221. *E.g.*, Brad Templeton, *Studio Does Content-ID Takedown of my Hitler Video About Takedowns*, BRAD IDEAS (Apr. 20, 2010), <http://ideas.4brad.com/studio-does-content-id-takedown-my-hitler-video-about-takedowns> (a user whose video has been removed writes in his personal blog that he filed a dispute over the Content ID takedown).

222. Sawyer, *supra* note 19, at 385.

223. *See YouTube Terms of Service*, YOUTUBE, <http://www.youtube.com/t/terms> (“YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement, such as, but not limited to, pornography, obscenity, or excessive length. YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user’s account for submitting such material in violation of these Terms of Service.”); *MySpace.com Terms of Use Agreement*, MYSPACE, <http://www.myspace.com/index.cfm?fuseaction=misc.terms> (“Furthermore, MySpace reserves the right, in its sole discretion, to reject, refuse to post or remove any posting (including, without limitation, private messages, emails and instant messages (collectively, ‘messages’)) by you, or to deny, restrict, suspend, or terminate your access to all or any part of the MySpace Services at any time, for any or no reason, with or without prior notice or explanation, and without liability.”); *Facebook’s Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (“We can remove any content or information you post on Facebook if we believe that it violates this Statement.”); *Yahoo! Terms of Service*, YAHOO!, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html> (which govern also the use of Flickr and states “You acknowledge that Yahoo! may or may not pre-screen Content, but that Yahoo! and its designees shall have the right (but not the obligation) in their sole discretion to pre-screen, refuse, or remove any Content that is available via the Yahoo! Services. Without limiting the foregoing,

statutory right to upload content, platforms operators and copyright owners can legally bypass the DMCA takedown procedure, thus leaving users with no recourse for over-filtering of lawful expression.

Second Level Agreements can also be claimed to represent an undesired expression of what Professors Patricia Aufderheide and Peter Jaszi have dubbed the “clearance culture.”²²⁴ The clearance culture is “the shared set of expectations that all rights must always be cleared.”²²⁵ In the copyright context, that is to say that users of copyrighted works often ask copyright owners to license or “clear” these works, even when the use is lawful. The clearance culture is fostered by the inherent vagueness in many copyright concepts (chiefly fair use), and the high costs of litigation. Incentivized by efforts to avoid litigation, many players in the copyright industries choose to take precessions in the form of voluntary agreements, which often restrict these players more than is required under copyright law. Consequently, a conception of the copyright bundle as all-encompassing emerges, transaction costs are augmented, and speech is chilled.²²⁶

The *Veoh* cases²²⁷ and the *Viacom* ruling²²⁸ indicate that while Second Level Agreements are legitimate business partnerships, they may not be required by copyright law. Under the current regime, ISPs are not obliged to filter uploaded content.²²⁹ Google, for example, has always argued that it not only follows the letter of the law when it comes to its Safe Harbor obligations, but that it goes “well above and beyond what the law requires.”²³⁰ Yet, even though the law does not require ISPs to

Yahoo! and its designees shall have the right to remove any Content that violates the TOS or is otherwise objectionable.”) (last visited Nov. 18, 2011).

224. Patricia Aufderheide & Peter Jaszi, Ctr. for Soc. Media, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* 22, ACCIL (2004), <http://www.acsil.org/resources/rights-clearances-1/nps240.tmp.pdf>.

225. *Id.* at 22.

226. *Id.*

227. *IO Grp. Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1092 (C.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1107 (C.D. Cal. 2009).

228. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

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

230. Eric Bangeman, *Google Cites Safe Harbor, Fair Use in Viacom v. YouTube Defense*, ARS TECHNICA (May 1, 2007), <http://arstechnica.com/tech-policy/news/2007/05/google-cites-safe-harbor-fair-use-in-viacom-v-youtube-defense.ars>; Greg Sandoval, *Veoh Wins Copyright Case; YouTube Wins, Too?*, CNET NEWS (Sept. 14, 2009), http://news.cnet.com/8301-1023_3-10352183-93.html (“... the DMCA protects services like YouTube,” Zahavah Levine, YouTube’s chief counsel said. “With the DMCA, Congress intended to foster online platforms like YouTube, which empower users, offer new distribution channels for content owners, and respect copyright.”); Miguel Helft, *Google Takes Step on Video Copyrights*, N.Y. TIMES (Oct. 6, 2007), http://www.nytimes.com/2007/10/16/business/16video.html?_r=1 (“Google has long insisted that

enter Second Level Agreements or implement an identification technology, the uncertainty surrounding their legal status causes risk-averse players to do more. Given that many analyses in copyright law involve examination of industry standards, the Second Level Agreements practice may end up as such standard. Courts may disapprove UGC platforms that do not engage in Second Level Agreements, which in turn would generate over-deterrence and undermine the benefits and positive externalities of UGC. Moreover, because the large industry players are usually those who enter Second Level Agreements, smaller UGC platforms may have to face a prohibitively large wall before enjoying a safe harbor status.

The preceding review aimed at presenting the positive and negative aspects of Second Level Agreements in theory and in practice. The following sections strive to set forth the legal and practical implications of the agreements, and to provide a normative assessment and a careful predication for their future in the burgeoning reality of the UGC revolution.

VI. LEGAL AND PRACTICAL IMPLICATIONS, NORMATIVE ASSESSMENT, AND CAREFUL PREDICTION

A. *Legal and Practical Implications*

The Second Level Agreements practice has become a common business model for UGC platforms and copyright owners, as well as the de-facto regime to determine production and consumption possibilities for end users in the Web 2.0 era. To fully grasp the significance of the phenomenon and its potential implications, it is important to analyze it as a formal legal tool on the one hand, and as an informal norm on the other hand.

