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From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course

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From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course

ABSTRACT

YouTube.com, named Time magazine's "Invention of the Year" for 2006 and widely recognized as the most-visited video site on the Internet, has changed the face of online entertainment. With the site's acquisition by Google in October 2006, the possibilities for YouTube's growth became truly endless. However, there is a darker side to the story of the Internet sensation, one that is grounded in its potential liability for copyright infringement. The issue is that many of the most-viewed and most-popular videos on the site are copyrighted. The copyright owners of those popular clips want their works back and are suing YouTube and Google for infringing their copyrights.

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), specifically addressing the potential copyright liability of Internet service providers. The DMCA provides a series of "safe harbors" for certain activities of Internet service providers, ensuring limited liability so long as providers comply with the "notice and takedown" provision of the statute. To date, YouTube has been capitalizing on the safe harbors provided by the DMCA and has avoided liability for infringement. Although the DMCA protects Internet service providers like YouTube, it leaves copyright holders out in the cold.

This Note first traces the development of copyright law and the liability of Internet service providers from the Copyright Act of 1976 to the DMCA. The Author then evaluates potential copyright claims against YouTube and Google under both statutes, with special emphasis on the applicability of the safe harbor provisions of the DMCA. The Author then discusses the current legal status of YouTube, how the site has avoided copyright liability in the past, and how it fares under the more traditional fair use analysis. The Author concludes that YouTube should not be eligible for a fair use defense and argues that the site, with all of its far-reaching capabilities, should be held responsible for its infringing actions.

TABLE OF CONTENTS

I.	THE FOUNDATION OF COPYRIGHT	182
A.	<i>Expanding Upon Fair Use</i>	183
B.	<i>The Development of Secondary Liability</i>	185
1.	Liability of Internet Service Providers.....	186
2.	Contributory Liability and Vicarious Infringement.....	186
C.	<i>The Digital Millennium Copyright Act of 1998</i>	188
1.	Safe Harbors	189
2.	Back to Choppy Waters.....	190
3.	A New Theory on the Horizon: The Inducement Rule .	194
4.	An Uncertain Future.....	195
II.	YOUTUBE'S LIABILITY UNDER CURRENT COPYRIGHT LAW.....	196
A.	<i>YouTube Under the Digital Millennium Copyright Act</i>	197
B.	<i>YouTube's Liability Under the Copyright Act of 1976</i>	199
1.	Direct Infringement	200
2.	Contributory Infringement	200
3.	Vicarious Liability.....	200
4.	<i>Grokster's</i> Inducement Rule for Liability.....	202
C.	<i>What About Fair Use?</i>	203
1.	Purpose and Character of the Use	203
2.	Nature of the Copyrighted Work.....	204
3.	Amount and Substantiality of the Portion Used	204
4.	Potential Market Harm	205
III.	LEGALLY LIABLE, YET PROTECTED ALL THE SAME	207
IV.	AN AMORPHOUS PROBLEM IN NEED OF A CONCRETE ANSWER	208
A.	<i>What is the Problem?</i>	208
B.	<i>What is the Answer?</i>	209
V.	CONCLUSION.....	213

“Broadcast Yourself™”:¹ two simple words and one website have revolutionized the world of Internet entertainment. The year 2006 was quite a year for YouTube.com (YouTube) and its founders Chad Hurley and Steven Chen.² Lauded as *Time* magazine’s “Invention of the Year” for 2006³ and the “most-visited video site on

1. YouTube.com, <http://www.youtube.com> (last visited Sept. 21, 2007).

2. Kevin J. Delaney, *Garage Band: With NBC Pact, YouTube Site Tries to Build a Lasting Business*, WALL ST. J., June 27, 2006, at A1.

3. Lev Grossman, *The People's Network*, TIME, Nov. 13, 2006, at 62.

the web,”⁴ YouTube was founded in February 2005 above a pizzeria in San Mateo, California.⁵ The concept was born of necessity, as Hurley and Chen recognized the need for an efficient way to share personal videos with friends.⁶ They developed the site as a “consumer media company” in order to allow people across the globe to upload and share videos.⁷ However, it has evolved into much more than a simple conduit through which to pass information. As the site itself acknowledges, YouTube has “grown into an entertainment destination with people watching more than 70 million videos . . . daily.”⁸ No longer the pet-project of two friends, YouTube has become a universal sensation, as demonstrated by its acquisition by the Internet behemoth Google in October 2006 for a staggering \$1.65 billion.⁹

With popularity came problems, however. As early as December 2005, the same month in which the site was publicly unveiled, YouTube faced allegations of copyright infringement.¹⁰ A popular skit from NBC’s “Saturday Night Live” was uploaded onto the site without the network’s permission and quickly became a user favorite.¹¹ While YouTube eventually removed the offending clip after notice was provided by NBC, the skit had already been viewed six million times.¹² The “Saturday Night Live” incident was merely a harbinger of things to come for the popular site, especially once Google came on to the scene. News agencies across the world noted the staggering deal as well as the problems that came along with it: “Google Will Inherit Law Claims Over YouTube”;¹³ “At YouTube, A Copyright Conundrum Continues.”¹⁴

The fact that YouTube users unlawfully post copyrighted material is not at issue: “the most-viewed items often involve some

4. Delaney, *supra* note 2, at A1.

5. *Id.*

6. *See id.*

7. About YouTube, <http://www.youtube.com/t/about> (last visited Jan. 5, 2007).

8. *Id.*

9. Grossman, *supra* note 3, at 62.

10. *See* Delaney, *supra* note 2, at A1 (noting that the site’s creators recognized potential infringement claims and contacted NBC on December 28, 2005 to find out “whether NBC had provided [one particular] clip itself, and volunteered to remove [the clip] from YouTube if the video had been shared without NBC’s permission”).

11. *See id.* (“[S]omeone posted to YouTube a skit from NBC’s ‘Saturday Night Live’ dubbed ‘Lazy Sunday,’ featuring two grown men rapping about cupcakes, red licorice candy and ‘The Chronicles of Narnia’ film.”).

12. *Id.*

13. Kenneth Li & Yinka Adegoke, *Google Will Inherit Law Claims Over YouTube*, BIRMINGHAM POST, Oct. 12, 2006, at B23.

14. Barrie McKenna, *At YouTube, A Copyright Conundrum Continues*, GLOBE & MAIL, Oct. 11, 2006, at B1.

type of copyright infringement.”¹⁵ The popular site has conceded this much in its recent deals at home and abroad. In an attempt to quell the raging storm of copyright liability, YouTube removed almost 30,000 clips of television shows, movies, and music videos in early October 2006, following a claim filed by the Japanese Society for Rights of Authors, Composers and Publishers.¹⁶ The site also has begun entering licensing agreements with entertainment powerhouses, including Universal Music Group, Sony BMG, and Warner Music Group, to avoid potential infringement claims lodged by those studios.¹⁷ However, it is yet to be seen if such prophylactic measures will assist Google in navigating the “litigation-laden landmine” it secured with its most recent acquisition.¹⁸ But the question remains: Has YouTube broadcasted itself right out of business?

This Note addresses whether YouTube is liable for the copyright infringement of its users. Part I traces the development of copyright law and the liability of Internet service providers from the Copyright Act of 1976 to the Digital Millennium Copyright Act of 1998. Part II analyzes YouTube’s potential liability under both statutes and considers possible fair use defenses available to the site. Part III addresses the current state of YouTube and how the site has avoided liability to this point. Finally, Part IV will address the shortcomings of copyright law in attempting to regulate burgeoning Internet technologies and a possible solution.

I. THE FOUNDATION OF COPYRIGHT

YouTube faces potential secondary liability for the infringing activities of its users. In uploading copyrighted film clips, music videos, and television shows, YouTube users are unlawfully violating copyright holders’ exclusive rights to reproduction and distribution as set forth in § 106 of the Copyright Act of 1976 (Copyright Act).¹⁹ In passing the Copyright Act, Congress sought to balance the competing interests of promoting artistic creativity through protection and reward, with the desire to expand and advance the bounds of public

15. Delaney, *supra* note 2, at A1.

16. Noam Cohen, *YouTube is Purging Copyrighted Clips*, N.Y. TIMES, Oct. 30, 2006, at C8.

17. See Li & Adegoke, *supra* note 13, at B23.

18. Tim Wu, *Does YouTube Really Have Legal Problems? How the Bell Lobby Helped Midwife YouTube*, SLATE, Oct. 26, 2006, <http://slate.com/id/2152264>.

