

YOUTUBE OR YOULOSE? CAN YOUTUBE SURVIVE A COPYRIGHT INFRINGEMENT LAWSUIT

Jason Breen^{*}**A. Introduction**

“As more people capture special moments on video, YouTube is empowering them to become the broadcasters of tomorrow.”¹ This self-glorifying quote may have seemed far fetched less than a year ago, but of late, YouTube has been discussed as a potential “sixth network,”² rivaling traditional distributors of video content that have had a stranglehold over audiences for decades. In some instances, it has even been shown that YouTube has already eclipsed television as the preferred arena for audiences. Connie Chung’s “Thanks for the Memories” episode was seen by twice as many viewers on YouTube after its initial broadcast.³ This is potentially a frightening scenario for both content creators and traditional content distributors, as their markets for both selling and providing exclusive avenues for consumption may be deteriorating.

It is fairly predictable that YouTube has already been the center of much attention for possible lawsuits. These discussions intensified after Google’s acquisition of the company for stock valued at \$1.65 billion in October of 2006.⁴ This resolved one of the major issues that confronted content providers: was a company like YouTube worth suing? Without the deep pockets provided by a company like Google, copyright holders would not have had the proper incentives to either sue the users of YouTube or the hosting service. Damages would have been limited and possible injunctions against individual users posting clips would be costly with little benefit. This is primarily due to the nature of a posting service like YouTube, which was aptly

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¹ *About YouTube*, at <http://www.youtube.com/t/about> (last visited Nov. 30, 2006).

² See Gary Arlen, ‘GooTube’ Impact on TV Unclear, TV Technology News (Nov. 1, 2006), at <http://www.tvtechnology.com/pages/s.0082/t.451.html>.

³ *YouTube Popularity Eclipses, and Influences, Fall TV Season*, FoxNews.com (Aug. 18, 2006), at <http://www.foxnews.com/story/0,2933,209022,00.html>.

⁴ Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, The New York Times (Oct. 9, 2006).

described in the first lawsuit against YouTube: ““The scope of the infringements is akin to a murky moving target ... Videos uploaded are not identified by copyright owner or registration number but rather by the uploader's idiosyncratic choice of descriptive terms to describe the content of the video -- tags -- making it extremely impractical to identify plaintiff's copyrighted works.””⁵

The final difficulty for those wishing to sue a video web hosting service like YouTube is its strict adherence to both prevailing case law and a statutory safe harbor that was not available to the likes of Grokster, Napster and Aimster. Although it is arguable that YouTube was built on the coat-tails of posted videos protected by copyright that would be deemed infringing, users also posted a significant amount of content that would be considered legitimate. In its infancy, legitimate content was predominately comprised of “user-created content.” This concept of legitimacy has been expanded as many content providers see service providers like YouTube as an avenue for growth. In August of 2006, YouTube unveiled a new advertising concept that will allow content providers to utilize YouTube as both an advertising platform and a revenue stream. A portion of the advertising sponsorships associated with pages featuring copyrighted content will be shared with the copyright holder of the video, in addition to YouTube setting up “brand channels” sponsored by the company. Some of the many companies forging deals with YouTube include CBS, NBC, TWT, Epic Records, Atlantic Records, E! Entertainment, MTV2, and Fox Searchlight.⁶ Music companies, like Sony BMG Entertainment, have even agreed to allow users to include copyrighted songs in their user created uploads.⁷

⁵ Mack Reed, *Publishers vs. YouTube: Does either side win?*, USC Annenberg Online Journalism Review (posted 7/20/06) (quoting complaint of Robert Tur v. YouTube, case number CV 06-4436-GAF (FMOx), filed July 14, 2006 in United States District Court, Central District of California)

⁶ Fred von Lohmann, *You Tube's Balancing Act: Making Money, Not Enemies*, The Hollywood Reporter, Esq. (July 10, 2006), available at <http://www.printthis.clickability.com/pt/cpt?action=cpt&title=YouTube%27s+Balancing+Act%3A+Making+Money>

These arrangements can be very lucrative for content providers, as CBS has discovered about one month after signing a deal with YouTube to create a brand channel. YouTube estimated that CBS content has been viewed nearly 30 million times in the past month alone, but this represents only a portion of the total benefit to CBS. Although the causation is questionable, since posting clips of the shows on YouTube, the “Late Show with David Letterman” and “The Late Late Show with Craig Ferguson” have seen increases in new broadcast viewership by 5% and 7%, respectively.⁸ Statistics such as these also tend to legitimize YouTube, as three of the top 25 most viewed videos for November were CBS clips that were uploaded legally.⁹

More importantly for video hosting services, an additional defense could insulate them from the fate of a service like Grokster if they adhere to the safe harbor’s standards. The Digital Millennium Copyright Act (DMCA) “‘was enacted to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability’ for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider.”¹⁰ With this policy goal in mind, four safe harbors were passed,¹¹ one of which is applicable to YouTube’s defense against a potential lawsuit. Section 512(c) provides insulation from liability for monetary relief for those that store infringing content at the direction of a user.¹² Whether YouTube adheres to the substantive requirements, and the surrounding case law, will be the

http://www.hollywoodreporteresq.com%2Fthresq%2Fspotlight%2Farticle_display.jsp%3Fvnu_content_id%3D1002802746&partnerID=104851.

⁷ *Song BMG Music Entertainment Signs Content License Agreement with YouTube* (Oct. 9, 2006), at http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA.

⁸ *After One Month, CBS Content Among Most Viewed Videos on YouTube*, (Nov. 21, 2006), at http://www.youtube.com/press_room_entry?entry=oJpEXVevcKg.

⁹ *Id.*

¹⁰ *Perfect 10, Inc. v. CCBill, LLC*, 340 F.Supp.2d 1077, 1086 (C.D. Cal. 2004), quoting H.R. Conf. Rep. No. 105-796, at 72 (1998).

¹¹ 17 U.S.C.A. § 512. § 512 (a) – (d) provide for the four safe harbors, while § 512 (e) – (n) are applicable to each of the safe harbors.

¹² 17 U.S.C.A. § 512(c)(1).

focus of this paper. I opine that YouTube has established the necessary policies and business practices to avail itself of this safe harbor.

Despite my opinion as such, YouTube and some content providers do not necessarily believe that this affirmative defense is available to video web hosting services.¹³ Rather than rely on §512(c) exclusively, YouTube deemed it necessary to obtain agreements with content providers that eventually could have been plaintiffs in copyright infringement lawsuits, severely limiting their exposure. At least five lawsuits have already been filed against video web hosting services, one of which is against YouTube.¹⁴ There are many reasons beyond legal liability that deals with content providers may have been explored, including the company's desire to be acquired by the likes of Google. At the very least, the strategic decision to share advertising revenues and the upcoming court cases call to question whether these business models are legitimate and warrant the investor attention they have received.

This paper will begin with a brief introduction to the service that YouTube provides, as well as explanations for its amazing growth after its official launch in December of 2005. Second, I will discuss the DMCA safe harbor found in §512(c) and how it has been interpreted by the courts since its adoption in 1998. Within this section, I will focus on case law that is applicable to YouTube's potential liability, as well as how related case law (especially in the realm of vicarious liability) may ultimately influence such a decision. Next, I will briefly discuss

¹³ For an interesting discussion of Mark Cuban's heated opinion on YouTube's viability over the long term, see *YouTube is "toast," Biztech* (Sept. 29, 2006), at <http://www.smh.com.au/news/biztech/youtube-is-toast/2006/09/30/1159337344017.html>.

¹⁴ A complaint has been filed against YouTube. *Tur v. YouTube, Inc.*, 2006 WL 3043777 (C.D. Cal. 2006). YouTube's answer has also been filed. *Tur v. YouTube, Inc.*, 2006 WL 3043780 (C.D. Cal. 2006). Universal Music has also sued three companies for infringement, including Myspace, Grouper Network and Bolt. *UMG Recordings, Inc. v. Myspace, Inc.*, 2006 WL 3466446 (C.D. Cal. 2006); *Universal hits MySpace with copyright suit*, CNNMoney.com (Nov. 17, 2006), at http://money.cnn.com/2006/11/17/technology/universal_myspace.reut/index.htm?postversion; *Sony: Grouper did not break copyright law*, CNNMoney.com (Nov. 22, 2006), at http://money.cnn.com/2006/11/22/technology/sony_grouper.reut/index.htm. Finally, Veoh Networks is being sued by the IO Group. *Io Group, Inc. v. Veoh Networks, Inc.*, 2006 WL 2180442 (N.D. Cal. 2006).

how YouTube may fair under the concepts of direct and secondary infringement liability, obviating the necessity of the §512(c) safe harbor. Finally, I will discuss the policy implications that such decisions could result in.