Second Level Agreements are, first and foremost, contractual agreements between UGC platforms' operators and copyright owners. They impose rights and obligations, which are specified in the contractual terms, on the contracting parties. Although users are formally bound only by the platforms' terms of service, these agreements do impact the users' legal status. While users who upload adaptations of preexisting works are technically considered infringers,

YouTube has always operated in compliance with copyright law, in part because it takes down unauthorized copyrighted clips when asked to by content owners.”).

Second Level Agreements may provide them with two main defenses: an implied license claim or an estoppel argument.²³¹

In the leading case for implied copyright license, *Effects Associates, Inc. v. Cohen*,²³² the court formulated a three-part test for the creation of an implied nonexclusive license. An implied license would be found “when (1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee copy and distribute his work.”²³³ Obviously users cannot pass this test based on Second Level Agreements practice, as an interaction between the licensee and licensor is missing. Nonetheless, in *Field v. Google, Inc.*, the court stated that an implied license may be found where the copyright owner’s conduct permits the other party to “properly infer” that the copyright owner has consented to the other party’s use.²³⁴ The court further held that a copyright holder’s consent does not have to be manifested verbally, and may be inferred even from silence if she knows of the use and encourages it.²³⁵

The knowledge and encouragement test of *Field* can be useful in the hands of platforms users. Whenever a copyright owner enters a Second Level Agreement, she cannot argue she wasn’t aware of the users’ use of her work, as the agreement was designed specifically to clear such uses. Indeed, the clearance was intended to benefit the platforms, but that does not change the evident existence of the right holders’ knowledge. As to the encouragement prong, users may argue that UGC platforms have always motivated users to upload materials, including copyrighted materials. This encouragement is utterly lawful, from the platforms’ perspective, thanks to Second Level Agreements, and may be construed to attribute encouragement to the copyright

231. Additional defenses such as laches and copyright misuse (which is historically related to the doctrine of “unclean hands”) may also aid users when an infringement suit is brought against them. A copyright defendant must prove two conjunctive elements to establish a laches defense: (1) the copyright owner inordinately delayed filing suit although she knew or should have known of the potential claim and (2) the delay resulted in undue prejudice to the alleged infringer. *See* *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000); *Chirco v. Crosswinds Cmty., Inc.*, 474 F.3d 227, 234 (6th Cir. 2007). According to the copyright misuse doctrine, the copyright holder’s own conduct may disqualify her from making any copyright infringement claim during the period of misuse. *See* *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 520 (9th Cir. 1997); *DSC Commc’ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977-79 (4th Cir. 1990).

232. *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

233. *Nelson-Salabes, Inc. v. Morningside Dev.*, 284 F.3d 505, 514 (4th Cir. 2002).

234. *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006).

235. *Id.*

owners. It is apparent, however, that Second Level Agreements do not perfectly satisfy the requirements for an implied license even under the broad Field's test. Yet, as one commentator put it, the implied license doctrine has always been used to insert some common sense into the dispute.²³⁶ Common sense would probably find a grant of a secondary license to the platform without an analogous implied license granted to its users to be preposterous.

Users may also resort to an equitable estoppel defense. Under copyright law, a copyright owner may be estopped from suing for copyright infringement if (1) the copyright holder knew of the facts of defendant's infringing conduct, (2) either intended that defendant rely on his acts or omissions or acted or failed to act in such a manner that defendant had a right to believe it was intended to rely on plaintiff's conduct, (3) the defendant was ignorant of the true facts, and (4) relied on the copyright holder's conduct to his detriment.²³⁷ If a copyright holder sues a user for her allegedly infringing use even though the use was covered under a valid Second Level Agreement, an estoppel argument would provide a strong defense. Although the copyright holder may have not known the facts of the specific infringement, she gave her permission for similar acts under the agreement. Users can also argue, justly, that it is reasonable to infer from the vast amount of copyrighted works, which are not being removed from the platform's server, that the copyright owner has intended users to maintain the practice of uploading such materials. Because informal and industry practices are often relevant to an estoppel analysis, a claim under this defense is even stronger.²³⁸

The difficulty with the previous discussion is that it seems highly unlikely that a copyright owner would decide to pursue individual users for a use covered by a valid Second Level Agreement. This is because, while formally granting immunity only to platforms' owners, these agreements are based on clearing users' uploads. In reality, the agreements allow users to create and consume content in a way which otherwise would have been considered infringing. Therefore, the

236. John S. Sieman, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 898 (2007).

237. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960).

238. *E.g.*, *Carson v. Dynegy, Inc.*, 344 F.3d 446, 455 (5th Cir. 2003) (The court held that because the copyright holder had freely allowed fellow employees to use and modify his copyrighted worksheet, he was estopped from bringing a copyright infringement claim against defendant for using the worksheet); *Field*, 412 F. Supp. 2d at 1116.

practical significance of Second Level Agreements goes way beyond their formal legal frame.

In an oft-cited article from 1996, Robert Merges describes versions of private self-correction that turn into industry norms.²³⁹ Merges discusses the benefits of permitting parties to contract into organizations governed by liability rules, as a response to a deficiency in the formal specification of property rights.²⁴⁰ Second Level Agreements demonstrate Merges' model in part because they were established as an alternative system to individual licensing. Nonetheless, there is still a major difference, which is grounded in the agreements' unique character. Second Level Agreements can be classified as collective licenses because they are intended to allow the use of copyrighted works by many individual users. Yet, as opposed to the examples brought in Merges' work, the licenses are not granted to the users, but to a third party facilitator. Having said that, Second Level Agreements exemplify the growth of a norm, which may eventually find its way into formal legal rules. In the meantime, Second Level Agreements function as the main regulator of consumption and production by UGC platforms' users.