19. 17 U.S.C. § 106 (2000).

knowledge.²⁰ In order to promote the former, § 106 of the Act grants copyright holders a collection of exclusive rights in copyrighted works, including the right of reproduction, the right of distribution, and the right of public display.²¹ However, the Copyright Act also provides a defense to some acts of copying under § 107—Limitations on Exclusive Rights: Fair Use—in order to permit courts to “avoid [the] rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²²

Case law has clarified and interpreted this section, creating what is commonly referred to as the “fair use doctrine,” a defense to infringement liability. However, the fair use doctrine does not set forth a concrete definition of fair use. Instead, it proposes several factors to consider when evaluating a claim of fair use. The factors include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work; and (4) the potential market harm resulting from copying the copyrighted work.²³

A. Expanding Upon Fair Use

The Supreme Court directly addressed the fair use doctrine in the seminal case of *Sony Corp. of America v. Universal City Studios, Inc.*²⁴ The case involved Sony’s development of the Betamax video tape recorder and possible copyright infringement by consumers.²⁵ The copyright owners of some publicly broadcast television programs alleged that Sony’s Betamax was used by its customers to record copyrighted television programs, and sought to hold Sony liable for the infringement.²⁶ In addition to the “substantial noninfringing uses” of the Betamax,²⁷ the Court noted that “[e]ven unauthorized uses of a copyrighted work are not necessarily infringing” and examined the doctrine of “fair use” with respect to the Betamax.²⁸ In evaluating the first factor—the purpose and character of the use—the Court determined that the copying by the Betamax was done for private,

20. See H.R. REP. NO. 94-1476, at 51-52 (1976).

21. 17 U.S.C. § 106.

22. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980); see 17 U.S.C. § 107.

23. 17 U.S.C. § 107.

24. 464 U.S. 417 (1984).

25. See *id.* at 420.

26. *Id.*

27. *Id.* at 456.

28. *Id.* at 447.

time-shifting use, not a commercial venture.²⁹ This tipped the scales in favor of fair use.³⁰ Moreover, the programs were broadcast free of charge.³¹ Although the nature of the copyrighted work was creative, and thus, at the core of copyright protection, this element was discounted by the fact that audiences were invited to view the programs for free.³² The same mitigating effect went toward the third prong—the amount and substantiality of the portion copied. Although the shows could be copied in their entirety, the fact that viewers were invited to view them free of charge once again went in favor of fair use.³³

The Court addressed the fourth factor—the potential market for or value of the copyrighted work—very carefully. According to the Court, even noncommercial uses of a copyrighted work could have the potential to infringe on a copyright owner's capacity to recoup on his creative efforts.³⁴ However, “a challenge to a noncommercial use of a copyrighted work requires proof that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”³⁵ Because the copyright owners failed to prove such an actual or potential harm, the Court held that Betamax users' time-shifting was fair use.³⁶

Legally, there can be no secondary liability without direct liability.³⁷ If time-shifting had failed the fair use analysis, Betamax users would have been directly liable for copyright infringement, and Sony could have been exposed to secondary liability as a result. The *Sony* Court acknowledged as much with its discussion of “contributory” infringement.³⁸ However, because the Betamax was capable of “substantial noninfringing uses,” the Court refused to find Sony liable for secondary copyright infringement.

29. *See id.* at 449. The Supreme Court explained that “time-shifting” occurred when an “average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time.” *Id.* at 421.

30. *See id.* at 450.

31. *Id.* at 425.

32. *See id.* at 449-50.

33. *See id.*

34. *See id.* at 450.

35. *Id.* at 451.

36. *See id.* at 456.

37. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 6.1 (2002).

38. *See Sony*, 464 U.S. at 435-38.

B. The Development of Secondary Liability

One of the earliest cases addressing secondary liability was *Shapiro, Bernstein & Co. v. H. L. Green Co.*³⁹ In *Shapiro*, defendant H. L. Green (Green) owned a chain of retail stores and employed a concessionaire, Jalen Amusement Co. (Jalen), to operate the record departments in each of its stores.⁴⁰ Jalen produced “bootleg” records to be sold in the defendant’s stores.⁴¹ Although Green denied any contribution to the bootlegging activities of the direct infringer, the Second Circuit found it liable nonetheless.⁴²

The court made the analogous distinction between a dance hall proprietor and a landlord.⁴³ A landlord requires a fixed fee, has no knowledge of the infringing activity that may take place upon his premises, and exercises no supervision over that property.⁴⁴ A music hall proprietor, on the other hand, has a direct financial interest in the performers he may hire.⁴⁵ If an infringing act is hired, it may bring in additional customers and profits, thus making the dance hall proprietor party to the infringing activity.⁴⁶ Because the defendant in *Shapiro* had supervisory control over its concessionaire and a direct financial interest in its sales, Green was likened to a dance hall proprietor and liable for secondary copyright infringement.⁴⁷

The *Shapiro* court, in concluding that Green could be liable for secondary infringement, noted:

[The dance-hall cases] and this one lie closer on the spectrum to the employer-employee model than to the landlord-tenant model Green’s relationship to its infringing licensee, as well as its strong concern for the financial success of the phonograph record concession, renders it liable for the unauthorized sales of the “bootleg” records [T]he imposition of *vicarious* liability in the case before us cannot be deemed unduly harsh or unfair. Green has the power to police carefully the conduct of its concessionaire⁴⁸

Because the agreement between Green and Jalen was a licensing agreement, Green directly benefited from the infringement by

39. 316 F.2d 304 (2d Cir. 1963).

40. *Id.* at 306.

41. *See id.*

42. *See id.* at 307.

43. *See id.* at 307-08.

44. *Id.* at 307.

45. *Id.*

46. *Id.*

47. *Id.* at 308.

48. *Id.* (emphasis added).

receiving ten to twelve percent of the revenue made from infringing sales.⁴⁹

1. Liability of Internet Service Providers

The liability of Internet service providers (ISPs) became increasingly prevalent in the early 1990s, as the World Wide Web was escalating in popularity. In *Playboy Enterprises, Inc. v. Frena*, the defendant maintained an online bulletin board service (BBS), to which people could subscribe, post material, and access materials posted by others.⁵⁰ One user of the service proceeded to post pictures to which Playboy held the copyright.⁵¹ Noting that the BBS posted “unauthorized copies of a copyrighted work,” the District Court for the Middle District of Florida found that the site had indeed directly violated Playboy’s right to public display.⁵²

2. Contributory Liability and Vicarious Infringement

Although the issue of ISP liability was raised in *Playboy*, it was not until two years later that the contours of secondary liability of ISPs really came into focus. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, the plaintiffs held the copyright to the unpublished and published works of L. Ron Hubbard, the founder of the Church of Scientology.⁵³ A defendant, Dennis Erlich, posted portions of Hubbard’s works online through a BBS that was connected to the Internet through service provided by defendant Netcom.⁵⁴ While the District Court for the Northern District of California did not find Netcom liable for direct infringement, it cleanly

49. *Id.* at 308.

50. 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

51. *Id.*

52. *Id.* at 1556. The court explained its reasoning as follows:

The concept of display is broad. It covers “the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.” . . . However, in order for there to be copyright infringement, the display must be public. A “public display” is a display “at a place open to the public or . . . where a substantial number of persons outside of a normal circle of family and its social acquaintances is [sic] gathered.” A place is “open to the public” in this sense even if access is limited to paying customers. Defendant’s display of PEI’s copyrighted photographs to subscribers was a public display. Though limited to subscribers, the audience consisted of “a substantial number of persons outside of a normal circle of family and its social acquaintances [sic].”

Id. at 1556-57 (citations omitted).

53. 907 F. Supp. 1361, 1365 (N.D. Cal. 1995).

54. *Id.* at 1365-66.

laid out the elements of both contributory and vicarious liability.⁵⁵ In order to prove contributory infringement, it must be shown that the defendant (1) had knowledge of the infringing activity and (2) substantially participated in the infringing activity.⁵⁶ A company substantially participates if it “induces, causes, or materially contributes to the infringing conduct’ of the primary infringer.”⁵⁷ In the case of *Netcom*, the plaintiffs failed to show that the ISP had knowledge of the infringing uses before they were contacted by the plaintiffs, thus causing their contributory infringement claim to fail.⁵⁸

The “knowledge” prong of the contributory infringement analysis was closely evaluated in *Sony Corp. of America v. Universal City Studios, Inc.*⁵⁹ Although the Supreme Court did not expressly delineate the branches of secondary liability, it discussed the knowledge standard to be used when evaluating contributory liability.⁶⁰ Because Sony did not have *actual* knowledge of the infringing uses of its Betamax recording machine, the Court refused to impose secondary liability on the company for mere “constructive knowledge.”⁶¹

The *Sony* Court went on to set forth its famous “staple article of commerce” doctrine:

The staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.⁶²

According to the Court, if there are “substantial noninfringing uses” for an article—actual or potential—then a court should not impute knowledge for the purpose of evaluating contributory infringement.⁶³

Although the plaintiff in *Netcom* could not establish the actual knowledge of the ISP as required under a theory of contributory

55. *See id.* at 1372-77.

56. *Id.* at 1373.

57. *Id.* at 1375 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

58. *See id.* at 1375.

59. 464 U.S. 417, 435-39 (1984).

60. *Id.* at 439.

61. *Id.*

62. *Id.* at 442.