B. YouTube: How It Works and How It Grew

1. You Post, We Host

YouTube, started as a personal video sharing service, has become a worldwide entertainment destination. One reason for its meteoric growth is the website's ease of use. After the user uploads and "tags"¹⁵ a video, the video hosting service encodes it, supplies a player, and provides bandwidth and server space at no charge to the user. Once the video is posted, a URL is provided which can be passed on to other users. These users can then browse the hosting service for additional content. New users can also post their own content (as well as embed posted videos onto other websites) and a library eventually is built on the hosting service. At this point, the hosting service is merely "technology and infrastructure."¹⁶

It has been argued that the reason for YouTube's dominance over Google Video stemmed from Google's inability to move beyond the technological service, whereas YouTube became a "destination and a brand."¹⁷ This can be accomplished by the browsing experience and an engaging and inviting front page.¹⁸ When the brand becomes associated with the content, the aggregator becomes as important as the content and an audience is built, which can also lead to

¹⁵ User provides "tags" that become associated with the uploaded video. They can describe the genre of the video, the person appearing in the video, or any other term that would easily identify the video. These terms are not standardized, as they are left to the idiosyncrasies of the user. Therefore, a duplicate video may have different tag associations. Tags are useful when users are browsing the site or when searching for videos.

¹⁶ *How YouTube Works*, On Demand Media, [at ondemandmedia.typepad.com/odm/2006/10/how_youtubs.wor.html](http://ondemandmedia.typepad.com/odm/2006/10/how_youtubs.wor.html) (last visited 10/30/06)

¹⁷ *Id.*

¹⁸ *Id.*

social networking opportunities for users.¹⁹ From there, network effects take over: more users lead to more content, which then leads to more users.²⁰ This self-perpetuating loop leads to supremacy and the potential for monopoly-type power. The download, user and library statistics have already begun to show YouTube's dominance over its more than 100 competitors in the free, Web-based video hosting service Internet business.²¹ Sources vary in their reporting of use statistics, but Nielsen NetRatings has estimated that as of July, 2006, YouTube users streamed 50 million videos per day to more 12.5 million people each month.²²

YouTube's content is as varied as its users, which is reflected by the breadth of video that can be found. There are some limits on what content is acceptable for posting. Unlawful, obscene, pornographic or racist content is impermissible, as well as material that is copyrighted, protected by trade secrets or otherwise subject to third-party proprietary rights without permission of the rightful owner.²³ In addition, YouTube has implemented a time restriction of 10-minute per video. One commentator stated "YouTube's 10-minute clip limit and tiny video

¹⁹ *Id.*

²⁰ From May to July, the number of videos uploaded daily on YouTube increased from 50,000 to 65,000. *YouTube - Serving 100 Million Videos a Day, Myspace Gaining Ground* (July 16, 2006), at <http://blog.experiencecurve.com/archives/youtube-serving-100-million-videos-a-day>.

²¹ von Lohmann, *supra* note 6.

²² *Id.* YouTube currently claims more than 70 million videos watched daily. *About YouTube, supra* note 1. According to other reports, this could be up to 100 million videos daily. *YouTube - Serving 100 Million Videos a Day, Myspace Gaining Ground, supra* note 20. From December, 2005 to October, 2006, YouTube has estimated the number of unique users has grown from 3 to 6 million. Jonathan A. Hyman, *How I Learned To Stop Worrying and Love YouTube*, at http://www.kmob.com/pdf/videohosting_youtube.htm (last visited Dec. 1, 2006). In July of 2006, according to Hitwise, it was estimated that YouTube held 29% of the U.S. multimedia entertainment market. Myspace was the only company close to YouTube (19%), while Yahoo, MSN, Google and AOL (3-5% each) trailed behind. *Id.* Again, according to Hitwise, YouTube was estimated to have a 43% market share of video search sites in May of 2006, which MySpace Video (24%), Yahoo! Video Search (10%), MSN Video Search (9%), and Google Video Search (6%) could not match. Hitwise, *Hitwise Data Shows Overall Visits to Video Search Sites Up 164%*, Hitwise (May 24, 2006), at <http://www.hitwise.com/press-center/hitwiseHS2004/videosearch.php>.

²³ The exact limitations, as found in YouTube's Terms of Use, User Submissions: users will not "(i) submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein; (ii) publish falsehoods or misrepresentations that could damage YouTube or any third party; (iii) submit material that is unlawful, obscene, defamatory, libelous, threatening, pornographic, harassing, hateful, racially or ethnically offensive, or encourages conduct that would be considered a criminal offense, give rise to civil liability, violate any law, or is otherwise inappropriate; (iv) post advertisements or solicitations of business; (v) impersonate another person." *Terms of Service*, at <http://www.youtube.com/t/terms> (last visited Nov. 30, 2006).

window cater to clip culture, not pirates,” as neither television programming nor movies would fall under this limitation.²⁴ This distinguishes YouTube from services that swap entire television shows and movies.

What can be found on YouTube includes more traditional media content, like TV clips and music videos. However, the website also hosts a large amount of user-created content, including animations, amateur lip-synched songs, Hollywood trailer mash-ups and other remixed material, family videos and seemingly anything that can be recorded using a camcorder. Importantly, what ends up on YouTube is user dependant, as YouTube uploads videos from users without screening prior to posting.²⁵ The homepage includes ten daily “featured videos,”²⁶ as well as one sponsored video.

2. Terms of Use and Copyright Info²⁷

The User Submissions section of the “Terms of Use” implicates the copyright issues discussed later in this paper, so a brief description of the pertinent clauses will inform that examination. A user is solely responsible for any User Submission posted and affirms that they own or have the necessary rights to use and authorize YouTube to use content that may be protected by any proprietary rights. All ownership remains with the user submitting the video, but the user grants YouTube a “non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform User Submissions in connection with the YouTube Website and YouTube’s business.”²⁸ Additionally,

²⁴ von Lohmann, *supra* note 6.

²⁵ Hyman, *supra* note 22.

²⁶ The selection process is not described by YouTube, nor is the information behind the selection process available as far as I can tell. When asked to describe their metric, I received an e-mail response, unhelpfully stating “Thank you for your interest in YouTube, but unfortunately we are unable to help you with the information you need. The YouTube Team” (e-mail response, received Dec. 12, 2006, from copyright@youtube.com).

²⁷ Copies of the *Terms of Use* and *Copyright Info* can be found at <http://www.youtube.com/t/terms> and http://www.youtube.com/t/dmca_policy, respectively.

²⁸ Section 5(B), *Terms of Service*, *supra* note 23.

YouTube will remove any content that infringes copyright or does not comply with the terms, after proper notification²⁹ of infringement is provided or at their discretion, without prior notice to the user and at their sole discretion.³⁰ If a User Submission is removed from YouTube, the user can elect to send a counter notice.³¹ Finally, the company details their repeat infringer policy: “YouTube will also terminate a User's access to its Website, if they are determined to be a repeat infringer. A repeat infringer is a User who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice.”³²

3. The Development of the YouTube Business Model

Statistics in April, 2006 estimated that YouTube's bandwidth costs alone were upwards of \$1 million per month.³³ Since YouTube is a free service to both its users and uploaders, this is a hefty bill to sustain. Advertising dollars could help YouTube become profitable, if the company is not already.³⁴ This business model is similar to that exploited by broadcast television networks: content is “free,” but the consumer “pays” by having to watch advertising. Reports indicate that as late as July, YouTube was conservative in its advertising sales, adding ads

²⁹ Section 5(D), *Terms of Service* provides elements of proper notification (can also be found in *Copyright Info*, *supra* note 27). The elements needed for proper notification follow the requirements provided in 17 U.S.C.A. 512(c)(3) and provides a designated Copyright Agent. Content holders have used this policy to remove their copyrighted materials from YouTube. For example, NBC owned “Saturday Night Live” skits and an American Airlines in-house training video have both been removed after a proper notification was received by YouTube. Hyman, *supra* note 22.

³⁰ “YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another's intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice... YouTube also reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User's access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.” Section 5(C), *Terms of Service*, *supra* note 23.

³¹ *Copyright Info*, *supra* note 27.

³² Section 5(C), *Terms of Service*, *supra* note 23.

³³ Dan Frommer, *Your Tube, Whose Dime?*, *Forbes.com* (Apr. 8, 2006), at

http://www.forbes.com/intelligentinfrastructure/2006/04/27/video-youtube-myspace_ex_df_0428video.html.

³⁴ For an interesting discussion on YouTube's profitability, see Mitch Ratcliffe, *YouTube wildly profitable?* (Oct. 4, 2006), at <http://blogs.zdnet.com/Ratcliffe/?p=186>.

exclusively to search result pages.³⁵ Following the Google acquisition, this approach has been amended. Banner advertising is now included on most clip pages, as are video advertisements on the homepage.³⁶

The change in advertising strategy may have also been the result of the deals YouTube has negotiated with many of the largest content providers, from sports leagues like the NHL,³⁷ to music companies like Sony BMG and Universal Music,³⁸ to network television stations like CBS,³⁹ to production companies like Lucasfilm.⁴⁰ For example, YouTube's deal with Warner Music signed in September, 2006 allows Warner Music to use YouTube as a platform for distributing music videos, while sharing in the ad revenue for the pages hosting Warner Music content.⁴¹ In addition, brand channels have been created pursuant to these deals under the "Channels-Partners" link.⁴²

In September of 2006, YouTube also announced a plan to create technology to combat the appearance of unlicensed content on its service. The above mentioned music deals embrace this technology, which is designed "to automatically spot copyrighted material that users upload without the permission of media companies, and then...share ad revenue with those companies."⁴³ This technology apparently will be able to flag content like music videos, as well

³⁵ von Lohmann, *supra* note 6.