Second Level Agreements can also, to some extent, exemplify the three-dimensional model of property presented by Professor Abraham Bell and Professor Gideon Parchomovsky.²⁴¹ Bell and Parchomovsky argue that property regimes will continue to develop to their optimal form mainly by reconfiguring assets or adjusting the owner's panoply of rights.²⁴² To demonstrate their account in the copyright context, Bell and Parchomovsky point, *inter alia*, to the record labels' abandonment of the traditional distribution methods (e.g., the music album on vinyl, tape, or CD) in favor of music online on a pay-per-track basis.²⁴³ Second Level Agreements have had a similar effect in terms of changing the distribution methods and utilizing the advantages of a third party distributor. The practice also represents a response to what Bell and Parchomovsky referred to as "evolutionary pressure." A slight adjustment of the copyright owner's right can be found in the unique legal arrangement offered by Second Level Agreements—the copyright owner sells a blanket license to the platform, for the benefit of its users,

239. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1361-62 (1996).

240. *Id.*

241. Abraham Bell & Gideon Parchomovsky, *The Evolution of Private and Open Access Property*, 10 THEORETICAL INQUIRIES L. 77 (2009).

242. *Id.*

243. *Id.* at 93-94.

but the copyright owner still retains her veto right to ask the removal of the content, even after the use was made in accordance with the license.²⁴⁴ In other words, the copyright owner sells some of her rights, but still has the privilege of denying the license after it has been granted.

Nonetheless, Second Level Agreements do not fit perfectly into the model as they neither typify a reconfiguration of the asset, nor do they involve a clear adjustment of the copyright holder's right. Instead of offering their works for free (e.g., tolerated use, choosing a creative commons licensing, etc.) or choosing to litigate, many copyright owners have decided on a middle ground approach. This compromise demonstrates a change of the distribution method while the rights and the asset remain the same.

B. Normative Assessment

Second Level Agreements herald a new generation of free content business models, not only for consumption but also for production. Compared to an ideal copyright world, there are obviously too many shortcomings. However, upon juxtaposing the flaws described above to the benefits the agreements bestow on the various parties, Second Level Agreements do more good than evil by promoting better information consumption, greater expression production, and broader infringement avoidance.

That said, the legal regime created by Second Level Agreements could still be improved to offer more benefits and fewer drawbacks. Before discussing possible improvements, two comments are due. First, many of the disadvantages discussed are grounded in the nature of copyright law, which is based primarily on property rules. Under property rules “[n]o one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he [or she] subjectively values the property.”²⁴⁵ A copyright owner enjoys the ability to grant a license and demand any price she finds appropriate to compensate her for the use. She can also, however, refuse to grant a permission to use her work. Some of the setbacks of

244. This bears some resemblance to Glen O. Robinson's model of unilateral use restrictions as covenants that run with the property. The copyright owner succeeds in imposing post-transfer restrictions. See Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1480 (2004). The difference is that naming the copyright owner's right to deny the use after the license is granted “a post transfer restriction” would be an understatement of the word “restriction.” It is not a restriction but a complete, unpredicted denial or withdrawal.

245. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972).

Second Level Agreements, like non-inclusiveness and vulnerability, are products of this proprietary regime and would be present in any alternative, unless copyright owners no longer retain their veto right.

Second, when judging the Second Level Agreements phenomenon, one should be mindful of the backdrop against which it has developed. The DMCA was criticized by many commentators for providing an inadequate solution for the challenges posed by the digital age.²⁴⁶ At least some of the criticism has proven to be right, as alternative ways of dealing with these challenges—such as Second Level Agreements—have emerged. Yet, Second Level Agreements represent a compromised stopgap, and thus cannot entirely alter the legal framework, or provide a comprehensive alternative to deficiencies in current copyright law. One shouldn't ask therefore whether this practice is perfect, but whether copyright owners, platforms, users, and society as a whole are better off under a Second Level Agreements regime. As Second Level Agreements allow a new market of mass production to prosper, rather than being shut down due to market failures, I believe the answer is yes.

Yet, Second Level Agreements can be revamped if some of their imperfections would be addressed. Following the words of Justice Louis D. Brandeis—"Sunlight is the best disinfectant"²⁴⁷—alleviating the opacity would be a good start. Besides scaling off the detrimental educational effect and the uncertainty surrounding the users' legal status, transparency will also help to cure other flaws in the Second Level Agreements regime, as it will bring the pacts to the center of attention, and expose them to public criticism and even pressure in case an unjustified arrangement took place. This can be done through a statutory requirement to fully disclose the terms of Second Level Agreements. Such a course, however, is at odds with freedom of contract because it imposes an unreasonable obligation on the contracting parties, especially when these parties are private corporations legitimately wishing to hide their business practices and trade secrets from the public eye. It is also possible that the opacity of Second Level Agreements is a precondition for their existence as copyright owners wish not to grant any legal rights in their works to users. While such a contention may have been viable at the emergence of the practice, it is not very likely to be true nowadays, as the practice itself has already altered the users' legal status and will

246. E.g., David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 739-40 (2000); Urban & Quilter, *supra* note 96; Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99, 157 (2005/2006).

247. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

keep doing so even more vigorously in the future as a rooted industry norm.

Another alternative is to initiate a legal prerequisite for Second Level Agreements, which will require the contracting parties to provide a written statement as to the legal rights and obligations of users under the pact. This statement would comprehensively describe the boundaries for users' production as well as the users' legal status. The statement would also indicate the duration of the agreement and the legal state of users and their works in case the agreement won't be renewed. In addition, the parties would be obliged to publicly announce the details of this statement, and platforms would have to incorporate a link to such statements in their terms of use. The power to enforce this obligation could be bestowed on the Copyright office, which upon receiving a complaint from a user, will be authorized to employ various sanctions, e.g., imposing fines.

Due to the perceived shift towards standardization of Second Level Agreements and the increasing deployment of filtering technologies, the over-filtering problem must also be addressed to the extent possible. Indeed, the need to employ filtering technologies to make the process of identifying infringements is understandable. Filtering systems protect UGC platforms and provide a workable environment for copyright owners, end users, and platforms' operators. Over-filtering, however, is an undesirable byproduct of this system which, as explained earlier, circumvents the DMCA counter-notification process. Thus, while the use of identification technologies ought to be allowed, platforms must be required whenever a copyright owner asks for the removal of content in the case of a system-match, to allow users to oppose the removal through counter-notification. YouTube already follows this model, and epitomizes a sincere attempt to compromise the need to employ filtering mechanism with users' legal rights.