63. *See id.*

infringement, its vicarious liability claim was much stronger.⁶⁴ To prove vicarious liability, a plaintiff must show that the defendant (1) had the right and ability to control the infringer and failed to do so, and (2) received a “direct financial benefit” from the infringing conduct.⁶⁵ Although Netcom contended that it could not possibly control what its users decided to post, the company’s “terms and conditions” showed otherwise.⁶⁶ Because Netcom retained the authority to “police” users’ conduct, it raised a material question as to whether it had the “right and ability to exercise control over the activities of its subscribers.”⁶⁷

However, the plaintiff could not prove that Netcom directly benefited financially from the actions of its users.⁶⁸ Returning to the landlord–dance hall proprietor distinction set forth in *Shapiro*, the *Netcom* court concluded that because Netcom charged a fixed fee for its services, the ISP had no direct financial interest in the infringing activity of its users.⁶⁹ “There [was] no evidence that infringement by [any] user of Netcom’s services, in any way enhance[d] the value of Netcom’s services to subscribers or attract[ed] new subscribers.”⁷⁰ As a result, the plaintiffs’ vicarious liability claim failed as well.⁷¹

C. The Digital Millennium Copyright Act of 1998

Because the *Netcom* decision clearly and specifically delineated the components of both contributory infringement and vicarious liability, it serves as a paradigm of secondary liability analysis for ISPs. Congress thought so as well. With the Digital Millennium Copyright Act of 1998 (DMCA), Congress essentially codified the holding of *Netcom* and attempted to bring U.S. copyright law into the twenty-first century.⁷² The Senate Report noted:

Rather than embarking upon a wholesale clarification of [contributory and vicarious liability], the Committee decided to leave current law in its evolving state and, instead, to create a series of “safe harbors,” for certain common activities of

64. *Religious Tech. Ctr. v. Netcom On-Line Commc’ns Servs., Inc.*, 907 F. Supp. 1361, 1375-77 (N.D. Cal. 1995).

65. *Id.* at 1375.

66. *Id.*

67. *Id.* at 1376.

68. *Id.* at 1377.

69. *Id.* at 1376-77; *see supra* text accompanying notes 38-50.

70. *Id.* at 1377.

71. *Id.*

72. *See* 17 U.S.C. § 512 (2000); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[A][1] (2006).

service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.⁷³

The DMCA overhauled existing statutory copyright law by adding § 512—“Limitations on Liability Relating to Online Materials”—to the Copyright Act of 1976.⁷⁴ Section 512 provides “safe harbor” exemptions from infringement liability in certain instances: (a) transitory digital network communications; (b) system caching; (c) information residing on systems or networks at direction of users; and (d) information location tools.⁷⁵ Section 512(c) addresses the problems of secondary liability posited by earlier cases such as *Netcom*.⁷⁶

1. Safe Harbors

Working from prior precedent such as *Sony* and *Netcom*, § 512(c)(1) sets forth the criteria that an ISP must meet in order to benefit from the DMCA’s safe harbors.⁷⁷ As far as knowledge is concerned, an ISP must have no actual knowledge of the infringing material on its site, must not be aware of any facts that may make the infringement “apparent,” and must promptly remove infringing material in the event that such knowledge is acquired.⁷⁸ According to the legislative history of the DMCA, “apparent knowledge” requires evidence that an ISP “turned a blind eye to ‘red flags’ of obvious infringement.”⁷⁹

In addition to requiring no knowledge, § 512(c)(1) insists that the ISP receive no “financial benefit directly attributable to the

73. S. REP. NO. 105-190, at 19 (1998).

74. See 17 U.S.C. § 512; RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP 477 (9th ed. 2005).

75. See 17 U.S.C. § 512(a)-(d); BROWN & DENICOLA, *supra* note 74, at 478.

76. See S. REP. NO. 105-190, at 19-20.

77. 17 U.S.C. § 512(c)(1). (“A service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”).

78. See *id.*

79. H.R. REP. NO. 105-551, pt. 2 at 57 (1998).

infringing activity” when the provider has the “right and ability to control” the infringing activity.⁸⁰ Finally, upon receiving notification by a copyright holder of an alleged infringement, the provider must “expeditiously” remove the material.⁸¹ This final stipulation is known as the “notice and take-down” provision of the DMCA.⁸²

In order for an ISP to be eligible for any of the safe harbor provisions set out in § 512, it must first meet the conditions of § 512(i).⁸³ In order to qualify for safe harbor and a limitation of secondary liability, an ISP must show that it:

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.⁸⁴

Section 512(i)(1)(A) requires ISPs to (1) adopt a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances, (2) implement that policy in a reasonable manner, and (3) inform its subscribers of the policy.⁸⁵ If a service provider fails to meet the requirements of § 512(i), it cannot qualify for protection within the safe harbors of § 512.⁸⁶

2. Back to Choppy Waters

Although the DMCA attempted to set forth a concrete structure with which to address the future treatment of Internet infringement claims, the subsequent treatment of such cases has been far from uniform.⁸⁷ While some courts plainly implemented the new provisions of the DMCA,⁸⁸ others were more skeptical of the new safe harbors and reverted back to the standards set forth in *Sony* or *Netcom*, or a combination of the two.⁸⁹ In 2001, a California district court relied on a straightforward application of § 512(c) of the DMCA to exonerate the popular selling site eBay from secondary liability.⁹⁰ Because

80. 17 U.S.C. § 512(c)(1)(B).

81. *Id.* § 512(c)(1)(A)(iii).

82. *See* BROWN & DENICOLA, *supra* note 74, at 478.

83. 17 U.S.C. § 512(i).

84. *Id.*

85. *Id.*

86. *Id.*

87. *See infra* text accompanying notes 92-122.

88. *See infra* text accompanying notes 92-98.

89. *See infra* text accompanying notes 101-122.

90. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001).

defendant eBay did not have “actual or constructive knowledge” of its users’ infringing activities and had no ability to control the activities of its users, the court held that the site passed the safe harbor test and granted summary judgment.⁹¹

Another straightforward application of § 512(c) may be seen in *Perfect 10, Inc. v. CCBill, LLC*, where an ISP once again found protection under the auspices of the DMCA’s safe harbor provisions.⁹² Co-defendants CWIE, an Internet service provider, and CCBill, an automated service that allows its clients to use credit cards to make payments over the Internet, were not held liable for the infringement of their users.⁹³ The defendant ISP transmitted the copyrighted images of the plaintiff without permission; however, those images were uploaded by its clients.⁹⁴ Under the DMCA, it was the plaintiff’s responsibility to notify the ISP of the infringing material.⁹⁵ While the plaintiffs attempted to provide this notice, the notices listed only the websites that contained the infringing images, not the web addresses of the photos themselves.⁹⁶ As a result, the court found the plaintiff’s notification insufficient, thus not providing the defendant with the requisite knowledge to mandate take-down under the DMCA.⁹⁷ As a result, the ISP was granted summary judgment pursuant to § 512(c).⁹⁸

In implementing the safe harbor provision of § 512, courts place a heavy burden on plaintiffs, requiring exacting adherence to the notification provisions.⁹⁹ However, ISPs must meet stringent demands of their own, and courts have been unwilling to apply DMCA safe harbors to ISPs that fail to meet those requirements.¹⁰⁰ In *Ellison v. Robertson*, the District Court for the Central District of California evaluated America Online’s (AOL) liability as an ISP under the traditional notions of secondary liability.¹⁰¹ AOL could not be held liable for the direct infringement of its users.¹⁰² Nevertheless, because

91. *Id.* at 1093-94.

92. 340 F. Supp. 2d 1077, 1105 (C.D. Cal. 2004).

93. *Id.* at 1084, 1102-05.

94. *See id.* at 1103.

95. *See id.* at 1098; 17 U.S.C. § 512 (2000).

96. *Perfect 10*, 340 F. Supp. 2d at 1089.

97. *See id.* at 1104.

98. *See id.* at 1105.

99. *See supra* text accompanying notes 92-98.

100. *See infra* text accompanying notes 108-110.

101. 189 F. Supp. 2d 1051 (C.D. Cal. 2002), *rev’d in part*, 357 F.3d 1072 (9th Cir. 2004).

102. *Id.* at 1056. The court explained its reasoning as follows:

AOL’s role in the infringement as a passive provider of USENET access to AOL users cannot support direct copyright infringement liability. In *Netcom*, the court

AOL substantially participated in disseminating the infringing material to millions and had reason to know of the direct infringement, the district court found a “triable issue of fact” as to AOL’s contributory infringement.¹⁰³ However, the plaintiff’s vicarious liability claim failed because AOL received no direct financial benefit from the infringing activity of its users.¹⁰⁴ According to the court, “[f]inancial benefit exists where the availability of infringing material ‘acts as a “draw” for customers.’”¹⁰⁵ Relying on the Ninth Circuit’s holding in *Fonovisa, Inc. v. Cherry Auction, Inc.*, the district court noted that “the sale or distribution of infringing materials must be a significant draw to customers in order for vicarious liability to apply.”¹⁰⁶

Although the district court granted AOL summary judgment as to the vicarious liability claim, relying on the DMCA safe harbors of § 512(a),¹⁰⁷ the Ninth Circuit disagreed.¹⁰⁸ According to the Ninth Circuit, it was unclear whether AOL even passed the threshold requirements of § 512(i) that would have allowed the company to seek the safe harbor.¹⁰⁹ The court concluded that a jury could find that AOL had not “reasonably implemented” a policy that addressed the problem of repeat infringers, and therefore, summary judgment was improper.¹¹⁰ The court remanded Ellison’s contributory liability claim, as the Ninth Circuit demonstrated that the safe harbor provisions of the DMCA were not to be a cure-all for all ISPs.¹¹¹

Another instance in which an ISP failed to qualify for safe harbor was in the case of *In re Aimster Copyright Litigation*.¹¹² The defendant’s Internet service implicitly allowed for the unlawful swapping of computer music files.¹¹³ Instead of going after individual

held that the defendant, an internet services provider like AOL, could not be found guilty of direct copyright infringement based on copies of works that were made and stored on its USENET servers.