³⁶ Kevin J. Delaney & Ethan Smith, *YouTube Model is Compromise Over Copyrights*, Wall Street Journal (Sept. 19, 2006), available at http://online.wsj.com/public/article/SB115862128600366836-75c3bUMscxrCANO6O7hKTgLNtTc_20070919.html.

³⁷ See *YouTube and National Hockey League Team Up For Strategic Content and Advertising Partnership* (Nov. 15, 2006), at http://www.youtube.com/press_room_entry?entry=2oJxBs3sq3k.

³⁸ See *Sony BMG Music Entertainment Signs Content License Agreement with YouTube* (Oct. 9, 2006), at http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA and *Universal Music Group and YouTube Forge Strategic Partnership* (Oct. 9, 2006), at http://www.youtube.com/press_room_entry?entry=JrYdNx45e-0.

³⁹ See *CBS and YouTube Strike Strategic Content and Advertising Partnership* (Oct. 9, 2006), at http://www.youtube.com/press_room_entry?entry=iXG7e1g-BWL.

⁴⁰ Hyman, *supra* note 22.

⁴¹ Delaney, *supra* note 36.

⁴² For an example, see <http://www.youtube.com/members?s=pa&t=w&g=-1>.

⁴³ Delaney, *supra* note 36.

as user created videos making use of copyrighted songs.⁴⁴ The audio identification system is hoped to be used to locate unauthorized non-music content as well. Such technology would help lower copyright holders' responsibility of tracking down unlicensed content on YouTube.

C. Is YouTube Safe Under §512(c)?

So what does this all mean for YouTube, or one of its competitors? As unlicensed, copyrighted material appears on the website, YouTube is open to lawsuits for copyright infringement. Content providers like Universal Music seem to believe, absent a licensing deal, a video hosting service on the Internet would be liable for infringement, as the company has proceeded with a lawsuit against Bolt and Grouper Network (which is now owned by Sony Pictures Entertainment). Grouper defended its actions, stating that the service complies with the DMCA.⁴⁵ Whether a video hosting service would survive such a lawsuit will be discussed in this section, utilizing YouTube as a case example.

The safe harbor does not affect the company's liability under the different theories of infringement, but limits the relief available. Finding safe haven under §512(c) would shield YouTube from monetary liability or equitable relief, except as detailed in §512(j), for infringing activities on its website.⁴⁶ Based on the policy to prevent copyright infringement liability for passive, automatic actions by a service provider and the surrounding case law, I believe

⁴⁴ "The system relies partly on what's known as 'fingerprinting' – comparing audio uploaded to the site to unique attributes of copyrighted content it already knows." *Id.* Video-identification technology is also hoped to be used eventually. *Id.*

⁴⁵ *Sony: Grouper did not break copyright law*, CNNMoney.com (Nov. 22, 2006), at http://money.cnn.com/2006/11/22/technology/sony_grouper.reut/index.htm.

⁴⁶ 17 U.S.C.A. § 512(c)(1). If an injunction is permissible under section 512, it is only for the limited context described under § 512(j)(1). When deciding to grant injunctive relief, the court must consider, among other factors, whether the injunction would "significantly burden either the provider or the operation of the provider's system or network" and whether "implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations." 17 U.S.C.A. § 512(j)(A)&(C). Shutting down YouTube completely would obviously violate these provisions.

YouTube would fall under this non-exclusive affirmative defense. The cases discussed are representative of the different approaches courts have applied to this DMCA provision. The requirements that will be at the center of finding YouTube eligible are as follows: (1) does YouTube have an appropriate repeat infringer policy and comply with standard technological measures? (§512(i)); (2) is YouTube a service provider? (§512(k)(1)(B)); (3) does YouTube have actual knowledge or is it aware of facts and circumstances of infringing activities on its website? (§512(c)(1)(A)); (4) does YouTube receive a financial benefit directly attributable to the infringing activity and the right and ability to control such activity? (§512(c)(1)(B)); and (5) does YouTube have a sufficient notice and takedown system? (§512(c)(1)(C)).

1. Accommodation of Technology

“Nothing in [Section 512] shall be construed to condition the applicability of [subsection (c)] on...a service provider monitoring its services or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i).”⁴⁷ This concept was further explained in the House Report, where it states that a service provider need not “investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.”⁴⁸ However, there are certain affirmative requirements that the hosting service must adhere to as a condition for eligibility.⁴⁹

a. Repeat Infringer Policy

Section 512(i)(1)(A) creates three service provider requirements, as interpreted by the *Ellison*⁵⁰ court: “(1) adopt a *policy* that provides for the termination of service access for repeat

⁴⁷ 17 U.S.C.A. §512(m)(1).

⁴⁸ H.R. Rep. 105-551(II) at 61 (1998).

⁴⁹ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1176 (C.D. Cal. 2002).

⁵⁰ *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004), emphasis added.

copyright infringers in *appropriate circumstances*; (2) implement that policy in a *reasonable manner*; and (3) *inform* its subscribers of the policy.”⁵¹ Part (3) of the test is easily resolved for YouTube, since a repeat infringer policy is included as a part of its Terms of Service.⁵² All that is required is that users be put on notice that repeated infringements will lead to termination of access from all services.⁵³

The remainder of this test presents difficult, fact dependant questions, not easily decided as a matter of law.⁵⁴ The case law makes clear that the adopted policy must eliminate the infringer and not merely the infringing content.⁵⁵ As evidenced by the *Corbis*⁵⁶ case, the level of detail needed to adopt such a policy is not great. The Participation Agreement in this case was held adequate despite its failure to define “repeat infringer,” arguably not indicating when appropriate circumstances for termination existed. It was sufficient that users knew there was a threat of losing access to the service if they infringed intellectual property rights, agreed to the Participation Agreement, and were disciplined under the Participation Agreement for violations.⁵⁷

What are appropriate circumstances for termination is the subject of some debate. The *Cybernet*⁵⁸ court appears to take a stricter look into what “appropriate circumstances” and “reasonably implemented” mean, whereas the *Corbis*, *Ellison* and *CCBill*⁵⁹ courts appear to conflate the issues into one. The *Cybernet* court implies that a “notice and take-down” provision like that in *Corbis*, on its own, may not meet the reasonable implementation requirement when

⁵¹ *Id.* at 1080.

⁵² *See* Section B.2 above.

⁵³ *Corbis Corporation v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1102 (W.D. Wash. 2004).

⁵⁴ *Ellison*, *supra* note 49, at 1078.

⁵⁵ *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp.2d 1077, 1090 (C.D. Cal. 2004).

⁵⁶ *Corbis*, *supra* note 53.

⁵⁷ *Id.* at 1101.

⁵⁸ *Cybernet*, *supra* note 49.

⁵⁹ *CCBill*, *supra* note 55.

ignorance of infringement would result in the services becoming “safe havens or conduits for known repeat copyright infringers.”⁶⁰ Although they did not hold on this prong when rejecting the summary judgment motion filed by the defendant, Cybernet, the court stated that there was a strong likelihood Cybernet did not meet its obligation. A point that appeared important to the court was that the known infringer be terminated from its services completely, not merely from certain services.⁶¹

Under the lesser *Corbis* standard, it appears that YouTube would have met its requirement. Their repeat infringer policy even provides for the appropriate circumstances for which a user would be terminated. However, under the arguably stricter *Cybernet* standard, YouTube may run afoul of being able to prevent repeat infringers from returning to the service. As one commentator points out, the policy is fairly easy to circumvent due to the anonymity in the posting process.⁶² It can be argued that YouTube could become a “safe haven” for infringers, since users can create a new identity if their account is terminated. This fear, although legitimate, may not create a major issue for YouTube if the court chooses to focus on YouTube’s efforts to curb infringement on its website. The company has clearly taken steps to prevent infringement through deals with content providers and their commitment to technologies to flag copyrighted content. Therefore, it would be hard to argue that they were turning a blind eye to the problem or creating a pirate-friendly website. This policy argument may not be persuasive, as YouTube’s failure to eliminate infringers, rather than infringing material, is the purpose behind this requirement.

b. Standard Technical Measures

⁶⁰ Cybernet, *supra* note 49, at 1177-78. “These circumstances would appear to cover, at a minimum, instances where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly infringement of a willful and commercial nature.” *Id.* at 1177.

⁶¹ *Id.* at 1179.

⁶² Hyman, *supra* note 22.

The second inquiry under §512(i)(1) requires the service provider “accommodates and does not interfere with standard technical measures.”⁶³ Standard technical measures is defined in §512(i)(2).⁶⁴ It would be difficult to argue that YouTube violates this requirement, as technical measures do not exist at this time that allow copyright owners to identify and protect copyrighted works in videos. YouTube could require watermarking by the copyright holder for videos to be uploaded, but this would prevent user created content from appearing on the website. YouTube is also taking affirmative steps, as discussed previously, to combat this problem. Until there is a broad consensus of copyright owners who agree on such a standard, video hosting services are likely accommodating standard technical measures.