Additionally, notwithstanding their merits, Second Level Agreements cannot and should not utterly substitute First Level Agreements. The current state in which non-commercial licensing exists virtually is, only in theory, fundamentally wrong. Users should be able to employ copyrighted work irrespective of a Second Level Agreement's presence. Second Level Agreements' non-inclusiveness would have less severe implications if alternative individual licensing practices exist. As I will demonstrate later, the shift towards premium content and reduction of derivative UGC reinforces the need for a non-commercial licensing regime. A non-commercial licensing system would result in a win-win situation, in which users, copyright owners, and society as a whole

benefit; innovative users would be able to pay a reasonable price for using a copyrighted work, copyright owners would employ another revenue source, and the amount of creative expression would escalate.

The previous discussion suggested that the practice of Second Level Agreements is overall desirable. Nonetheless, the UGC market is faced with ongoing changes, which are expected to influence, *inter alia*, the practice of Second Level Agreements. As demonstrated above, the practice has already gone through some changes when agreements became more standard, employing filtering technologies as an integral part of them. The growing demand for premium content and the declining attractiveness of UGC for potential advertisers also implies a different Second Level Agreements practice in the future. The latest court ruling in the case of *Viacom v. Google* may affect the practice of Second Level Agreements as well. The move towards disintermediation, encouraged by the Internet, may likewise impact the future of UGC platforms and the Second Level Agreements practice. Also, the recent initiation of the first non-commercial licensing platform may herald additional developments of the non-commercial licensing scheme, and accordingly may impact the Second Level Agreements practice. In the next and last section, I analyze these influential factors and provide a careful prediction as to the future of copyrights in the digital realm.

C. *The Future of Second Level Agreements*²⁴⁸

i) The Growing Demand for Premium Content

When the first Second Level Agreements were signed, it seemed like a perfect arrangement—utilizing advertising revenue to enable users to upload copyrighted content. As previously shown, however, UGC has become less attractive to advertisers, who seek “safe” premium content to attach to their ads. Consequently, platforms have realized that in order to turn themselves into better revenue generators, they must

248. Another two factors that could influence the future of Second Level Agreements are the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011) (also known as the Protect IP Act of 2011) (recommended to be considered by the whole Senate) and the Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (also known as SOPA) (introduced). If passed, these acts could significantly impact UGC websites, as copyright infringement would become remarkably risky for end-users and service providers. These bills are still undergoing major changes and redrafting, and it is hard to determine the extent to which they alter the Second Level Agreements practice. For this reason, this Article does not discuss their potential effects on the Second Level Agreements practice.

either enhance UGC residing on their servers with premium content, or adhere to the premium content model and refrain from hosting UGC. YouTube, for example, lost approximately \$470 million in 2009 as the costs of bandwidth and storage far exceeded its revenue from advertising.²⁴⁹ Since then, YouTube has been trying to transform from an online clutter of amateur videos to a mainstream host of TV programs and movies by adding more premium content.²⁵⁰ While YouTube keeps demonstrating its obligation to the maintenance of UGC, few platforms could endure years of financial losses for the ideal of making their users happy.²⁵¹ For this reason, some platforms turned from hosting UGC and premium content to offering merely the latter. Other websites were initiated on the premium content model, and abandoned UGC uploads as a traffic generator under the belief that some advertisers are ambivalent to hosting advertising on a website alongside UGC.²⁵²

The move towards premium content has already affected Second Level Agreements and is expected to maintain its influence in the future. Indeed, bandwidth costs as well as storage costs are declining. From \$270 in 1998, the cost of streaming a movie over the Internet dropped to merely five cents today.²⁵³ Still, as the rate of uploaded UGC has grown immensely in the past decade, the decreasing costs of storage and bandwidth are not necessarily reflected in practice to a full extent. Thus, a business model that involves offering UGC along with premium content (akin to the YouTube model) can be proven unprofitable. As one commentator put it, “imagine a store where you stock thousands of items, but only 5 percent of them are ever sold. That’s YouTube.”²⁵⁴

For the reasons described above, the move towards premium content is expected to continue. A direct consequence would be

249. Stelter & Helft, *supra* note 146.

250. Greg Sterling, *YouTube Moves: Google TV Ads And More Premium Content*, *Search Engine Land*, SEARCH ENGINE LAND (Apr. 17, 2009), <http://searchengineland.com/youtubes-future-tvads-and-more-premium-content-17723>.

251. Eric E. Schmidt, Google’s chief executive, said in an interview that YouTube would continue to embrace user created content, even if it was not easy to earn revenue from it, because that content was essential to the popularity of the site. See Stelter & Helft, *supra* note 146.

252. Greg Sandoval, *Universal, YouTube near deal on music video site*, CNET NEWS (Mar. 4, 2009), http://news.cnet.com/8301-1023_3-10188600-93.html?tag=mncol;title. See also VEVO, <http://www.vevo.com/>.

253. Dan Rayburn, *Bandwidth Pricing Trends: Cost To Stream A Movie Today, Five Cents: In 1998, \$270*, BUSINESS OF VIDEO.COM BLOG (Jan. 6, 2010), http://blog.streamingmedia.com/the_business_of_online_vi/2010/01/bandwidth-pricing-trends-cost-to-stream-a-movie-today-five-cents-cost-in-1998-270.html.

254. R. Scott Raynovich, *The YouTube Model is Dead*, CONTENTINOPLE (July 4, 2009), available at <http://www.webvideomarketing.org/fullarticle.html?id=1911> (last visited Nov. 18, 2011).

decreasing engagement in Second Level Agreements, as opposed to premium content partnerships, of major UGC platforms. Because Second Level Agreements are sensitive to market changes, some of the current agreements would be terminated or modified to include premium content only. Current UGC platforms may also turn into premium content platforms, thus leaving the UGC market in the hands of smaller websites. So far, however, Second Level Agreements have been present only in major UGC platforms. Unless this changes, a complete shift to premium content and the domination of the UGC market by smaller platforms would have a significant influence over the prospects of Second Level Agreements, and the amount of authorized UGC on the Internet.