Id. at 1056-57 (citation omitted).

103. *Id.* at 1060.

104. *See id.* at 1062.

105. *Id.* (quoting *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)).

106. *Id.* at 1063 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 260 (9th Cir. 1996)) (citation omitted).

107. *Id.* at 1072.

108. *See Ellison v. Robertson*, 357 F.3d 1072, 1074 (9th Cir. 2004).

109. *Id.* at 1080.

110. *Id.*

111. *Id.* at 1082.

112. 334 F.3d 643 (7th Cir. 2003).

113. *See id.* at 645.

users, copyright owners sued the service provider itself.¹¹⁴ However, Aimster was not only an Internet service; the system also provided software that facilitated file-sharing amongst its users.¹¹⁵ In its defense, Aimster relied on *Sony*, contending that, like the Betamax, its system had “substantial noninfringing uses,” and therefore, it was not liable for contributory infringement.¹¹⁶ Although the court was not willing to adopt the defense wholesale, it noted that “when a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement.”¹¹⁷

Aimster’s substantial noninfringing uses defense fell apart, however, as the court took a hard-line approach to the issue of knowledge, at least where contributory infringement was concerned.¹¹⁸ Although the *Sony* Court held that “constructive” knowledge was not enough to impose contributory infringement,¹¹⁹ the court in *Aimster* noted an important caveat: “Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement)”¹²⁰ The court’s unbending interpretation of the knowledge requirement carried over into its evaluation of Aimster’s DMCA claim.¹²¹ While the DMCA provided safe harbor for ISPs that took “reasonable” steps to protect against repeat infringement, Aimster failed to meet the Act’s requirements: “Far from doing anything to discourage repeat infringers . . . Aimster invited them to do so”¹²² As a result, the plaintiff’s injunction was granted, and Aimster’s service was shut down.¹²³

Although ISPs attempted to take solace within the confines of the DMCA in the post-*Netcom* world, courts became increasingly skeptical of the liberal use of safe harbors. In fact, when ISPs were brought to court for copyright infringement, straightforward application of the DMCA was far from certain, as *Ellison* and *Aimster* demonstrate. Not only was the law applicable to Internet infringement claims in flux, but a new rule was on the horizon.

114. *Id.* at 645-46.

115. *Id.* at 646.

116. *See id.* at 649.

117. *Id.* at 649.

118. *See id.* at 650.

119. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 462 U.S. 417, 439, 488 (1984).

120. *Aimster*, 334 F.3d at 650 (citations omitted).

121. *See id.* at 655-56.

122. *Id.* at 655.

123. *See id.* at 655-56.

3. A New Theory on the Horizon: The Inducement Rule

In the era of Napster and peer-to-peer file sharing, courts kept a watchful eye on ISPs as technology developed rapidly to allow ISPs to circumvent prior precedent, thus perpetuating the endless infringement of anything and everything over the World Wide Web. By 2005, the Supreme Court had had enough, and drew a hard line in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*¹²⁴ With the death of Napster and open liability of index servers in peer-to-peer networks,¹²⁵ ISPs sought to develop a product that offered the same benefit—the ability to swap music from one user to another—without the cost—copyright infringement liability.¹²⁶ Grokster was one such company. By developing new software that bypassed the need for central servers and allowed users to communicate directly, the company ostensibly insulated itself from potential copyright infringement.¹²⁷ The Supreme Court was not convinced in *Grokster*, however.¹²⁸ Far from being a “passive recipient[] of information,” the Court emphasized that Grokster “knowingly and intentionally distributed their software to enable users to reproduce and distribute . . . copyrighted works.”¹²⁹ In fact, nearly ninety percent of the files on the system were protected by copyright.¹³⁰

Grokster relied heavily on Sony’s “significant noninfringing uses” in an attempt to defend itself against infringement liability.¹³¹ According to Grokster, because the service had the potential for

124. 545 U.S. 913 (2005). In the case, the Supreme Court noted a tension between “supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.” *Id.* at 928. The Court addressed this tension, along with claims that

digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works [T]he indications are that the ease of copying songs or movies using software like Grokster’s and Napster’s is fostering disdain for copyright protection.

Id. at 928-29.

125. In 2001, the Ninth Circuit found a strong likelihood that Napster was liable for both contributory infringement and vicarious liability in *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1020, 1024 (9th Cir. 2001). As a result, Napster was shut down and soon after settled its copyright lawsuit. Matt Richtel, *Songwriters and Publishers Reach a Deal With Napster*, N.Y. TIMES, Sept. 25, 2001, at C10.

126. See *Grokster*, 545 U.S. at 920.

127. See *id.*

128. *Id.* at 923.

129. *Id.* at 923, 921.

130. *Id.* at 922.

131. See *id.* at 933.

significant noninfringing uses, knowledge of the infringing uses of its users could not be imputed, and therefore, it could not be held liable for contributory infringement.¹³² However, the Court noted a fundamental difference between Sony and Grokster, a difference that the Court explained by looking to the intent of the parties.¹³³ “[W]here evidence . . . shows statements or actions directed to promoting infringement, Sony’s staple-article rule will not preclude liability.”¹³⁴ The Court adopted the “inducement rule” and held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”¹³⁵

Because Grokster clearly expressed a desire to move in on the market previously dominated by Napster and took affirmative steps through advertising to do so, it unlawfully induced copyright infringement by its users.¹³⁶ Consequently, the Court remanded the case for further proceedings, designed to evaluate the “inducement” actions of Grokster.¹³⁷ However, unlike previous decisions, the *Grokster* Court did not rely on a theory of secondary liability. Instead, the Court introduced a new breed of liability and held that Grokster could be liable for copyright infringement under its new inducement rule.¹³⁸

4. An Uncertain Future

In evaluating the implications of § 512, Nimmer’s influential copyright treatise notes that, “instead of drawing stark lines, Section 512 outlines a myriad of minute circumstances that can either afford or preclude access to its safe harbors. For that reason, one must anticipate much litigation over the concrete issues . . . below before the contours of the law develop sharp edges.”¹³⁹ In hindsight, this prediction was correct. From the printing press to the Xerox machine, from BBS sites to new file-sharing software, copyright law has fought to keep up with the rapid evolution of technology, while still

132. See Brief for Respondents at 1, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480).

133. See *Grokster*, 545 U.S. at 934-35.

134. *Id.* at 935.

135. *Id.* at 936-37.

136. See *id.* at 937-38.

137. *Id.* at 941.

138. *Id.*

139. NIMMER, *supra* note 72, § 12B.01[C][4].

attempting to maintain the delicate balance between artists' rights and the free trade of ideas and knowledge. Although the DMCA purported to offer a solution, it has failed. While some courts have implemented the DMCA in evaluating service provider infringement, others return to the standards set out in *Sony* or *Netcom*, or a synthesis of the two.¹⁴⁰ Most recently, the Supreme Court forewent the above and established an entirely new test with its inducement rule.¹⁴¹ A clear standard for evaluating the secondary liability of ISPs has yet to be established.

YouTube's sweeping popularity is attributable to its popular content, which is largely comprised of copyrighted material.¹⁴² The site's sweeping popularity has opened the door for potential copyright infringement claims and has thrown the issue of the secondary liability of service providers back to the forefront of legal minds. Although the DMCA attempted to provide a workable framework for addressing such infringement claims in the ever-expanding virtual environment, it has failed. It is time to go back to the drawing board.

II. YOUTUBE'S LIABILITY UNDER CURRENT COPYRIGHT LAW

Is YouTube liable for copyright infringement? The site maintains that it is free from legal liability, arguing that its actions fall under fair use as well as within the "safe harbors" of the DMCA.¹⁴³ According to Fred von Lohman, attorney for the Electronic Frontier Foundation in San Francisco, "YouTube looks to be on relatively firm legal ground."¹⁴⁴ However, John Palfrey, an intellectual property professor at Harvard Law School, disagrees.¹⁴⁵ In Palfrey's opinion, the financial benefit that Google derives from advertising sales precludes the site from taking advantage of the DMCA's safe harbors.¹⁴⁶ Who is right?

140. See *supra* text accompanying notes 92-98, 101-122.

141. See *supra* text accompanying notes 126-138.

142. Many critics note that the majority of the most viewed clips on the site "involve some type of copyright infringement." Delaney, *supra* note 2, at A1.

143. See Tim Weber, *Google's Copyright Nightmare*, BBC NEWS, Oct. 10, 2006, <http://news.bbc.co.uk/2/hi/business/6038116.stm>.

144. Matthew Karnitschnig & Kevin J. Delaney, *Media Titans Pressure YouTube Over Copyrights*, WALL ST. J., Oct. 14, 2006, at A3.