2. *Service Provider*

The §512(c) safe harbor only applies to service providers, defined in §512(k)(1)(B) as “a provider of online services or network access, or the operator of facilities therefor.”⁶⁵ Under the standard definition, many websites may not be considered service providers,⁶⁶ but under the judicially interpreted, statutory definition, courts “have trouble imagining the existence of an online service that *would not* fall under the definitions.”⁶⁷

In *Hendrickson*⁶⁸, this definition was interpreted very broadly, but the court failed to qualify why eBay fell under the statute’s definition.⁶⁹ The *Corbis* court provided more insight,

⁶³ 17 U.S.C.A § 512(i)(1)(B).

⁶⁴ “Definition.--As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and --(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.” 17 U.S.C.A § 512(i)(2).

⁶⁵ 17 U.S.C.A § 512(k)(1)(B)

⁶⁶ The plaintiffs in *Aimster* provide the commonplace definition: “internet service providers ‘generally provide a way to connect to the Internet (e.g., phone or cable modem) as well as a mechanism that tells a computer how and where to access information on the Internet.’” *In re: Aimster Copyright Litigation*, 252F.Supp.2d 634, 658 (N.D. Ill. 2002).

⁶⁷ *Id.* *Aimster* was found to be a service provider.

⁶⁸ *Hendrickson v. eBay Inc.*, 165 F.Supp.2d 1082 (C.D. Cal. 2001).

⁶⁹ *Id.* at 1088.

holding that Amazon was a service provider, as it “operates web sites, provides retail and third party selling services to Internet users, and maintains computers to govern access to its web sites.”⁷⁰ Further clarity into the breadth of the term “service provider” was offered by the *Cybernet* court. In rejecting Perfect 10’s more limited definition, which would exclude services that had an interest in the content or participated in screening or selecting the data,⁷¹ the court made it abundantly clear that almost all websites would fall under this expansive definition, including YouTube.

3. Knowledge: Actual or Apparent

The safe harbor is not intended to insulate those service providers who have actual or apparent knowledge of infringing activity. The three prongs dealing with infringement awareness have been interpreted very narrowly and favorably for service providers, which leads me to conclude that YouTube will likely satisfy this requirement.

a. Actual Knowledge

There are two primary methods a content provider can use to establish a service provider’s actual awareness under §512(c)(1)(A)(i). The first and more practical method is to supply evidence that notification was provided of the infringing material. By substantially complying with the DMCA’s notice requirement,⁷² actual infringement would be established.⁷³ Failure by the content holder to provide notice of infringement requires that there be knowledge beyond “a general awareness that a particular type of item may be easily infringed.”⁷⁴ Very little guidance

⁷⁰ Corbis, *supra* note 53, at 1100.

⁷¹ *Cybernet*, *supra* note 49, at 1175.

⁷² 17 U.S.C.A. § 512(c)(3)(B). This requirement will be discussed in Section C.5 of this paper. The service provider can challenge that that the notice substantially complied with the requirements.

⁷³ Corbis, *supra* note 53, at 1107.

⁷⁴ *Id.* at 1108.

is provided by the courts as to the extent of the evidence needed,⁷⁵ but an extreme onus can be inferred by the high threshold required for apparent knowledge. As there is no affirmative duty to search for infringing content, however, it appears that absent notification, establishing an instance of actual knowledge of infringement would be almost impossible.

b. Apparent Knowledge

If actual knowledge is not established, the copyright holder has to demonstrate that the service provider is “aware of facts or circumstances from which infringing activity is apparent.”⁷⁶ Awareness does not hinge on whether a reasonable person would have inferred that infringement was occurring,⁷⁷ but whether a service provider “turned a blind eye to ‘red flags’ of obvious infringement.”⁷⁸ As interpreted by the *Corbis* court, to demonstrate apparent knowledge, the copyright holder must show that their material was being hosted on a website that was “clearly a pirate site.”⁷⁹ One is clearly a pirate site if the URL and header information uses terms that show the purpose is illegal, like pirate or bootleg, even when the viewing is “brief and casual.”⁸⁰

In *Corbis*, the court held that Corbis did not adequately establish that the defendant Amazon had anything more than general knowledge of infringement, and did not ignore red flags that would have led to awareness.⁸¹ Third party notices were not held to constitute red flags, absent other evidence. Moreover, no evidence on the actual websites was found to be an

⁷⁵ Where no notice was provided of infringement of photos, actual knowledge was not established when the plaintiff, Corbis, supplied evidence of third party notices regarding non-Corbis photos or evidence of awareness by the defendant, Amazon, that Corbis licensed photos. *Id.* at 1107.

⁷⁶ 17 U.S.C.A. § 512(c)(1)(A)(ii).

⁷⁷ 3 Nimmer on Copyright, §12B.04[A][1], at 12B-49.

⁷⁸ H.R.Rep. No. 105-551, pt. 2, at 42.

⁷⁹ Corbis, *supra* note 53, at 1108.

⁸⁰ *Id.*

⁸¹ *Id.* at 1109. There was nothing blatant on the vendor listings that would have led to a suggestion that the websites contained copyrighted material. Amazon meeting with representatives of Corbis to provide general knowledge that infringing photos may appear on zShop sites was also not enough to prove that Amazon had apparent knowledge. *Id.*

indicator of obvious infringement. Finally, they held that general familiarity of Corbis' business was not enough to put them on notice of infringement.⁸² Other courts looking at the issue of apparent knowledge have held that defective notices do not act as red flags;⁸³ nor were disclaimers on a website stating that any copyrighted images found were either in the public domain or posted for a newsworthy purpose.⁸⁴

Whether YouTube ignores red flags is unclear, based on some cursory searches performed in early December, 2006. Typing "pirate" into the search engine yields results ranging from videos discussing the legal ramifications of pirating music, to videos that, oddly enough are based on a pirate theme. "Illegal" generates information regarding illegal activities, or live performances of Shakira performing her song, "Illegal" (ironic, I know). "Bootleg" is probably the most damaging to YouTube, as the search results provide videos of soccer, concerts or television interviews, all of which likely appear illegally. The service provider may not be required to perform these searches, based on the lack of a duty to discover infringing material. How a court would interpret what appears to be a conflict between the absence of an affirmative obligation to investigate and the requirement that the service provider not ignore red flags is unclear. However, the strictness of the courts' interpretation of this prong leads me to believe that YouTube would not have apparent knowledge.

c. Expeditious Removal

The final condition under §512(c)(1)(A) requires the service provider "upon obtaining such knowledge or awareness" to act "expeditiously to remove, or disable access to, the material."⁸⁵ Accordingly, YouTube promptly removes the infringing material once it is properly

⁸² *Id.* at 1108-9.

⁸³ Hendrickson, *supra* note 68, at 1093.

⁸⁴ CCBill, *supra* note 55, at 1098.

⁸⁵ 17 U.S.C.A. § 512(c)(1)(A)(iii)

notified. They also reserve the right to unilaterally remove material they are aware is infringing, as expressed in the “Terms of Use.” Presumably, YouTube removes this material, and therefore meets this requirement.

4. Financial Benefit, and Right and Ability to Control

This condition is likely to be the heart of a lawsuit against YouTube and their ability to utilize the §512(c) safe harbor. Based on the prevailing precedent, YouTube may be found to “directly benefit attributable to the infringing activity” and the “right and ability to control such activity.”⁸⁶ This is primarily the result of courts conflating precedent from contributory and vicarious liability cases, which has led to inconsistent rulings. At least one court has explicitly rejected the importation of contributory liability theories for the financial benefit prong.⁸⁷ As this issue would be integral to any ruling regarding YouTube, I will distinguish cases where other theories of liability influence the decision of the court. Ultimately, I believe the court will follow the *CoStar II* line of cases, rather than those that rely on *Fonovisa*⁸⁸ and its progeny.

a. Direct Financial Benefit Attributable to the Infringing Activity

There are two primary precedents under this section of the safe harbor. The first, set by *CoStar II*, was ruled consistent by *Cybernet*, which falls into the vicarious infringement line of cases. *CoStar II* involves the posting of photographs by users to advertise property listings on the defendant LoopNet’s website, some of which were potentially infringing. No posting fee was required for any listing, regardless of the use of a photograph.⁸⁹ The court held that there is no direct financial benefit attributable to the infringing activity “where the infringer makes the same

⁸⁶ 17 U.S.C.A. § 512(c)(1)(B)

⁸⁷ See *CoStar Group Inc. v. Loopnet, Inc.* 164 F.Supp.2d 688, 705 (D.C. Maryland 2001) (“CoStar II”).

⁸⁸ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (Ninth Cir. 1996).