YouTube is currently the leading platform for UGC, and as long as it follows its statements to embrace user created content, UGC will stay around, along with the practice of Second Level Agreements. While many have predicted the demise of the “You” in YouTube, based on the apparent shift towards premium content, so far none of them were right.²⁵⁵ Not only that, although advertisers favor premium content over UGC, there is still an ample demand among users for UGC platforms to share and communicate with others. The market is expected to satisfy this demand by creating more UGC platforms and augmenting existing UGC networks. Second Level Agreements, then, could be based on the ad share revenue model, depending on advertisers that wish to capitalize on the traffic on a website, irrespective of the content generating it. Alternatively, platforms and copyright owners may utilize royalty payments, although this course is unlikely to be sustainable with no revenue source for the platforms to justify the payment of royalties. Platforms could also profit from offering complementary goods, such as downloadable songs, t-shirts, DVDs, photos, concerts tickets, etc., and share the earnings with copyright owners as part of a Second Level Agreement. Although difficult to implement after offering the platforms’ services for free, charging end-users for uploading their materials could also provide some revenue source for platforms, and may enable them to financially enter Second Level Agreements.

Until a successful alternative to the ad revenue share model is found, the practice of Second Level Agreements is jeopardized. Pending

255. *E.g., id.*; Sela, *supra* note 144; Chris Albrecht, *Will Premium Content Kill the “You” in YouTube?*, NEW TEEVEE (Mar. 30, 2009), <http://newteevee.com/2009/03/30/will-premium-content-kill-the-you-in-youtube/>.

court's rulings, however, may still allow it to flourish, as I show in the next section.

ii) The *Viacom* Ruling

Many interested parties closely watched the three-year-old legal battle between Viacom and YouTube, as it has pitted powerful Hollywood studios against equally dominant technology giants. Although the filing of the lawsuit has revealed the great tension between UGC platforms and media companies over copyrights, this tension has subsided substantially with time, due in large part to the rise of Second Level Agreements and the use of identification technologies to detect infringing content. Because Viacom appealed the decision, it is important to consider the possible effects of both the current decision and a potential adverse ruling on the practice of Second Level Agreements.

The holding in *Viacom* places the onus of policing copyright infringement squarely on the shoulders of copyright owners. The court concluded that:

If a service provider knows of specific instances of infringement, the provider must promptly remove the infringing material. *If not, the burden is on the owner to identify the infringement.* General knowledge that infringement is “ubiquitous” does not impose a duty on the service provider to monitor or search its service for infringements.²⁵⁶

The decision means that UGC platforms are not legally required to develop filtering systems and would enjoy a safe harbor status as long as they took down content when copyright holders complained. The *Veoh* appellate court recently echoed this approach, by holding that the DMCA did not impose investigative obligations on service providers.²⁵⁷

The current decision dramatically improved the bargaining position of UGC platforms' owners in negotiating Second Level Agreements. Before outlining the ramifications of this upgrade, it is important to distinguish small UGC platforms and small copyright owners from their major counterparts. Small UGC platforms are only marginally affected by this ruling, which shields them from liability had they followed the court's clear interpretation of the DMCA. In practical terms, small

²⁵⁶. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010) (emphasis added).

²⁵⁷. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 101 U.S.P.Q.2d 1001, 1015 (9th Cir. 2011).

platforms would probably remain an unattractive contractual party for major copyright owners. Thus, no Second Level Agreements are expected to appear as far as these platforms are involved. Small copyright holders are even less affected by the ruling, as they have been virtually absent from the Second Level Agreements practice. Except for monetizing their content in platforms that enable them to do so (what may sometimes qualify as Second Level Agreements), these copyright owners would continue to do what they have always done—monitor the Web and send takedown notifications, or tolerate the use.

Conversely, major UGC platforms and powerful content owners would be greatly affected by the outcome of this case. While the current ruling is expected to encourage copyright owners to replace constant monitoring of UGC platforms for infringing content with content partnerships, the demands for the latter would probably increase. If the decision were to be reversed on appeal, the same effect is presumed on copyright holders; UGC platforms would have a stronger motivation to enter content partnerships while copyright owners are likely to augment their demands. If the current ruling will be upheld on appeal, the pivotal question would be whether UGC platforms insist on getting more than right holders agree to grant, which in turn may cause negotiation breakdown and threaten the Second Level Agreements practice. It is more likely, however, that such a scenario would not take place for several reasons. First, the current *Viacom* ruling is subject to appellate review and may be overturned. UGC platforms and content owners are aware of this fact and will not dramatically change their strategies until a final judgment is delivered. Second, even if the ruling is affirmed on appeal, it is in the interest of both parties to work in tandem because they stand to gain from a content partnership. UGC platforms could utilize copyrighted materials to increase traffic on their websites, offer creative users informal permission to use copyrighted content in their works, and employ premium content to attract advertisers and increase revenues. Also, given the importance of hosting copyrighted materials to their prosperity, UGC platforms have always been keen to maintaining a good relationship with content owners.²⁵⁸ As previously discussed, copyright owners are also better off under a valid Second Level Agreement, which allows them to save enforcement costs and to enjoy the platforms' marketing potential. Because Second Level Agreements enable UGC

258. One of the problems with the *Viacom* case is that to a large extent it addressed past conduct—*Viacom* sought damages only for actions taking place before YouTube implemented its content ID in early 2008. As discussed above, the conditions of the market have tremendously changed since three years ago with the rise of Second Level Agreements and content partnerships.

platforms and copyright holders to retain the advantages as described, they are facially expected to maintain it.

iii) Disintermediation

The development of the Internet has been shown to shorten processes and eliminate intermediaries.²⁵⁹ This disintermediation has not skipped the media companies, which have often chosen to launch their own platform for distribution instead of partnering with existing platforms. Hulu, a web-based commercial-supported site, which operates cooperatively with NBC Universal and a number of other major American networks, follows this model.²⁶⁰ Another relatively new example is Vevo, a premium content portal owned by Universal Music Group, Sony Music Entertainment, and the Abu Dhabi Media Company.²⁶¹ The disintermediation move could impact UGC practice too, as powerful content owners may start employing their own technologies to monitor the Web and send automated takedown notices in case a match is found. Additionally, they could establish distribution platforms for their premium content to attract Internet users from current UGC and premium content platforms. Such development could be destructive to UGC platforms and possibly bring the Second Level Agreements practice to an end.