145. *Id.*

146. See *id.*

A. YouTube Under the Digital Millennium Copyright Act

YouTube shrouds itself within the safe harbors of the DMCA in an attempt to insulate itself from liability for copyright infringement.¹⁴⁷ However, how safe are those safe harbors for this new Internet sensation? For an ISP to claim safe harbor under the DMCA, it must meet the stipulations in § 512(c)(1).¹⁴⁸ Pursuant to this section, an ISP must prove that it had no knowledge of the infringing material.¹⁴⁹ It must have no “actual knowledge” of the infringing material and no knowledge of circumstances that would make infringing activity “apparent.”¹⁵⁰ If the website is notified that such infringing material is located on the site, then it must have acted “expeditiously” to have the offending material removed.¹⁵¹

In YouTube’s case, the site contests that it would be “impossible to screen each of the 65,000 clips added each day.”¹⁵² Moreover, YouTube was developed to, and continues to, serve legitimate, substantial noninfringing uses—the sharing of user-generated content amongst friends and social networks.¹⁵³ As a result, given the absence of “actual knowledge” of particular cases of infringement, a court most likely would not impute knowledge to YouTube under § 512(c)(1)(A) in evaluating its potential liability for infringement, and therefore, would not hold the site liable for infringement.

A second piece of the knowledge analysis requires that the ISP not be aware of “circumstances from which infringing activity is apparent.”¹⁵⁴ The legislative history of the DMCA states that, although an ISP is not obligated to “seek out copyright infringement . . . it would not qualify for safe harbor if it turned a blind eye to ‘red flags’ of obvious infringement.”¹⁵⁵ However, in order for such a red flag to be raised, the infringing material must be “obviously pirate[d].”¹⁵⁶ Because YouTube does not initially screen users’ uploads, instead only monitoring them once put on notice, the site

147. See Delaney, *supra* note 2, at A1.

148. 17 U.S.C. § 512(c)(1) (2000).

149. *Id.*

150. *Id.* § 512(c)(1)(A).

151. *Id.* § 512(c)(1)(C).

152. Jonathan Thaw, *Google’s \$200 Million Legal Reserve Underscores YouTube Worries*, BLOOMBERG.COM, Nov. 15, 2006, <http://www.bloomberg.com/apps/news?pid=20601087&sid=at8yc9NCGj0w>.

153. See Delaney, *supra* note 2, at A1.

154. 17 U.S.C. § 512(c)(1)(A).

155. S. REP. NO. 105-190, at 48 (1998).

156. *Id.* at 49.

does not willfully ignore red flags of piracy and meets the knowledge prong of the safe harbor analysis.¹⁵⁷

In fact, YouTube professes that it “goes out of its way” to protect the content of copyright holders, in compliance with the third prong of the safe harbor analysis.¹⁵⁸ Upon receiving notification by a copyright holder of an alleged infringement, the DMCA requires that a provider “expeditiously” remove the material.¹⁵⁹ YouTube complies with this “notice and take-down” provision by establishing channels through which copyright holders can notify the site of unlawful infringement, in order to have the clip removed.¹⁶⁰ The site’s Terms of Use state:

[I]f you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act (“DMCA”) by providing our Copyright Agent with the following information in writing (see 17 U.S.C 512(c)(3) for further detail).¹⁶¹

Additionally, YouTube has attempted to formulate a system to protect against such infringement as effectively as possible and has implemented a ten-minute-length limit upon discovering that “longer videos were more likely to be copyrighted.”¹⁶² In compliance with § 512(i) of the DMCA, the site has also adopted a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances, has implemented that policy in a reasonable manner, and has informed its subscribers of the policy.¹⁶³ Therefore, YouTube satisfies both the first and third prongs of the safe harbor analysis.

The second prong of the safe harbor analysis—requiring that an ISP not receive a direct financial benefit—could be the most problematic for YouTube.¹⁶⁴ Even if YouTube meets both the knowledge and take-down requirements, the site “entered uncharted

157. See McKenna, *supra* note 14, at B1.

158. Greg Sandoval, *YouTube Dances the Copyright Tango*, CNET NEWS.COM, July 24, 2006, http://www.news.com/2100-1025_3-6097365.html.

159. 17 U.S.C. § 512(c)(1)(C).

160. See YouTube Terms of Use, <http://www.youtube.com/t/terms> (last visited Sept. 22, 2007).

161. *Id.*

162. See, e.g., Your 15 Minutes of Fame..ummm...Make that 10 Minutes or Less, http://www.youtube.com/blog?entry=oorjVv_HDVs (Mar. 26, 2006) [hereinafter Your 15 Minutes of Fame].

163. See YouTube Terms of Use, *supra* note 160.

164. See 17 U.S.C. § 512(c)(1)(B) (2000).

territory when it recently began adding ads next to search results.”¹⁶⁵ The site’s advertising-based business model could prove to be a legal liability to the company.¹⁶⁶ According to Gary Stein of Ammo Marketing in San Francisco, sites like YouTube are “attractive to advertisers for one reason: numbers.”¹⁶⁷ YouTube’s success in ad sales depends on how many users visit the site; the more users the site attracts, the more the company can charge for advertising.¹⁶⁸ However, many critics note that the majority of the most viewed clips on the site “involve some type of copyright infringement.”¹⁶⁹ Arguably, because the infringing clips attract users and those users allow YouTube to profit from advertising sales, YouTube benefits from the infringing material posted on its site. Because YouTube receives a direct financial benefit from advertising sales that are stimulated by infringing material, it very likely may be precluded from seeking shelter under the safe harbor provisions of the DMCA.

B. YouTube’s Liability Under the Copyright Act of 1976

Even if a court determines that YouTube benefits financially from the infringing material on its site, thus precluding it from taking advantage of the DMCA’s safe harbors, that is not the end of the inquiry regarding the legal liability of the site. In the event that an ISP’s activities fall outside the limitations on liability specified in the DMCA, liability is adjudicated based on the doctrines of direct, vicarious, or contributory liability for infringement as they are articulated in the Copyright Act and in judicial opinions interpreting and applying that statute. These theories of liability are unchanged by § 512 and the DMCA.¹⁷⁰

Even though YouTube is “pushing at the boundaries” of copyright law and the DMCA,¹⁷¹ in order to evaluate its potential liability, one has to look back to the beginning, back to its liability under the Copyright Act of 1976.

165. Heather Green, *Whose Video is It, Anyway? YouTube’s Runaway Success Has Opened a Pandora’s Box of Copyright Issues*, BUS. WK., Aug. 7, 2006, at 38.

166. See generally Greg Sandoval, *YouTube: Too Rough for Advertisers?*, CNET NEWS.COM, Apr. 21, 2006, http://www.news.com/2100-1024_3-6063536.html (describing YouTube’s advertising-based business model).

167. *Id.*

168. See *id.*

169. Delaney, *supra* note 2, at A1.

170. See S. REP. NO. 105-190, at 55 (1998).

171. Weber, *supra* note 143.

1. Direct Infringement

For YouTube to be directly liable for copyright infringement, it must have encroached upon one of the exclusive rights of the copyright holder as listed in § 106 of the Copyright Act.¹⁷² However, because YouTube does not post the infringing material itself, it cannot be held directly liable.¹⁷³ On the other hand, as the site's users unlawfully post copyrighted material, YouTube may be potentially liable for secondary infringement, similar to the BBS in *Netcom*.¹⁷⁴ In order for a copyright holder to succeed in a suit for secondary infringement against the site, he must prove the elements of contributory infringement or vicarious liability.¹⁷⁵

2. Contributory Infringement

A case for contributory infringement is made out if the defendant (1) had knowledge of the infringing activity and (2) substantially participated in that infringing activity.¹⁷⁶ YouTube allows users around the world to view anything and everything posted by other users, including copyrighted material. Therefore, it is reasonable to believe that a court would find that YouTube substantially participates in the spread of the infringing material.

The knowledge prong of the contributory infringement analysis would be more difficult to prove. Because YouTube has the "substantial noninfringing use" of sharing personal video clips with others, courts would likely be wary in inferring knowledge for the purposes of evaluating contributory infringement.¹⁷⁷ Therefore, a contributory infringement claim against YouTube is likely to fail.

3. Vicarious Liability

A vicarious liability claim may be more promising for a copyright holder to pursue against YouTube. Vicarious liability

172. See 17 U.S.C. § 106 (2000).

173. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal. 1995). Like the BBS in *Netcom*, YouTube is insulated from direct liability. *Id.*

174. *Id.* at 1373-75.

175. See *supra* text accompanying notes 55-71 (detailing the requirements for proving secondary liability of an Internet service provider).

176. See *Netcom*, 907 F. Supp. at 1373.

177. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442-56 (1984) (finding no contributory infringement because the Betamax was capable of substantial noninfringing uses).

requires that the owner of a copyright prove that the defendant had (1) the right and the ability to control the infringing activity and failed to do so and (2) received a "direct financial benefit" from the infringing conduct.¹⁷⁸ Although a spokeswoman for YouTube declared that it would be "impossible to screen each of the 65,000 clips added each day,"¹⁷⁹ that does not necessarily mean that the site does not have the right and ability to control its users. YouTube, like Netcom, boasts extensive Terms of Use that are clearly incorporated into the site.¹⁸⁰ The terms state the following: "YouTube will . . . terminate a User's access to its Website, if . . . they are determined to be a repeat infringer."¹⁸¹ Although the conditions seemingly insulate the site from infringement liability on their face, they also demonstrate the site's purported right and ability to control the activities of its users.¹⁸² In *Netcom*, the district court interpreted a similar policy as demonstrating the site's right to "police" its users' conduct and activities.¹⁸³ Therefore, it is possible that a court would view YouTube's Terms of Use as fulfilling a similar function, thus proving the first prong of the vicarious liability analysis.