⁸⁹ *CoStar II*, *supra* note 87, at 692

kind of payment as non-infringing users of the provider's service."⁹⁰ Neither the infringers or the non-infringers paid anything for the service, so there was no direct financial benefit.⁹¹

The court also rejected the plaintiff's argument that there is a direct financial benefit attributable to the infringing activity for the purposes of §512(c) when "infringing performances enhance the attractiveness of the venue to potential customers."⁹² The court found that the application of this "indirect" benefit test, although applicable in a contributory infringement cause of action, was not warranted by the plain language or purpose of the statute. Since the financial benefit was required to be directly attributable, an indirect benefit test was deemed inapplicable.⁹³ However, this indirect benefit test was applied in *Fonovisa* as a method of showing direct financial benefit from the customers in a vicarious infringement suit.⁹⁴ This seems to imply that *CoStar II* was rejecting the use of vicarious liability precedent for this requirement of the safe harbor, as it was a vicarious liability test that was rejected. Whether this was their intent is unclear,⁹⁵ but a question arises as to what case law relating to direct financial benefit should be applicable to the DMCA safe harbors.

The *Cybernet* court held that "the direct flow of income to Cybernet based on the number of new Adult Check users that sign up to Adult Check from infringing sites establishes that direct relationship."⁹⁶ In this case, websites using the Adult Check⁹⁷ service included infringing

⁹⁰ *Id.* at 705, quoting H.R.Rep. No. 105-551, Part 2, at 54.

⁹¹ *Id.*

⁹² *Fonovisa*, *supra* note 88, at 263.

⁹³ *CoStar II*, *supra* note 87, at 705. The plaintiff attempted to use *Playboy Ent. v. Hardenburgh*, 982 F. Supp. 503 (N.D. Oh. 1997), a contributory infringement cause of action, as controlling precedent. The test discussed from *Hardenburgh* relies on *Fonovisa*'s vicarious liability precedent. I believe *Hardenburgh* misapplied this precedent in a contributory negligence context.

⁹⁴ *Fonovisa*, *supra* note 88, at 263.

⁹⁵ Interestingly, at the same time, the court states that "the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability." *Id.* at 704. The *Cybernet* court expressed "no opinion on the question whether 'directly attributable' language is narrower or equivalent to the general vicarious infringement requirements." *Cybernet*, *supra* note 49, at 1181.

⁹⁶ *Id.*

pictures. The webmasters who run and promote the websites under the Adult Check brand are not charged a fee for the service; rather the customer pays a monthly fee to Cybernet, who then distributes revenue to the webmasters based on which website was responsible for the enrollment.⁹⁸ Perfect 10 found approximately 900 Adult Check affiliated websites⁹⁹ housed more than 10,000 copies of Perfect 10 images.¹⁰⁰

The court looked at legislative history to derive the outcome. Courts should use a “common-sense, fact based approach, not a formalistic one.”¹⁰¹ Where the value of the service originates from the infringing content, rather than a “legitimate business,” the service provider receives a direct financial benefit.¹⁰² Since membership growth, and thus Cybernet’s revenue, was dependant on the quantity and quality of images available on Adult Check member websites (some of which were using infringing images to attract new members), a direct benefit was found to exist.¹⁰³

In coming to this conclusion, the court attempts to distinguish this case from *CoStar II*: “[t]his is quite different from the situation in *CoStar* where the site made money on other services it offered, which were not directly tied to the infringing activity.”¹⁰⁴ Implicit in this argument is that the infringement is enhancing the desirability of these sites, which leads to a disproportionate amount of funds from infringing sites. Otherwise, using the reasoning of *CoStar II*, since the webmasters are indirectly paying the same percentage fee per new customer regardless of their status as an infringer, they would not be directly benefiting from the

⁹⁷ Adult Check is an age verification service, which is designed to prevent minors from accessing online pornographic content. *Id.* at 1157-58.

⁹⁸ *Id.*

⁹⁹ Adult Check has approximately 300,000 sites total. *Id.* at 1158.

¹⁰⁰ *Id.* at 1162.

¹⁰¹ H.R.Rep. 105-551(II), at 54.

¹⁰² *Id.*

¹⁰³ Cybernet, *supra* note 49, at 1181.

¹⁰⁴ *Id.*

infringement. The *Cybernet* court appears to be adopting a vicarious infringement standard for direct financial interest, like that used in *Fonovisa*. Similarly, *Aimster* held that the direct financial benefit element of §512(c)(1)(B) was met, and refers the reader to the section discussing vicarious liability.¹⁰⁵ In *Aimster*, the “financial benefit element is...satisfied where...the existence of infringing activities act as a draw for potential customers.”¹⁰⁶ The tests adopted in *Fonovisa*, *Aimster* and *Cybernet* appear to be the same test, and it is unclear that any of them are consistent with the precedent set in *CoStar II*. Whether all vicarious infringement precedents for this prong are applicable is ambiguous to say the least.

One of particular importance to YouTube is the recently decided *Google*¹⁰⁷ case, where under a vicarious infringement theory of liability, the defendant Google was found to receive a direct financial benefit. Applying the precedent of *Fonovisa* as applied broadly by the *Napster*¹⁰⁸ court, a direct financial benefit was established as Google’s revenue was directly dependent on an increase in their user-base. “Google certainly derives a direct financial benefit if users visit AdSense¹⁰⁹ partners’ websites that contain such infringing photos” since they will share in the advertising revenue appearing on those sites.¹¹⁰

This murky background creates many questions as to YouTube’s ability to rely on §512(c). “Some have argued that this may restrict the kinds of advertising business models that YouTube (and other video hosting services) might want to pursue, as ads tied too closely to an infringing video could be viewed as creating a ’financial benefit directly attributable to the

¹⁰⁵ *Aimster*, *supra* note 66, at 661.

¹⁰⁶ *Id.* at 655.

¹⁰⁷ *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D. Cal. 2006). For a more detailed description of this case’s vicarious liability precedent, please see Section D.2.a above.

¹⁰⁸ *Napster, Inc. v. A&M Records, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

¹⁰⁹ “‘To participate [in AdSense], a website publisher places code on its site that ask Google’s server to algorithmically select relevant advertisements’ based on the content of that site.” *Google*, *supra* note 107, at 834, quoting Def.’s MacGillivray Decl. ¶ 9.

¹¹⁰ *Google*, *supra* note 107, at 857.

infringing activity.”¹¹¹ This may explain YouTube’s initial hesitance to place advertisements on content pages, as well as their rush to make deals with copyright holders. Following *CoStar II*’s precedent, it is unlikely that YouTube will be found to have received a direct financial benefit from displaying a banner ad on an infringing video’s website. As posters of video, including infringers, are not charged to do so, they appear to follow that precedent. The less formalistic approach of the *Cybernet* court may not find this to be persuasive. Moreover, if other vicarious liability doctrines are imported to §512(c), like that of *Google*, it appears that YouTube’s banner ads on infringing video pages would clearly confer a direct financial benefit.

b) Right and Ability to Control Activity

The case law is slightly more consistent for this section of the statutory safe harbor. Almost all of the courts recognize that the right and ability to control the infringing activity, “as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored on its system.”¹¹² Two cases explicitly import concepts from contributory and vicarious infringement jurisprudence,¹¹³ again generating doubt as to which precedents are applicable to this statutory condition.

The *Hendrickson* court argued that the purpose behind the DMCA necessitated the adoption of the above bright line rule. The DMCA requires that infringing materials be removed from the website, so to espouse that service providers would lose their insulation under §512(c) by adhering to the statute would be internally inconsistent. Additionally, the court held that the “voluntary practice of engaging in limited monitoring of [a service provider’s] website for

¹¹¹ von Lohmann, *supra* note 6.

¹¹² Hendrickson, *supra* note 68, at 1093.

¹¹³ *Cybernet* applies a concept borrowed from contributory infringement cases to hold that the company had a right and ability to control the infringing activity. *Cybernet*, *supra* note 49, at 1181-82. *CoStar II* seems to indicate that they are adopting a vicarious infringement standard: “LoopNet does not have the ‘right and ability’ to control its users commensurate with the standard for vicarious infringement.” *CoStar II*, *supra* note 87, at 704. *Aimster* again refers the reader to the section discussing vicarious liability in coming to its conclusion that this requirement is met. *Aimster*, *supra* note 66, at 661.

‘apparent’ infringements...cannot, in and of itself, lead the Court to conclude that [the service provider] has the right and ability to control infringing activity within the meaning of the DMCA.”¹¹⁴ eBay’s practice of searching its website daily, using terms like “bootleg” or “pirated,” to find and remove users that are selling infringing products was consistent with legislative history, stating that a service provider’s ability to use §512(c) should not be limited solely because of their use of a monitoring program.¹¹⁵ This rule also makes the statute internally consistent with what is required under the “red flag” standard for apparent knowledge.¹¹⁶

The *Cybernet* court held that Cybernet had the right and ability to control the infringing activity. The court provides a list of activities Cybernet partook in that established this conclusion, which included prescreening sites,¹¹⁷ giving “extensive advice,” prohibiting “proliferation of identical sites,” among other things. These procedures meant they did “something more,” a concept borrowed from contributory liability of trademark licensors.¹¹⁸ It appears the court was concerned that Cybernet was too involved with the content, rather than merely operating a service for hosting the content. The *Corbis* court, applying *Cybernet*, held that Amazon did not have the right and ability to control: “Amazon does not preview the products prior to listing, does not edit the product descriptions, does not suggest prices, or otherwise involve itself in the sale.”¹¹⁹

Aimster refers the reader to the vicarious liability section in its application of the DMCA.