Yet, a complete disintermediation is unlikely to occur as several current indications imply. Above all, history proves that technology has always preceded industry practice and business models, which had to be adjusted duly. For this reason, platforms owned and operated by tech-savvy intermediaries are still dominant and would probably continue to prevail.²⁶² Even if copyright owners would manage to acquire technology to effectively monitor the Web and send takedown notices, such technology would expose them to liability for misrepresentation under §512(f) of the DMCA. §512(f) was intended to provide an economic disincentive to remove non-infringing material.²⁶³ When a

259. Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381, 397 (2009).

260. HULU, <http://www.hulu.com>.

261. Although the video hosting for Vevo is provided by YouTube, with Google and Vevo sharing the advertising revenue.

262. See, for example, current talks about Google's plan to launch a music service to compete with Apple's iTunes store. Scott Morrison, *Google Plans Music Service Tied to Search Engine*, WALL STREET JOURNAL (June 21, 2010), <http://online.wsj.com/article/SB10001424052748704895204575321560516305040.html>.

263. Charles W. Hazelwood, Jr., *Fair Use and the Takedown/Put back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 316 (2010).

copyright owner sends a takedown notice, “knowingly materially misrepresents” that the content in question infringes her copyright, the alleged infringer has a claim for damages incurred and may seek monetary relief.²⁶⁴ One court recently concluded that under the DMCA, copyright owners must consider the fair use doctrine in determining whether to issue a takedown notice.²⁶⁵ As opposed to the current operation of filtering systems, which bypasses this DMCA obligation by removing the content automatically prior to its upload, technology employed by content owners without platforms’ cooperation would involve regular DMCA procedure, and thus would have to comply with the requirements set forth in §512(f). As I explained earlier, although technical approximations provide some degree of certainty, they are not capable of identifying all fair uses. Copyright owners are therefore expected to face a serious dilemma if they choose to employ such technologies without the platforms’ safeguarding hand.

Another reason for copyright owners and UGC platforms not to part ways has to do with the popularity of UGC among both users-providers and users-consumers. Users demand to post and consume amateur content, and they vote with their feet.²⁶⁶ Studies that analyzed UGC platforms’ popularity found that UGC allows users to attain three groups of needs virtually all together: (a) self-expression and self-actualization, (b) social interaction and community development, and (c) information and entertainment.²⁶⁷ The importance of fulfilling many needs in one convenient location has created a high demand for UGC networks. While copyright owners can provide the need for information and entertainment, the combination of satisfying users’ informational wants, providing entertainment (not only premium entertainment), and enabling social connections requires more than a premium content platform. UGC, thus, seems to call for cooperation between content owners and platforms to maintain its appealing qualities.

264. 17 U.S.C. § 512(f).

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

266. UGC videos keep generating the largest number of views. *See, e.g.,* Relaxnews, *YouTube’s most-watched videos of the week*, THE INDEPENDENT (May 21, 2010), <http://www.independent.co.uk/news/media/youtubes-mostwatched-videos-of-the-week-1979790.html> (listing the ten most viewed YouTube videos for that week, from which eight were user-created videos).

267. Guosong Shao, *Understanding the appeal of user-generated media: a uses and gratification perspective*, 19 INTERNET RESEARCH 1, 7 (2009). *See also* Ivan B. Dylko, *What is Politics-Oriented UGC?*, TECH, MEDIA AND POLITICS BLOG (May 13, 2009), <http://ivandylo.blogspot.com/2009/05/what-is-politics-oriented-ugc.html>.

A relatively new form of intermediation, however, threatens the Second Level Agreements practice. After performing successfully in the UK, a digital rights management company, Base 79 (previously—“My Video Rights”),²⁶⁸ sought to bring its model to the U.S. market, and started offering technology to monitor unauthorized usage of copyrighted materials in web videos.²⁶⁹ When a copyright infringement is found through the monitoring technology, the copyright owner may earn income from the infringement in the form of advertising, which is then placed next to the infringing video.²⁷⁰ While the technology resembles YouTube’s Content ID system, unlike this system, this business model leaves UGC platforms out of the game and takes ad revenue away from them.²⁷¹ The choice to monitor the web independently discourages right holders from entering Second Level Agreements in their current form, as it provides a monetization alternative for the entire web and does not require individual negotiation with each platform. Also, as long as independent monitoring results in monetization, as oppose to removal, of infringing content, rightholders are shielded from liability under §512(f) of the DMCA. Consequently, independent monitoring may be a game changer for the Second Level Agreements regime.

iv) Non-Commercial Licensing Practice²⁷²

As mentioned before, in the absence of a Second Level Agreement, a user-provider wishing to make a derivative use of a work has basically four options—avoiding the use because the copyright owner would probably demand its removal; using the work in compliance with the fair use doctrine; taking more than the fair use doctrine allows and hoping the copyright owner tolerates the use; or obtaining permission for

268. *Base 79*, BASE 79, <http://www.base79.com/#!home>.