As for the financial analysis under the theory of vicarious liability, the site's advertising-based business model once again could prove legally problematic for the company. YouTube attracts advertisers because of its vast viewership.¹⁸⁴ Attracting more viewers has a direct relationship to the site's advertising revenues: the more viewers, the more ad sales, and the more the site can charge for such advertising.¹⁸⁵ Moreover, many critics contend that the most popular content of the site, the content that attracts the most users, is in fact copyrighted and uploaded illegally.¹⁸⁶ Therefore, because the infringing clips attract users, and those users allow YouTube to profit from advertising sales,¹⁸⁷ YouTube benefits from the infringing material posted on its site.

178. See *Netcom*, 907 F. Supp. at 1375.

179. Thaw, *supra* note 152.

180. See YouTube Terms of Use, *supra* note 160.

181. *Id.*

182. In *Netcom*, the defendant BBS contended that it could not be held liable for vicarious infringement, because it allegedly did not have the power to control the activities of its users. *Netcom*, 907 F. Supp. at 1375. However, the court found that the terms and condition of the site that allowed Netcom to "reserve[] the right to take remedial action against subscribers," demonstrated its ability and control over its subscribers. *Id.*

183. *Id.* at 1376.

184. See Sandoval, *YouTube: Too Rough for Advertisers?*, *supra* note 166.

185. See *id.*

186. See Delaney, *supra* note 2, at A1.

187. See Sandoval, *YouTube: Too Rough for Advertisers?*, *supra* note 166.

Unlike the infringing material in *Netcom*, infringing clips on YouTube “enhance[] the value of . . . services to subscribers [and] attract[] new customers.”¹⁸⁸ Looking to the foundation case of *Shapiro, Bernstein & Co v. H. L. Green Co.*, YouTube is more analogous to a music hall proprietor who benefits from the unlawful activities of his performers than a landlord who has no knowledge or control over his tenants.¹⁸⁹ Because YouTube has the right and ability to control its users, and benefits financially from their infringing conduct, the site could be held liable under a theory of vicarious copyright infringement.

4. *Grokster*’s Inducement Rule for Liability

Another avenue for establishing the liability of YouTube may be through the Supreme Court’s *Grokster* decision.¹⁹⁰ In fact, Robert Tur, owner of the Los Angeles News Service, is relying on the infamous decision in his suit against YouTube, filed on July 14, 2006.¹⁹¹ Tur claims that “[b]ecause YouTube has the [infringing] files on its servers, it is able to have ‘actual knowledge of what particular copyrightable files are being distributed, played and copied through its service.’”¹⁹² According to Tur, because the site “generates advertising dollars in accordance with the number of visitors to its Web site . . . the site encourages infringing behavior.”¹⁹³ However, the Court based its holding in *Grokster* on its new inducement rule, which required a “clear expression” that the ISP had taken “affirmative steps” to foster infringement.¹⁹⁴ Unlike *Grokster*, a service that was explicitly designed to usurp the unlawful Napster market,¹⁹⁵ YouTube is more comparable to the Betamax of *Sony* in that it has legitimate, “substantial noninfringing uses,”¹⁹⁶ such as sharing personal and/or non-copyrighted videos with family and friends. Therefore, a theory of liability against YouTube under the *Grokster* inducement rule is likely to fail.

188. *Netcom*, 907 F. Supp. at 1377.

189. *See* 316 F.2d 304, 307-08 (2d Cir. 1963); text accompanying notes 38-48.

190. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *see supra* text accompanying notes 124-138 (detailing the contours of the inducement rule as set forth by the *Grokster* Court).

191. *See Journalist Sues YouTube for Display of Reginald Denny Video*, MEALEY’S LITIG. REP. COPYRIGHT, Aug. 7, 2006, at 17.

192. *Id.*

193. *Id.*

194. *Grokster*, 545 U.S. at 937.

195. *See id.* at 937-38.

196. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

C. What About Fair Use?

If a copyright holder proceeded with a claim for vicarious liability against YouTube, the site would most likely not have a viable fair use defense. The factors of a fair use defense, as set forth in § 107 of the Copyright Act, include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work; and (4) the potential market harm of the copying of the copyrighted work.¹⁹⁷

1. Purpose and Character of the Use

Whereas commercial use of a copyrighted work was once presumptively not fair use, courts have since retreated from such an extreme position.¹⁹⁸ Nonetheless, the Supreme Court has clearly stated that commercial use of a copyrighted work “tends to weigh against a finding of fair use.”¹⁹⁹ Although the posting of copyrighted clips on YouTube might be for personal enjoyment, the use is of a commercial character nonetheless given the site’s advertising-based model. This works against YouTube in a fair use analysis.²⁰⁰ Moreover, in determining the purpose and character of the use, courts look to “whether the new work merely ‘supersede[s] the objects’ of the original creation or instead adds something new, with a further purpose or different character . . . ; it asks, in other words, whether and to what extent the new work is ‘transformative.’”²⁰¹ Copyrighted clips are posted on YouTube to perform their original function: to entertain. Nothing new is added to the clips that would change their inherent character. Therefore, the first factor of the fair use analysis—the purpose and character of the use—falls in favor of copyright holders.

197. 17 U.S.C. § 107 (2000).

198. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Sony*, 464 U.S. at 448-49) (“[T]he commercial . . . character of a work is ‘not conclusive,’ but rather a fact to be ‘weighed along with other[s] in fair use decisions.’”).

199. *Id.* (quoting *Sony*, 464 U.S. at 562).

200. The commercial nature of YouTube’s clips is demonstrated through the site’s advertising-based business model. See Sandoval, *YouTube: Too Rough for Advertisers?*, *supra* note 166. Essentially, the infringing clips on YouTube “enhance[] the value of . . . services to subscribers [and] attract[] new subscribers” to the site. *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F.Supp. 1361, 1377 (N.D. Cal. 1995); see also *supra* text accompanying notes 167-176 (discussing YouTube’s advertising-based business model).

201. *Campbell*, 510 U.S. at 579 (citations omitted).

2. Nature of the Copyrighted Work

The second factor in the fair use analysis considers the nature of the copyrighted work.²⁰² By looking at the nature of the work, the fair use analysis recognizes that “some works are closer to the core of intended copyright protection than others,” and that creative works fall into the “core of the copyright’s protective purposes.”²⁰³ Therefore, there is a legal presumption against fair use in the copying of creative works.²⁰⁴ Although YouTube was created to allow for the efficient swapping of user-generated content, the site has far surpassed its humble roots.²⁰⁵ The site now hosts innumerable clips from television shows, music videos, and movies.²⁰⁶ Because such works are creative in nature, they lie at the heart of copyright and are entitled to the core of copyright protection.²⁰⁷ As a result, the second factor of the fair use analysis falls against YouTube as well.

3. Amount and Substantiality of the Portion Used

The third factor in analyzing a fair use claim looks to the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²⁰⁸ In the spring of 2005, YouTube implemented a ten-minute-length limit on clips in order to help “balance the rights of copyright owners with the rights of users.”²⁰⁹ The site “poked around” and determined that longer videos were more likely to be copyright protected.²¹⁰ Although such a move demonstrated a good faith effort on the part of the site to prevent the dissemination of copyright works, that effort does not necessarily push the third factor in favor of YouTube.

The third factor is a “qualitative” assessment of the taking, not necessarily a quantitative one.²¹¹ Therefore, although a three-minute clip taken from an hour-long program may not amount to a significant portion of the show as a whole, it may still constitute a “substantial” portion of the work if it copies the “heart” of the copyrighted work.

202. See 17 U.S.C. § 107(2).

203. *Campbell*, 510 U.S. at 586.

204. See *id.* (noting that fair use is more difficult to establish when such creative works are copied).

205. See Delaney, *supra* note 2, at A1.

206. *Id.*

207. See *supra* text accompanying notes 203-204.

208. 17 U.S.C. § 107(3) (2000).

209. Your 15 Minutes of Fame, *supra* note 162.

210. *Id.*

211. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985).

The heart of a copyrighted work is that which is unique to the work, thus giving the copyright its value.²¹² Therefore, stealing the heart of the work, however long or short, may prove as detrimental as stealing the work in its entirety.²¹³ As Judge Learned Hand remarked, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”²¹⁴

The value of the clips on YouTube is that they provide entertainment to millions of the site’s users on a daily basis.²¹⁵ Essentially, the site has opened up an entire new genre of entertainment for the twenty-first century.²¹⁶ However, the fact that the entirety of copyrighted works is not available to be downloaded does limit the site’s exploitation of copyrighted clips.²¹⁷ For example, YouTube initially gained widespread popularity with the posting of “Lazy Sunday,” a faux music video from NBC’s *Saturday Night Live*.²¹⁸ The skit was viewed six million times on YouTube before it was finally pulled following a request from NBC.²¹⁹ The fact that the entire episode of *Saturday Night Live* was not posted did not affect the popularity of the clip. Instead, the two-and-one-half-minute clip was representative of what the audience wanted to view and was the heart for the work from which it was taken. As far as the fair use analysis is concerned, this factor once again weighs against YouTube.