In doing so, the precedent set by this court is the one outlier where termination of individual

¹¹⁴ Hendrickson, *supra* note 68, at 1093. The court also stated that eBay did not have a right and ability to control the infringing activity, since the sales and distribution of the infringing material was consummated offline, and no infringing material was actually found on the website. eBay never had possession or the ability to inspect the material. *Id.* at 1094. YouTube, who hosts the infringing videos, would not have this defense.

¹¹⁵ *Id.*

¹¹⁶ See Section C.3.b above.

¹¹⁷ This does not appear to include the type of pre-screening that the *Hendrickson* court allowed. *Cybernet*, *supra* note 49, at 1181.

¹¹⁸ *Id.* at 1181-82.

¹¹⁹ *Corbis*, *supra* note 53, at 1110.

users is found to be instructive in holding that a right and ability to control existed. In addition, the Aimster service required members to logon, which allowed them to supervise the activities of the users. Aimster's argument that the system's encryption prevented them from blocking a user's access without shutting down the entire service was rejected.¹²⁰ The court again relied on *Fonovisa* as controlling precedent, where an ability to control was found for vicarious infringement when the company promoted, policed and controlled access of customers through its rules and regulations.¹²¹

It is fairly clear that *Aimster* is inconsistent in the cases analyzing the §512(c) safe harbor. A court could choose to follow the absolute importation of vicarious liability precedent, although I doubt they will to such an extent as to make §512(c) internally inconsistent. Furthermore, YouTube is unlikely to lose the benefits of the safe harbor for prescreening and removal of sites obviously infringing copyright, consistent with their duty to not ignore red flags of infringement. The harder question is whether YouTube is found to control the content found on its website, as to amount to an issue like that in *Cybernet*. One commentator has expressed concern that exerting editorial control, like creating a "top 10" list or "editor's picks," could create an issue under this DMCA safe harbor.¹²² YouTube may have already run afoul, as they post "featured videos" on the home page.¹²³ They have also setup "channels" for certain content providers. If YouTube provides advice to users who administer channels, a court could find that they had the right and ability to control. Lastly, since their Terms of Service state that YouTube retains a

¹²⁰ Aimster, *supra* note 66, at 654-55.

¹²¹ Fonovisa, *supra* note 88, at 263.

¹²² Amanda Bronstad, *Video Web Sites Download a Defense*, The National Law Journal (Nov. 2, 2006), at www.law.com/jsp/law/LawArticleFriendly.jsp?id=1162375515690. In its Answer to the Tur complaint, YouTube denied editing the content posted on its site. Tur Answer, *supra* note 14.

¹²³ It is unclear how "featured videos" are selected. It is at least speculated that the featured videos are not selected based on "metrics that involve user interest or ratings." Rather, it is hypothesized that YouTube staff selects the Featured Videos and Director Videos featured on the right side of the page. "Some of the videos [are] actually just corporate marketing." Richard Tur, *ScrewTub* (Oct. 16, 2006), at www.richardtur.com/2006.10.16.shtml. Please note that the source may be biased, as Robert Tur is currently a plaintiff against YouTube.

license in the material, they could be said to have a certain level of control over the material, including the ability to reproduce, distribute and prepare derivative works of the submitted video. Whether having a license to control is synonymous with control is uncertain. These fact dependant questions could be integral to a court's determination.

5. Notification and Replacement of Disabled Material

The elements of a proper notification of claimed infringement are laid out in §512(c)(3).¹²⁴ YouTube's Terms of Use strictly adheres to the statute. Following a proper notification, the service provider must expeditiously remove or disable access to the infringing material.¹²⁵ "The purpose behind the notice requirement under the DMCA is to provide the internet service provider with adequate information to find and examine the allegedly infringing material expeditiously."¹²⁶ A notification must adhere "substantially" to the requirements. A written communication provided to the designated agent is necessary, and not part of the substantial adherence requirement.¹²⁷ The two notification obligations that are most implicated with regards to substantial compliance are those dealing with identification of the infringing material.¹²⁸ This question is extremely fact dependant and thus, will rely on the specifics of a copyright holders notice.¹²⁹

If the original poster chooses to file a substantially compliant counter-notification, pursuant to §512(g)(3), the service provider must supply notice to the provider of the initial

¹²⁴ The statute lists the requirements in 17 U.S.C.A. § 512(c)(3)(A)(i)-(vi).

¹²⁵ 17 U.S.C.A. § 512(c)(1)(A)(iii). Some content holders do not believe that YouTube's policies are satisfactory. Disney stated that "[i]t's not efficient and [they] think there is a larger conversation to be had." Eric Auchard, *YouTube needs to do more on piracy, Disney exec says*, Reuters (Nov. 29, 2006), available at <http://uk.biz.yahoo.com/30112006/325/youtube-needs-piracy-disney-exec-says.html>.

¹²⁶ CCBill, *supra* note 55, at 1087.

¹²⁷ Hendrickson, *supra* note 68, at 1091. Strict adherence to these requirements is essential.

¹²⁸ "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." 17 U.S.C.A. § 512(c)(3)(A)(ii). "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." 17 U.S.C.A. § 512(c)(3)(A)(iii).

¹²⁹ See Hendrickson, *supra* note 68, at 1089-92 for an example of how a court may deal with the notice requirement.

notification that the removed material will be replaced.¹³⁰ Unless the provider of the notification informs the service provider of their filing an action to seek a court order to restrain the material's restoration, the service provider must replace the material.¹³¹ If the service provider adheres to these requirements, they "shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing."¹³² Unsubstantiated claims of infringement could lead to liability for the filer of the notice.¹³³

D. Is YouTube An Infringer?

The safe harbor discussed above does not shield YouTube from being found guilty of infringement, under the theories of direct, vicarious and contributory liability. The DMCA statute is an affirmative defense that merely limits the relief available. If a court finds that YouTube is not liable for any of the above forms of copyright infringement, then the safe harbor under §512(c) is not necessary. YouTube is currently being sued by Robert Tur under each of these theories of liability, as well as the *Grokster*¹³⁴ theory of inducement.¹³⁵ A sampling of relevant precedents indicates that YouTube could be found liable of copyright infringement. Thus, the question of whether §512(c) is satisfied is crucial to its ability to operate.

1. Direct Infringement

¹³⁰ 17 U.S.C.A. § 512(g)(2)(A)-(B).

¹³¹ 17 U.S.C.A. § 512(g)(2)(C).

¹³² 17 U.S.C.A. § 512(g)(1).

¹³³ 17 U.S.C.A. § 512(f). "Copyright owners should be cautious about making unsupported claims of infringement as false claims can lead to liability to anyone who suffers any damages because of a misrepresentation, including court costs and attorneys' fees under Section 512(f). Thus, the copyright holder can become liable to YouTube or the poster for any damages that resulted from the improper removal of the material." Hyman, *supra* note 22.

¹³⁴ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

¹³⁵ Tur Complaint, *supra* note 14.

To establish a prima facie claim for direct infringement, the copyright holder must demonstrate that they own the material and that one of the exclusive rights provided under 17 U.S.C. §106 have been violated.¹³⁶ YouTube's users potentially violate all of these exclusive rights of copyrighted material when running its web service, but it is clear that they could be found to infringe the rights of reproduction and distribution, as Napster's users were.¹³⁷ YouTube's liability for direct infringement is improbable, however, based on the precedent set by *CoStar*.

The *CoStar* court held that "there should still be some element of volition or causation which is lacking where a defendant's system is merely used to use a copy by a third party," although copyright is a strict liability statute.¹³⁸ The court went on to state that "an ISP who owns an electronic facility that responds automatically to users' input is not a direct infringer."¹³⁹ They are then acting more as conduits than copiers, as they have "no interest in the copy itself."¹⁴⁰ The question then becomes whether YouTube is truly passive.

¹³⁶ Napster, *supra* note 108, at 1013. The rights granted under 17 U.S.C. § 106 include ability to reproduce, prepare derivative works, distribute copies, perform publicly, display publicly and perform work publicly by means of a digital transmission.

¹³⁷ *Id.* at 1014. YouTube's users could be protected under the Fair Use defense provided under 17 U.S.C. § 107. The factors considered by the court 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 work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work." *Id.*, quoting 17 U.S.C. § 107. The analysis of the applicability of this defense is beyond the scope of this paper. If the court found that this defense was available to YouTube's users (for example, if a lip-sync video of a copyrighted song was not found to be fair use), then YouTube would not be found liable of contributory or vicarious liability for posting such a video. At least one commentator believes that YouTube's users have a good fair use defense, as the end user is engaging in a non-commercial activity and most copyrighted material in user created videos do not have a licensing market. von Lohmann, *supra* note 6.

¹³⁸ *CoStar Group Inc. v. LoppNet Inc.*, 373 F.3d 544, 548 (4th Cir. 2004).