269. James Careless, *MyVideoRights Thinks Big as it Expands Into the U.S.*, STREAMING MEDIA MAGAZINE (April/May 2011), [http://www.streamingmedia.com/Articles/ReadArticle.aspx?ArticleID=74798&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+StreamingMediaMagazine-FeaturedArticles+\(StreamingMedia.com:+Featured+Articles\)](http://www.streamingmedia.com/Articles/ReadArticle.aspx?ArticleID=74798&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+StreamingMediaMagazine-FeaturedArticles+(StreamingMedia.com:+Featured+Articles)) (last visited Nov. 18, 2011).

270. *Id.*

271. My Video Rights’ Chief Operating Officer, Ron Schneier, describes the process: “For instance, rather than remove a popular clip from YouTube so that no one can see it, we replace it with a higher quality version that provides a better viewing experience and makes money from advertising, i.e., through a short commercial preroll before the content is shown or a midroll of ads during the content itself.” *Id.*

272. This section is based on a work by the author of this article—Yafit Lev-Aretz, *Towards a Non-Commercial Licensing Practice* (on file with the author).

employing the copyrighted content. To be on the safe side, the user has to choose between refraining from using the copyrighted work, or obtaining a license from the copyright holder. Although copyright law aims at encouraging the second choice, so that creation of new expressions would expand, in practice users are markedly discouraged from taking that path.

A user-producer's journey towards acquiring a license starts with identifying the copyright holder. While the Internet made such a quest much easier, in some cases it is still not at all simple, especially when the copyrighted work is not a popular one. If the user succeeds in identifying the copyright owner, she would have to contact the owner to negotiate a license. All these actions are time-consuming and may involve expenditure on top of the license's costs, which may render the transaction inefficient to complete.²⁷³ Moreover, since currently there is no common practice of licensing for non-commercial purposes, a user is usually required to pay a pricy licensing fee, which she cannot afford as a private user.²⁷⁴ The difficulty is greater when the requested license is for the use of a popular work.²⁷⁵ Previous cases demonstrated that the copyright industries have been reluctant to provide no-cost or reduced-price licenses for non-profit and non-commercial uses.²⁷⁶ As Professor Neil Netanel pointed out, this state makes perfect economic sense for the

273. For example, see the following question asked by a YouTube user on the YouTube Help forum:

I wanted to make a video to accompany a piece of music . . . soon after uploading the video I was informed that the audio would be disabled because I had violated copyrighted material from 'WMG' . . . The disabling of the music made the video nonsensical . . . So, I finally decided to do something about it by finding out who had the rights to the song and legally get permission . . . I searched for a couple of days and came up empty handed . . . The next logical step was using the 'Contact Us' portion of the Warner Music Group website . . . Now each time I wanted to contact them I had to fill in a form—I did this quite a number of times over a two-month period and never received a response. I came across a site that said it would contact people on your behalf to get rights to use music, movies, etc., and give you a quote for the cost so you could legally get the rights . . . So I regularly contacted this company over a two-month period again having to fill in a form each time—and I never received a response. So I have hit a brick wall and would like to know what the next logical step would be in trying to get permission to use this song? Or, at the very least, a response from a human?

Vercingetorix, Posted *How to Gain Copyright Permission?*, YOUTUBE HELP FORUM (Aug. 16, 2009), <http://www.google.com/support/forum/p/youtube/thread?tid=48e112ea6309599c&hl=en>.

274. Gervais, *supra* note 4, at 848.

275. Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 U. TORONTO L.J. 525, 549-52 (2010) (describing the potentials of market failure in the process of licensing popular works).

276. Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 79 (2003).

copyright industry firm, as “at some point the costs of setting and administering differential pricing outweigh the revenues the firm can expect to reap from such a regime.”²⁷⁷

Still, the demand for a non-commercial licensing system keeps growing. Online forums are saturated with users’ posts concerning the same issue—an obtainment of a license to use a copyrighted work.²⁷⁸ While Second Level Agreements have considerably promoted the needs of users-providers, as users become more productive and their works gain more popularity, the agreements’ non-inclusiveness becomes a major hurdle. Although quite belatedly, companies have started to recognize this demand and the first non-commercial licensing mechanism was launched recently. The initiative came from Google’s YouTube and Music licensing store RumbleFish, which announced the launch of Friendly Music, an online store designed to help users find appropriate soundtrack music for their videos.²⁷⁹ The service offers users to purchase a perpetual synchronization license to a copyrighted song for \$1.99. Under the license, users are allowed to use the song as part of the audio track of one video that they may upload to UGC networks for non-commercial purposes only.²⁸⁰ The license agreement requires users not to get paid for making the video, not to charge anyone for watching it, and not to receive revenue from advertising or other sources.²⁸¹

Friendly Music is merely a start and is still far from fulfilling the current demand for non-commercial licenses. Nevertheless, Friendly Music marks the first time users-providers, acting within a mass creation platform, enjoy the option to obtain a direct non-commercial license without UGC platforms’ involvement. Prior to the inception of the Second Level Agreements practice, users-providers could not legally acquire a license and had to either avoid using the copyrighted work or turn the use into a commercial one so they would be able to negotiate

277. *Id.*

278. *E.g.*, the aforementioned “Vercingetorix” post. Vercingetorix, *supra* note 273. *See also* Ron, Posted *How do you get permission to use copyrighted material?*, YAHOO (June 2, 2010), <http://answers.yahoo.com/question/index?qid=20100503054515AALTElx>; Cheeky0Little0Gamer, Posted *how do i get permission to use a song in my video? Ive got the cd!*, GOOGLE (Feb. 3, 2010), <http://www.google.com/support/forum/p/youtube/thread?tid=2408bf1732b89c01&hl=en>.

279. FRIENDLY MUSIC, <http://www.friendlymusic.com>.

280. *Friendly Music License Agreement*, FRIENDLY MUSIC, <http://www.friendlymusic.com/docs/friendly-music-license-agreement.pdf> (last visited Nov. 18, 2011).