4. Potential Market Harm

The final step in analyzing a fair use claim is evaluating the “effect of the use upon the potential market for or value of the copyrighted work.”²²⁰ A plaintiff only must show that an infringing use harms a “potential” market.²²¹ However, because the Internet is quickly becoming the ultimate entertainment destination, the market harm caused by infringement of sites such as YouTube is far more

212. See *id.*

213. See *id.*

214. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

215. See Delaney, *supra* note 2, at A1.

216. See *id.* (discussing YouTube’s increasing popularity and its competitors’ attempts to keep up).

217. Clips themselves are valuable for the traffic they bring to the site. According to Gary Stein of Ammo Marketing in San Francisco, sites like YouTube are “attractive to advertisers for one reason: numbers.” Sandoval, *YouTube: Too Rough for Advertisers?*, *supra* note 166.

218. See Delaney, *supra* note 2, at A1.

219. *Id.*

220. 17 U.S.C. § 107(4) (2000).

221. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

than speculative. For example, the “Lazy Sunday” skit was viewed six million times on YouTube before it was removed.²²² The skit was also available for download from Apple’s iTunes store for \$1.99.²²³ Although not all six million viewers would have paid the iTunes fee in order to purchase the clip, at least some of them would have. Thus, NBC and Apple were deprived of these potential profits.

However, media giants are not the only ones who are having the value of their copyrights streamed away. Take, for example, independent video producers Fritz Grobe and Stephen Voltz.²²⁴ The pair conceived an elaborate display of the physics of carbonation by dropping five hundred Mentos candies into one hundred two-liter bottles of Diet Coke.²²⁵ Grobe and Voltz filmed the experiment and posted the video on Revver.com, a site that shares advertising revenue with individuals who post popular videos.²²⁶ Grobe and Voltz hoped to make a small profit for their eight months of work.²²⁷

It was not long, however, before the Mentos video showed up on YouTube and was seen close to eight million times.²²⁸ On Revver.com, the clip was viewed only 5.5 million times, earning Grobe and Voltz \$30,000.²²⁹ The pair believes that they lost half of their advertising income because of hits lost to unauthorized YouTube copies.²³⁰ YouTube not only usurps the market of media giants but also that of the independent filmmaker, the “little guy.” Given the potential and oftentimes actual harm, this final factor weighs against YouTube as well.

Unfortunately for YouTube, it fails at every turn of the fair use analysis. Its use is commercial in nature, in order to attract more users and increase advertising sales. Such a commercial use, even if not presumptively unfair, definitely weighs against a finding of fair use.²³¹ Moreover, the copyrighted clips are largely creative, thus lying at the core of copyright protection.²³² Because the clips may be said to represent the heart of a given work and detrimentally affect the

222. See Delaney, *supra* note 2, at A1.

223. Anne Broache, *SNL Cult Hit Yanked From Video-Sharing Site*, CNET NEWS.COM, Feb. 17, 2006, http://www.news.com/2100-1026_3-6041031.html.

224. See Green, *supra* note 165, at 38.

225. *Id.*

226. *Id.*

227. *Talk of the Nation: On YouTube, Popularity Can Be a Curse* (National Public Radio broadcast Nov. 14, 2006) [hereinafter *Talk of the Nation*].

228. *Id.*

229. Green, *supra* note 165, at 38.

230. See *Talk of the Nation*, *supra* note 227.

231. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

232. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

market for the copyrighted work, a fair use claim by YouTube must fail, and the site is potentially liable for copyright infringement.

III. LEGALLY LIABLE, YET PROTECTED ALL THE SAME

Even though a court could hold YouTube liable for copyright infringement, the site has gone to great lengths and expense to prevent that from happening.²³³ Following YouTube's acquisition by the Internet behemoth Google, the site became a virtual bull's eye for copyright litigation.²³⁴ Because the site was no longer a modest shop of thirty-five employees, copyright holders were incentivized to bring infringement suits, a possible victory being well worth their while.²³⁵ However, Google has put its deep coffers and army of lawyers to good use.²³⁶ In an attempt to quell the raging storm of copyright liability, YouTube removed over 30,000 clips of television shows, movies, and music videos in early October 2006, following a claim filed by the Japanese Society for Rights of Authors, Composers and Publishers.²³⁷ The site also has begun entering licensing agreements with entertainment powerhouses, including Universal Music Group, Sony BMG, and Warner Music Group, to avoid potential infringement claims.²³⁸ The studios will receive a percentage of the advertising proceeds that derive from their copyrighted content,²³⁹ while they, in turn, turn a blind eye to the infringing content.²⁴⁰ While YouTube is hoping to avoid potential infringement suits brought by the studios, the studios, recognizing the universal appeal of the site, are adopting an "if you can't beat 'em, join 'em" mentality.²⁴¹ Regarding the

233. See generally Katie Hafner, *We're Google. So Sue Us.*, N.Y. TIMES, Oct. 23, 2006, at C1 (discussing Google's "aggressive" response to potential legal problems).

234. With Google's acquisition of YouTube in October 2006, commentators predicted, "Google will inherit law claims over YouTube." Li & Adegoke, *supra* note 13, at B23. The site became referred to as Google's "litigation-laden landmine." Wu, *supra* note 18. Because YouTube was no longer a fly-by-night operation, copyright holders had more incentive to bring potential infringement suits: a possible victory opening up the deep, deep pockets of Google and well worth the while. See Karnitschnig & Delaney, *supra* note 144, at A3.

235. See Karnitschnig & Delaney, *supra* note 144, at A3.

236. See Hafner, *supra* note 233, at C1.

237. Cohen, *supra* note 16, at C8.

238. Li & Adegoke, *supra* note 13, at B23.

239. Peter Kafka, *Can YouTube Grow Up and Stay Cool?*, FORBES.COM, Sept. 18, 2006, http://www.forbes.com/digitalentertainment/2006/09/18/youtube-warner-video-tech-media_cx_pk_0918youtube.html.

240. See Karnitschnig & Delaney, *supra* note 144, at A3 (noting that media companies have generally tolerated YouTube's use of their videos).

241. See Anne Becker et al., *Big Changes Ahead: How Google-YouTube Will Shake Up the TV Industry*, BROADCASTING & CABLE, Oct. 16, 2006, at 14 (arguing networks will need to decide whether to take a "beat 'em" or "join 'em" attitude toward Google-YouTube).

licensing deals, Chad Hurley, chief executive of YouTube, stated that “YouTube is committed to balancing the needs of the fan community with those of copyright holders.”²⁴²

However, what about the Mentos video makers of the world? What about the little guy? How can he protect his content when he does not have the deep pockets of Google at his expense? David A. Milman, the chief executive of Rescuecom (an Internet provider of computer services), has experience trying to take on Google after suing the service for trademark infringement.²⁴³ In an interview with *The New York Times*, he candidly commented, “People say you can’t fight the government. Google, in this case, is very similar to the government. They’re the government of the internet.”²⁴⁴ Because the “little guy” is just that—little—it is easy to dismiss his plight: What is the damage of copying just one video? However, from the beginning, the Supreme Court has recognized such reasoning as being precarious.²⁴⁵ In *Sony*, the Court noted that, “[a]lthough such a use may seem harmless when viewed in isolation, [isolated] instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.”²⁴⁶

IV. AN AMORPHOUS PROBLEM IN NEED OF A CONCRETE ANSWER

A. *What is the Problem?*

One major problem with copyright law as it applies to YouTube is that both copyright holders and developers of new technologies have to rely on legislation that was passed before the technology existed. Unfortunately, “technology is often several steps ahead of copyright law.”²⁴⁷ In passing the DMCA, Congress took its best stab at a dilemma that had no boundaries: how to regulate the burgeoning world of technology.²⁴⁸ In the spirit of copyright law, the DMCA tried to balance the competing interests of promoting artistic creativity with

242. Press Release, YouTube, Universal Music Group and YouTube Forge Strategic Partnership (Oct. 9, 2006), http://www.youtube.com/press_room_entry?entry=JrYdNx45e-0.

243. See Hafner, *supra* note 233, at C1.

244. *Id.*

245. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 482 (1984) (Blackmun, J., dissenting).

246. *Id.* (alteration in original) (citation omitted).

247. *Talk of the Nation*, *supra* note 227.

248. The Senate Judiciary Committee stated that the purpose of the DMCA was “to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.” S. REP. NO. 105-190, at 1-2 (1998).

the desire to expand and advance knowledge.²⁴⁹ However, as shown through the problems with YouTube, the DMCA falls short on the side of promotion and protection and allows for the expanded exploitation of the rights of copyright holders, both large and small.²⁵⁰ Although the notice and take-down provisions of the Act seemingly protect the rights of copyright holders, in reality, the DMCA provides little solace to those whose work is being pirated.²⁵¹ Even if infringing copies are initially removed, it seems inevitable that they will be reposted within days, or even hours.²⁵² Essentially, in reaping the benefits of their work, copyright holders deserve “more bites of the apple.”²⁵³

However, the current dilemma of how to regulate the burgeoning world of technology is dangerous. If a litany of copyright holders begin to take YouTube to court, “[i]t might take 10 years of litigation to get a clear sense” of where the law will lie, intellectual property professor Lawrence Lessig predicts.²⁵⁴ According to Lessig, this is problematic: “In Internet time, it’s an eternity. There’s 10 years of chilled innovation. That’s really quite costly.”²⁵⁵

B. What is the Answer?

Attempting to sue YouTube out of existence is not the answer. It is “inevitable” that “another site, another technology, will rise up on its place and the same thing will happen over and over again.”²⁵⁶ Moreover, such a litigious route could very well result in the chilling of innovation as predicted by Lessig, a result directly contrary to the spirit of the Copyright Act. This does not mean, however, that the courts should play no role at all.