¹³⁹ *Id.* at 550.

¹⁴⁰ *Id.* at 551. LoopNet apparently did not have an interest in the copy of the infringing pictures, as they were not found guilty of direct infringement. The court never explicitly holds on this, leading one to believe that having an interest in the copy was mere dicta. If not, the court must have found that LoopNet's interest in the infringing pictures used to advertise real estate listings was insufficient to find the company liable. It could be argued that LoopNet had an interest in such pictures, as the pictures themselves could act as a draw for customers. Unlike LoopNet, where the text of the listings is likely the primary attraction, YouTube's videos are the basis of its business. It would be hard to argue that YouTube did not have an interest in the posted video content, as it is the principal allure for users.

The passivity of YouTube, at first glance, seems clear as YouTube does not pre-screen videos before they are posted. A pre-screening process does not in itself equate to non-passivity, as LoopNet's process of briefly examining photographs that clearly infringed copyright did not create liability for LoopNet as a direct infringer in *CoStar*.¹⁴¹ The current lawsuits challenge whether services like YouTube are in fact passive, as "they are greatly involved in editing their content."¹⁴² The creation of the featured video section, for example, could be considered "copying," similar to that found in *Hardenburgh*.¹⁴³ After encouraging users to upload files onto their system, Hardenburgh's employees would transfer the files into folders available to subscribers. This was considered distribution by the court.¹⁴⁴ YouTube could befall a similar fate if its employees are involved in the selection process of featured videos. This would be a factual question and at least calls to question whether YouTube would be deemed a direct infringer.¹⁴⁵

2. Vicarious Infringement

As discussed in Section C.4, YouTube is most in danger of being found liable for vicarious infringement of copyright. The vicariously liability conditions for users' infringement are very similar (if not identical) to those §512(c)(1)(B). The party claiming infringement must establish that the service provider "derived a direct financial benefit and had the right and ability to supervise the infringing activity."¹⁴⁶

a. Direct Financial Benefit

¹⁴¹ *Id.* at 556.

¹⁴² Bronstad, *supra* note 122.

¹⁴³ Hardenburgh, *supra* note 93.

¹⁴⁴ *Id.* at 513.

¹⁴⁵ Commentators have weighed in on whether YouTube could be held directly liable for infringement under the *CoStar* precedent. "[B]ecause its systems are largely automated, it may be that YouTube simply hasn't engaged in the necessary 'volitional act' to cross into the realm of copyright infringement." von Lohmann, *supra* note 6. "[T]he court held that an OSP that simply owns and manages a system used by others who are violating copyrights, and is not an actual duplicator itself, is not directly liable for copyright infringement. Thus, current case law likely requires a volitional act from YouTube to attach liability." Hyman, *supra* note 22.

¹⁴⁶ Ellison, *supra* note 50, at 1078.

The *Ellison* court further narrowed the *Fonovisa* precedent for the direct financial benefit prong as applied to the digital world in *Napster*. “The essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of *how substantial* the benefit is in proportion to a defendant’s overall profits.”¹⁴⁷ In this case, AOL was not found liable for hosting USENET groups where users transferred an author’s copyrighted novels. Insufficient evidence was presented that AOL’s “customers either subscribed because of the available infringing material or canceled subscriptions because it was no longer available.”¹⁴⁸ The USENET groups were not found to be a draw that increased AOL’s userbase, but rather were an added benefit of the service.¹⁴⁹

The *Cybernet* court found that there was a strong likelihood of success that there was a direct financial benefit. Unlike *Ellison*, the content of the websites found in Cybernet’s network was the primary attraction for customers. “The more consumers appreciate the content of a page, the more money Cybernet receives,” as the user will only sign up through their AdultCheck system if they are pleased by the pictures appearing on the member website.¹⁵⁰ Unlike the *Ellison* court, where the copyright holder presented insufficient evidence to support a finding that the USENET groups acted as a draw, the *Cybernet* court placed this burden on the defendant: “Cybernet has given no reason to believe that these pages do not attract consumers, thereby creating a financial benefit to Cybernet.”¹⁵¹

Most recently, and potentially most damaging to YouTube, the *Google* court found that a website that posts advertisements on websites exhibiting infringing images were directly

¹⁴⁷ *Id.* at 1079.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Cybernet*, *supra* note 49, at 1172.

¹⁵¹ *Id.* at 1173.

benefited under the theory of vicarious infringement. Google received a percentage of the advertising revenue derived from users of the infringing websites. Moreover, the infringing photographs found on the internet acted as at least a limited draw for Google Image Search, and the court found it “indisputable that Google does stand to benefit the more users visit and use Google Image Search.”¹⁵² In neither of these theories of direct financial benefit was firm evidence provided,¹⁵³ demonstrating the broadness by which the court has interpreted this prong.

The progression and apparent liberalization of this prong established by these illustrative cases signifies the likelihood that YouTube will be found to receive a direct financial benefit from the infringing videos on its website. The infringing videos hosted on YouTube hypothetically act as a draw for customers, even if no definitive evidence is presented by a potential plaintiff that provides confirmation. Under the stricter *Ellison* standard, evidence could be provided that establishes that copyrighted videos have been among the most popular with users. However, as more content becomes licensed, the amount of illegal material found on YouTube continues to diminish, as does the drawing power of the remaining, improperly uploaded videos. Similar to Google, YouTube also relies on its ability to sell advertising space to collect revenue. If a banner advertisement is found alongside an infringing video, the necessary nexus of benefit would appear to be demonstrated.

b. Right and Ability to Supervise

Fonovisa provides the controlling precedent for this prong of the vicarious liability test. A third party has a right and ability to supervise the infringing activity when their rules and regulations provide for the power to promote and police the service, as well as control the access

¹⁵² Google, *supra* note 107, at 857.

¹⁵³ *Id.*

of customers.¹⁵⁴ *Napster* applied this precedent to the digital realm and determined that Napster retained the right to control access to its system. The terms of service provided that Napster reserved the right to refuse access and terminate users at its discretion. “To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent,” which included monitoring the file name indices¹⁵⁵ for copyrighted material.¹⁵⁶ The court held that Napster failed to police its system, and thus held to satisfy this condition. YouTube’s liability will likely depend on this “closed system” standard.¹⁵⁷ YouTube’s internal policy of searching tags would appear integral to a court holding, as their terms of service provide for controls similar to those endorsed by Napster.¹⁵⁸

3. *Contributory Infringement*

“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer.’”¹⁵⁹ There is no contributory infringement for providing the means to infringe where the means to infringe is a staple article of commerce that is capable of substantial non-infringing use.¹⁶⁰ This requires that a balance be struck between providing effective copyright protection

¹⁵⁴ Fonovisa, *supra* note 88, at 263.

¹⁵⁵ The file name indices are the means for which files on Napster were identified. These terms allowed for users to search the database of music stored on Napster’s system.

¹⁵⁶ *Napster*, *supra* note 108, at 1023-24.

¹⁵⁷ The *Google* court distinguished Google’s service from that of Napster, stating that “Napster did control the ‘particular environment’ in which its file-sharing operated; its architecture was based on a proprietary, closed-universe system, not an open, web-based service.” *Google*, *supra* note 107, at 857. In comparison, Google’s search service did not have the right and ability to control. “Google does not exercise control over the environment in which it operates—*i.e.*, the web. Google’s ability to remove a link from its search index does not render the linked-to site inaccessible.” *Id.*

¹⁵⁸ Interestingly, the *Google* court applied the *Hendrickson* standard for the right and ability to control requirement of the DMCA safe harbor in coming to its conclusion. “[T]he ‘right and ability to control’...infringing activity...cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its system.” *Id.* at 858. Google’s AdSense policy, which “reserved the right to monitor and terminate partnerships with entities that violate others’ copyright,” did not constitute a right and ability to control infringing activity. Because Google did not have the right to prevent the websites from posting infringing pictures, this requirement was not met. *Id.*

¹⁵⁹ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

¹⁶⁰ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 789-90 (1984).

and preserving the “rights of others to engage in substantially unrelated areas of commerce.”¹⁶¹

YouTube’s function as a distribution channel for user-created and licensed works, otherwise lacking avenues for dissemination, will likely lead a court to rule that YouTube is not liable for contributory infringement under the staple of commerce doctrine.

a. Knowledge

There is some disagreement in the courts as to the scope of the knowledge requirement. Generally, “contributory liability requires that the secondary infringer ‘know or have reason to know of direct infringement.’”¹⁶² The *Napster* court limited this precedent to actual knowledge in the online context. “Absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.”¹⁶³ *Napster* was found to possess the specific information which identified the infringing activity, including a notification by the RIAA of more than 12,000 infringing files and a document written by the service’s founder about the need to remain “ignorant of users’ real names and IP addresses.”¹⁶⁴ While the users were eliminated from the servers, the songs were still available for download.¹⁶⁵ In contrast, the *Netcom*¹⁶⁶ court found that a disputed issue of fact as to knowledge existed where an online bulletin board was merely capable of infringing uses.¹⁶⁷

¹⁶¹ *Id.*

¹⁶² *Napster*, *supra* note 108, at 1020, quoting *Cable/Home Communication Corp. v. Network Prods., Inc.* 902 F.2d 829, 845 & 846 n. 29 (11th Cir. 1990).