281. Other than UGC platform’s ad share revenue on the video portion of the work. In case users wish to employ the music for commercial purposes, they would have the option to contact the service and negotiate an additional license fee. *See id.*

and pay the expensive license fee. Under Second Level Agreements, users-providers were able to create more freely, but still pursuant to an indirect license, unknown terms, and full dependence on the copyright holders' will. A non-commercial licensing practice takes this state to the next level by enabling creative users to acquire a direct license, with fully disclosed terms and little room for surprises.

The truly interesting question would be to what extent, if at all, this practice would affect Second Level Agreements. From the right holders' perspective, it all comes down to the profitability of each model. The non-commercial licensing model is likely to be less successful, at least in its first years. Making popular works available for non-commercial licensing, demanding users to pay for such use after enjoying it for free for many years now, offering a non-commercial licensing mechanism in other UGC fields, and creating a more appealing licensing structure that allows users to apply more creative changes to the original work—all are developments that entail time and expenditures. If a non-commercial licensing system would manage to overcome the aforementioned difficulties, it would offer copyright owners a more comprehensive scheme for charging users, without subjecting the charge to the interests of other players (e.g., UGC platforms and advertisers). Until then, however, Second Level Agreements are expected to remain the favored licensing option for copyright holders.

For creative users, Second Level Agreements, regardless of their vulnerability and non-inclusiveness, make more economical sense. As opposed to the iTunes model which offered a reasonably priced alternative to the illegal conduct of file sharing, a non-commercial licensing system would have to compete with legitimate licenses, which on top of being lawfully made are completely free. The free license alternative leaves little incentive for users to engage in a non-commercial licensing practice. Also, ironically, Second Level Agreements in their current form are better for creative users because these pacts allow creation without imposing preliminary restrictions. As long as Second Level Agreements continue to offer users a complimentary, restrictions-free license, non-commercial licenses will operate as a form of insurance. When a user purchases a non-commercial license, she can be certain that her work is legally produced and distributed, thus not conditional on right holders' caprices. Still, it seems that for the vast majority of users, the benefit of this insurance exceeds its price. Users are expected to be risk seeking because they only risk the presence of their work on the platform, which can be easily

restored through a non-commercial license in case the copyright owner demands its removal. Until Second Level Agreements cease to afford a better alternative for most users, the relatively low number of risk averse users who would choose to pay for a formal license as insurance is unlikely to maintain sufficient demand to keep non-commercial licensing thriving.

It is hard to determine whether a non-commercial licensing system would better survive in copyright practice than Second Level Agreements. In the only current form of the non-commercial licensing system, one dominant UGC platform actively participated in establishing the system. Thus, this platform is expected to actively promote itself among its users. When a user obtains a non-commercial license, she also immunizes the platform from secondary liability, because the user has the legal right to post the content. In such case, the platform can stipulate in its terms of service that it reserves the right to attach advertisements to users' works.²⁸² Shifting the licensing burden to users would also release platforms owners from including derivative UGC in Second Level Agreements, thus making the agreements more beneficial and presumably less expensive for the platforms. Because UGC has already proven itself as a poor interest for advertisers, platform operators are better off without bearing financial and legal responsibility for licensing such uses.

Non-commercial licensing also opens the market for another kind of intermediary, which may eat into the current UGC platform's scope of operation. However, Friendly Music's business model implies that Second Level Agreements may end up incorporating non-commercial licensing systems, which will be operated by the platforms themselves. It is still for the platforms to resolve how an automated filtering system could automatically distinguish between premium content, which may or may not be covered under content partnership, and authorized derivative UGC pursuant to a non-commercial license.

In light of this analysis, one has to give thought to two important points. First, if built appropriately, a non-commercial licensing scheme is the ideal way of operating in the copyright market. A direct, clear, and certain license provides better and more efficient creation opportunities, and thus promotes the underpinning of copyright law. Second, the current non-commercial licensing attempt has sprung from a market demand, which kept growing, notwithstanding the presence of Second Level Agreements. This makes perfect sense when

282. Although this may conflict with the "non-commercial" requirement of the license.

understanding the grounds on which Second Level Agreements emerged—a sudden reality of mass creation and user-supplied content, statutory safe harbors for UGC platforms, and lack of a feasible way to charge users for their employment of copyrighted works. Against this backdrop, it almost appears as though Second Level Agreements were the only quick and efficient substitute for a non-commercial license that the market could come up with. Therefore, non-commercial licensing is expected to develop and naturally undermine its antecedent, although such subversion will take time to complete. In the meanwhile, Second Level Agreements and non-commercial licensing are expected to overlap until finding the appropriate allocation.

VII. CONCLUSION

Second Level Agreements have changed the landscape of copyright practice. Formally, Second Level Agreements are meant to limit the potential liability of UGC platform operators, while having no direct bearing on the legal status of end users. In practice, however, Second Level Agreements have dramatically affected the rights and privileges of end users. Effectively, they have dramatically expanded consumption and use possibilities, and have afforded users far greater access and use privileges with respect to copyrighted content relative to what they previously had. Hence, it will not be an exaggeration to say that in terms of practical significance, Second Level Agreements are far more important than fair use and tolerated use.

Second Level Agreements are ubiquitous, especially among large UGC platforms. Websites, such as YouTube, MySpace, and Yahoo, to name just a few, have all entered Second Level Agreements with powerful right holders, such as the big four U.S. record labels, Viacom, Disney, and others. As a result, Second Level Agreements redefined not only the legal rights and duties of the contracting parties, but also the prevailing norms and industry practices, which regulate the creation and distribution of UGC.

The goal in this article was to provide a first comprehensive study of the Second Level Agreements phenomenon. Descriptively, it presents a detailed account of the emergence of Second Level Agreements as well as their effects. Normatively, it evaluates the vices and virtues of Second Level Agreements. It also offers a prediction as to the future of Second Level Agreements.

Despite the immense practical significance of Second Level Agreements and the theoretical challenges they raise, legal scholarship has not provided a thorough analysis of their regime. This article

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attempts to redress this omission. It is my hope that this study will constitute a useful first step for future research on the subject.