A more promising approach would be to force YouTube to put its promises into action. For example, as a part of its licensing arrangements, the site promised to implement a “content

249. See *id.* at 69.

250. See *supra* text accompanying notes 222-230.

251. See *supra* text accompanying notes 224-230 (outlining the case of Fritz Grobe and Stephen Voltz, creators of the Mentos video).

252. See, e.g., Green, *supra* note 165, at 38 (noting that once removed, copies of Grobe and Voltz’s video kept reappearing, forcing them to notify YouTube to take down each individual version).

253. Rickard Siklos & Bill Carter, *Old Model Versus a Speedster*, N.Y. TIMES, Dec. 18, 2006, at C1.

254. Heather Green & Lorraine Woellert, *Coming to Grips with Grokster: Now the Only Thing Innovators are Sure of is That They’ll Have to Watch Their Step*, BUS. WK., July 11, 2005, at 37 (quoting Lawrence Lessig).

255. *Id.* (quoting Lawrence Lessig).

256. *Talk of the Nation*, *supra* note 227.

identification system,” creating a virtual “first line of defence [sic]” against the uploading of infringing copies.²⁵⁷ YouTube expected to have completed the software by September 2006; however, by the end of the year there was no such system in sight.²⁵⁸ In fact, the tenuous peace that YouTube has fashioned through content agreements may be at risk if the site fails to implement such a safeguard: “[f]ailure to build adequate systems to protect copyright owners could . . . add to the risk of legal action against the site.”²⁵⁹

The judicial system needs to tackle YouTube head-on and find the site liable for copyright infringement in order to incentivize the site to step up its efforts in developing and implementing a content identification system. Suing YouTube out of existence is not the answer. Bankrupting the site through litigation will not solve the problem. Instead, courts should condition the site’s liability on the implementation of an adequate content identification system. For example, every week the site is operated without screening copyrighted content, YouTube should have to pay a fine. Then, that fine should be distributed to copyright holders whose rights are infringed by the site.

Who will be reimbursed under such a system? In order to get a piece of the “fine pie,” copyright holders should be required to contact the site and provide proof of infringing material. Such a requirement would not be overly burdensome, as copyright owners are already accustomed to providing such information under the DMCA’s notice and take-down provisions. Once the site is contacted, the owner’s name can be put on a list of those who will receive compensation for YouTube’s failure to implement copyright protections. Once a fixed fee-per-play is established, by YouTube or the court, that amount can then be multiplied by how many times each video is viewed, thus generating the amount an individual holder is to be paid for YouTube’s profiting off of the copyrighted content. Because YouTube keeps a running tally of how many times each video is seen, awarding the copyright holder a portion of the fine in relation to how many times his or her video is seen is a matter of simple algebra.²⁶⁰

In order to prevent the abuse of such a system, YouTube can demand that owners prove their ownership in such a work. Such

257. Richard Waters, *YouTube Lag on Software Might Hit Google Plans*, FIN. TIMES, Dec. 30, 2006, at 11.

258. *Id.*

259. *Id.*

260. For example, if the fee-per-play owed by YouTube is \$1.00 and a copyright holder’s property is played 150 in one week, YouTube would owe the copyright holder \$150.00— $\$1.00 \times 150 \text{ plays} = \150.00 .

verification steps could follow those laid out by the DMCA in § 512(c)(3)(A), which requires that the copyright owner provide a written communication including the following information:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. [and]
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.²⁶¹

Essentially, YouTube would be able incorporate the statutory verification and notification procedures set forth above in the implementation of their own copyright protection system.

Although taking this action appears very similar to simply complying with the notice and take-down provisions of the DMCA, the difference here is that a copyright holder would only be required to act *once*. Once YouTube is put on notice of the infringing material and the owner of that material, it should be YouTube's responsibility to keep a list of complaining copyright holders as well as their copyrighted works. When it comes time to distribute the fine to individual copyright owners, YouTube would be required to review its list of how many times each video is viewed and would then pay out funds accordingly.

While this system would put far more responsibility into the hands of YouTube, doing so is only fair. After all, "[f]airness is what justice really is."²⁶² The site is making money off of the clips of

261. 17 U.S.C. § 512(c)(3)(A) (2000).

262. BrainyQuote.com, Potter Stewart Quotes, http://www.brainyquote.com/quotes/authors/p/potter_stewart.html (last visited Sept. 23, 2007).

copyright owners.²⁶³ Therefore, it is inequitable that copyright holders should bear the cost of protecting their rights against those who violate them. The copyright owner should not be saddled with the obligation to inform YouTube every time a pirated version of their work appears on the site. Instead, YouTube is far better equipped to implement protections that can alert it of such instances. The responsibility should lie in the hands of those best-equipped to implement the protections required. In this case, that is undoubtedly YouTube.

Requiring YouTube to maintain a database of copyright holders and their individual rights also lays an integral foundation for a future content identification system. Once in place, such a system would “automatically identif[y] content and match[] it to a master list.”²⁶⁴ In making its deals with entertainment studios such as Universal Music Group, Sony BMG, and Warner Music Group, YouTube has begun developing a “master list” of the companies’ holdings in order to distribute advertising revenue.²⁶⁵ Once individual copyright holders have met the specifications outlined above, they too should be put on the list, forcing YouTube to protect their interests just as the site does for the larger studio houses. The little guy should then receive the same benefit afforded to the media giants: distribution of advertising revenues. As YouTube already distributes advertising revenue to the media giants, the little guy should be afforded the same benefit.

Whereas contracts set the terms and conditions for payouts from YouTube to different powerhouse studios, it is undeniable that the independent videographer lacks the resources to negotiate with the YouTube juggernaut. However, instead of negotiating separate contracts with every individual videographer, a task without end, YouTube could implement the distribution system used in dividing the hypothetical fine outlined above in distributing advertising revenues amongst independent copyright holders. Once a fixed fee-per-play is established, that amount can then be multiplied by how many times each video is viewed, thus generating the amount an individual holder is to be paid for YouTube’s profiting off of the copyrighted content.

Another important feature of a successful content identification system would be the capability for copyright holders to remove their

263. See, e.g., Sandoval, *YouTube Dances the Copyright Tango*, *supra* note 158 (discussing how the increasing number of videos and users makes YouTube’s plan to sell advertisements an attractive and profitable option).

264. Kafka, *supra* note 239.

265. See *id.*; Li & Adegoke, *supra* note 13, at B23 (discussing YouTube’s deals with Universal Music Group and Sony BMG).

own material without having to contact YouTube time and time again.²⁶⁶ Such a feature would allow the copyright holder to take proactive steps to protect his interests, beyond merely sending a letter or filing a lawsuit.²⁶⁷ Although the implementation of a sophisticated content identification system would be labor intensive and costly at the front end, that does not mean that it cannot be done. Other popular social networking sites, such as MySpace, have successfully implemented such screening measures in an attempt to better protect copyrighted material.²⁶⁸

V. CONCLUSION

It is hard to believe that the “Invention of the Year” for 2006,²⁶⁹ a website that streams more than seventy million videos on a daily basis,²⁷⁰ does not have the capacity to protect the rights of copyright holders while maintaining the service to the public that has become so universally popular. Shutting down YouTube is not the answer. Not only will a multitude of competitor sites be waiting in the wings to take its place,²⁷¹ but such a move would deprive the public of the benefits that the site offers. In a recent interview with the *Christian Science Monitor*, a new YouTube user announced: “It’s entertaining, it’s information, it’s a community of people sharing things.”²⁷² As the site itself professes, YouTube allows individuals to “upload, tag and share videos worldwide, [b]rowse millions of original videos uploaded by community members, [f]ind, join and create video groups to connect with people who have similar interests, [and c]ustomize the experience by subscribing to member videos, saving favorites, and creating playlists.”²⁷³

In an attempt to address the legal quandary that YouTube has introduced into the world of copyright law, the law should not throw the baby out with the bathwater. Granted, as more technology is developed at lightning speed, the ability of the law to effectively regulate such will become increasingly murky. By implementing

266. See Kevin J. Delaney & Ethan Smith, *YouTube Model is Compromise Over Copyrights*, WALL ST. J., Sept. 19, 2006, at B1.

267. See *id.*

268. See Kafka, *supra* note 239.

269. Grossman, *supra* note 3, at 62.

270. About YouTube, *supra* note 7.

271. See Greg Sandoval, *YouTube Rivals Look for Answers*, CNET NEWS.COM, Jan. 10, 2007, http://www.news.com/2100-1025_3-6149004.html.

272. Daniel B. Wood, *The YouTube World Opens an Untamed Frontier for Copyright Law*, CHRISTIAN SCI. MONITOR, Dec. 18, 2006, at 1.

273. About YouTube, *supra* note 7.

systems that are capable of addressing fact-specific problems, sites such as YouTube are taking the initiative to help clear the water. Instead of waiting for the law to catch up with technology, a race that may never be won, it is important to develop regulatory alternatives that can be as fluid and forward-looking as the technology that they are meant to regulate.

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