¹⁶³ *Id.* at 1022.

¹⁶⁴ *Id.* at 1020 n. 5. The *Cybernet* court found that notification of generic potential copyright infringement by users should have alerted the defendant to infringing activities occurring on its member websites. *Cybernet*, *supra* note 49, at 1169.

¹⁶⁵ *Napster*, *supra* note 108, at 1022 n. 6.

¹⁶⁶ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* 907 F.Supp. 1361, 1371 (N.D. Cal. 1995).

¹⁶⁷ *Napster*, *supra* note 107, at 1021.

The *Aimster II* court rejected the 9th Circuit's test, and provided that constructive knowledge is sufficient in cases where the secondary infringer exhibits willful blindness.¹⁶⁸ The operator of a service cannot use "encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service--maybe all the users of his service--are copyright infringers."¹⁶⁹ The court also held that it was insufficient for the service to only be physically capable of non-infringing uses. Absent evidence of actual non-infringing uses by the users of the service, a service can be found contributorily liable for infringement.¹⁷⁰ "Even when there are noninfringing uses of an Internet file-sharing service, moreover, if the infringing uses are substantial, then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses."¹⁷¹

Under either of these standards, YouTube may be found to have knowledge of infringing uses. Content users have made multiple requests for videos to be removed from the service,¹⁷² akin to the notice that the *Napster* court found sufficient to find Napster had actual knowledge. Additional evidence of knowledge could be established through the discovery process. Unlike Napster, YouTube appears to eradicate the files completely from their system, although it may be impossible to have a full-proof system of total abolition. YouTube may have difficulties claiming that they are merely aware of the possibility of infringement, but it is hard to imagine a court ruling that YouTube has been willfully blind to the issue of copyright infringement. As previously discussed, they are attempting to license content that would otherwise appear

¹⁶⁸ *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) ("Aimster II").

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 652-53. This appears to directly challenge the precedent set in *Sony*.

¹⁷¹ *Id.* at 653.

¹⁷² For example, 30,000 Japanese copyrighted videos were requested to be taken down, which YouTube promptly removed. The Associated Press, *YouTube deletes 30,000 files after Japanese group complains about copyright infringement*, International Herald Tribune (Oct. 30, 2006), available at http://www.iht.com/articles/ap/2006/10/20/business/AS_TEC_Japan_YouTube_Copyrights.php.

illegally, as well as researching copyright identification technology. Finally, YouTube has many well established, non-infringing uses as have been discussed throughout this paper. The unavailability of other means of distribution would endanger these non-infringing purposes from occurring, especially in the context of user-created content. The combination of these factors will likely lead a court to rule that YouTube is not contributing to its users' infringements.

b. Material Contribution

“Providing the site and facilities for known infringing activity is sufficient to establish contributory liability.”¹⁷³ To create a triable issue of fact for material contribution, it is only necessary that the service allow users to access copyrighted works.¹⁷⁴ Napster was found to materially contribute to infringement by providing the site and facilities for direct infringement that enabled users to easily find and download music that would otherwise be difficult absent the service.¹⁷⁵ This “but for” causation is likely to be damaging to YouTube, as they provide the servers and website that store and display videos posted by users. Absent YouTube (or similar services), users would not be able to share videos with the ease for which they are now accustomed. Therefore, a content holder will almost undeniably be able to present a prima facie case for material contribution.

4. *Grokster* Inducement

The *Grokster* theory of inducement is an additional theory of secondary liability. “[O]ne 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.”¹⁷⁶ As a secondary infringer meeting this test would not

¹⁷³ Fonovisa, *supra* note 88, at 264.

¹⁷⁴ Ellison, *supra* note 50, at 1078.

¹⁷⁵ Napster, *supra* note 108, at 1022.

¹⁷⁶ *Grokster*, *supra* note 134, at 2780.

“compromise legitimate commerce or discourage innovation having a lawful promise,” the *Sony* substantial non-infringing use standard is not applicable in such cases.¹⁷⁷ The court found three notable factors that proved Grokster had the unlawful intent to promote infringement: (1) the service was aimed to satisfy a known demand for infringement; (2) the service did not develop tools to lessen infringement on the service; and (3) the commercial viability of the service hinges on high volume use, which is infringing.¹⁷⁸ The court states that in the absence of corroborating evidence, factors (2) or (3) would not alone establish a finding of unlawful intent.¹⁷⁹

Robert Tur’s lawsuit addresses each of these factors specifically. He first claims that YouTube “aimed to satisfy in part a known source of demand for copyright infringement, e.g., the market comprised of former Grokster video ‘sharers.’”¹⁸⁰ Whether YouTube has internal documents suggesting an unlawful intent will be critical, but publicity for the service never claimed to be a replacement for a file sharing service previously shut-down.¹⁸¹ Next, Tur claims that YouTube “failed to develop any substantial filtering tools or other mechanisms to diminish the infringing activity.”¹⁸² It is at least arguable that YouTube has created mechanisms to diminish infringing activity, by signing deals with content providers and creating a notice/takedown system that would remove copyrighted material from its website. YouTube is also creating software to help curb infringement. Finally, Tur claims that YouTube is pursuing a “model which rewards high-volume use, including that of infringing uses, with greater

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2781-83.

¹⁷⁹ *Id.* at 2781-82.

¹⁸⁰ Tur Complaint, *supra* note 14, ¶ 20. Commentators see this as an important point in determining liability. “If discovery in the Tur case turns up evidence that YouTube was banking on infringing material to increase viewership, it will likely fall prey to Grokster’s demise.” Hyman, *supra* note 22.

¹⁸¹ The message presented by YouTube does not appear to fill a void for a Grokster-like service. YouTube’s current message to users is as follows: “YouTube is a place for people to engage in new ways with video by sharing, commenting on, and viewing videos. YouTube originally started as a personal video sharing service, and has grown into an entertainment destination with people watching more than 100 million videos on the site daily. Our users determine what is popular on the site, and can unleash their creativity and broadcast their talents to a global audience.” *YouTube Fact Sheet*, at http://www.youtube.com/t/fact_sheet (last visited 12/16/06).

¹⁸² *Id.*

advertising revenue, as revenue is correlated with usage.”¹⁸³ This factual question of infringing uses would require discovery. However, as it is probable that Tur will fail to verify YouTube’s intent to satisfy a known demand for illegally sharing copyrighted videos, I am skeptical that YouTube will be found liable for inducement.

E. Conclusion

The outcomes of the legal and factual disputes discussed above will be integral to the future development of a service like YouTube. Video web hosting services have already proven to be exceptionally popular, and the potential for growth seems immense. If the courts find YouTube guilty of copyright infringement, either directly or under a theory of secondary liability, the availability of the DMCA safe harbor will be integral in allowing the service to develop on their current trajectory. Otherwise, an alteration of policies may be necessary to conform to the court’s interpretation of the statute’s qualifications. The implications of such potential changes, and whether they will allow YouTube to flourish and become a significant media channel, are yet to be seen. Remember, YouTube is still a fledgling company that has been in operation for roughly a year. Google obviously believes the future for video web hosting servers is bright, but the ever evolving digital world, with its demanding and erratic customer base, may not agree.

This is already apparent, as some users have voiced concerns about how YouTube may change after Google purchased the company. One YouTube poster commented that “[t]he Wild West feel of YouTube is already slipping away, and within a few weeks it likely will be gone

¹⁸³ *Id.*

altogether.”¹⁸⁴ The service’s popular creators may become annoyed by YouTube’s ability to profit from their content without any retribution, while more powerful content aggregators are sharing in advertising revenue. Their once loyal user base, which helped build the service, could flock to another video hosting service perceived to be less restrictive of their use.¹⁸⁵ Will YouTube’s interest lie with these users or their new partners, the major movie studio, networks and record labels? Ironically, the deals that added legitimacy to YouTube’s business model may result in their losing the user base that made them the target of a \$1.65 billion acquisition. The legal consequences, therefore, go beyond the possibility of copyright infringement liability. They may ultimately influence YouTube’s ability to become the “sixth network.”

¹⁸⁴ Mary Kastens, *YouTube community fears they'll be pushed out after Google acquisition of the video Web site*, Record Thursday (Oct. 12, 2006), at <http://record.wustl.edu/clip/page/normal/11482.html>.

¹⁸⁵ A commentator aptly voiced the many potential hazards that YouTube may soon encounter: “As we’ve seen before in this space, young Web 2.0 fans have no problem leaving one technology for a newer or better one. We saw that when Friendster lost ground to MySpace, and even today, MySpace seems to be losing some of its own young audience. With YouTube, the major risk I see is that their core audience could decide tomorrow to go somewhere else, especially since YouTube’s core technology is not very advanced-- meaning that a newer, more advanced online video service could pretty easily capture those users.” Dawn Anfusio, *The Beginning of a Trend* (Oct. 10, 2006), at <http://www.imediconnection.com/content/11666.asp>.