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The Digital Titanic: The Sinking of YouTube.com in the DMCA's Safe Harbor

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NOTES

The Digital Titanic: The Sinking of YouTube.com in the DMCA's Safe Harbor

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I. AN INTRODUCTION TO YOUTUBE AND THE DMCA

In today's technologically advanced world, video-sharing Internet sites ("VSIs"), such as Grouper.com,¹ Bolt.com,² and YouTube.com,³ provide free, unfettered access to clips of your favorite television shows and artistic performances, from *Animaniacs* to ZZ Top.⁴ With movie clips viewed over 100 million times each day, YouTube is the behemoth of these sites⁵—a major accomplishment considering the site entered the video-sharing market in May 2005.⁶ Two friends, Steve S. Chen and Chad Hurly, created YouTube after they experienced difficulty posting a video online.⁷ Taking advantage of online blogging's popularity, the two distinguished their site by coupling quick and easy video posting with the ability for site users to comment on particular clips.⁸ Their plan worked, and soon YouTube was attracting over 15 million viewers per day.⁹ The site's popularity has continued to grow, and now the website receives over 100 million hits daily.¹⁰ Indeed, YouTube is so popular that Google Inc. ("Google") purchased the site for \$1.65 billion to acquire advertising revenue.¹¹ Although this purchase sent Google's stock soaring, it could ultimately

1. This website currently operates under the name of Crackle. Crackle Home Page, <http://www.grouper.com> (last visited Sept. 17, 2007).

2. Bolt.com recently took down its website after plans for a merger with GoFish fell through. Ellen Lee, *Bye-bye Bolt*, S.F. CHRON., Aug. 17, 2007, at D1; see Bolt.com Home Page, <http://www.bolt.com> ("Please be advised that the operations of Bolt, Inc. and Bolt.com have ceased."). Earlier this year, Bolt settled a copyright infringement action brought by Universal Music Group for \$10 million. Lee, *supra*; Caroline McCarthy, *RIP Bolt.com: Social Networking Before We Knew What It Was*, CNET NEWS.COM, Aug. 16, 2007, http://www.news.com/8301-13577_3-9760877-36.html (last visited Sept. 17, 2007).

3. YouTube Home Page, <http://www.youtube.com> (last visited Sept. 17, 2007).

4. *Id.* (search for "Animaniacs" or "ZZ Top").

5. Patrick Goldstein, *The People's Republic of YouTube*, L.A. TIMES, Oct. 17, 2006, at E1. YouTube.com alone had over 72.1 million unique visitors in August 2006, compared to 8.1 million for Bolt.com and 1.8 million for Grouper.com. *Universal Music Sues Two Online Video Sites*, REUTERS, Oct. 17, 2006, available at <http://www.webtechgeek.com/NEWS/10-17-06/Universal-Music-sues-two-online-video-sites.htm>.

6. Scott Woolley, *Raw and Random*, FORBES, Mar. 13, 2006, <http://members.forbes.com/global/2006/0313/027.html>.

7. *Id.*

8. Jefferson Graham, *Video Websites Pop Up, Invite Postings*, USA TODAY, Nov. 22, 2005, at 3B.

9. Woolley, *supra* note 6.

10. See Goldstein, *supra* note 5 (discussing YouTube's success and noting that its "video clips are viewed more than 100 million times each day").

11. David Kirkpatrick & Brent Schlender, *The Future of Goo-Tube*, FORTUNE, Oct. 30, 2006, at 32.

prove to be the company's undoing if it does not thoroughly examine the legality of YouTube's current and future operational framework.¹²

VSI's exist in a gray area of the law, and as such, they are prone to copyright infringement lawsuits by big-name corporations and artists, such as Universal Music Group and Sony BMG Music.¹³ If litigated against successfully, VSI owners could be liable for millions, if not billions, of dollars in damages, effectively putting them out of business.¹⁴ So the question arises: Given the current operational framework of video-sharing Internet sites, are owners of these sites liable for copyright infringement when copyrighted material is illegally posted by their users?

The Digital Millennium Copyright Act of 1998 ("DMCA") primarily governs this issue.¹⁵ This Act, established to prevent the problem of online copyright infringement, contains "safe harbor" provisions that protect Internet service providers ("ISPs") from liability if they meet certain criteria.¹⁶ Specifically, § 512 of the Act precludes ISP liability as long as the ISP (1) adopts and implements a policy to remove repeat infringers, (2) informs users of this policy, (3) accommodates and does not interfere with "standard technical measures" used to protect copyright holders, and (4) meets the additional activity-specific requirements parsed out in the remaining subsections.¹⁷ For VSI's such as YouTube, which allow third-party users to store information on their systems at the users' election, this fourth prong requires that that the ISP (1) not have actual or

12. One week after purchasing YouTube.com, Google's stock increased \$33.61 to \$459.67 a share. Jefferson Graham, *Google Profit Rockets on 'Very, Very Good' Business; Analyst Calls Search Giant's Quarter 'Amazing'*, USA TODAY, Oct. 20, 2006, at 1B. Graham also notes that "Internet analysts say Google could potentially be liable for expensive lawsuits from companies concerned about copyright infringement on YouTube. But [Google CEO] Schmidt said he has no such concerns." *Id.*

13. In fact, Universal filed lawsuits against Grouper.com and Bolt.com on October 9, 2006 alleging copyright infringement for "allowing users to swap pirated versions of its musicians' videos." *Universal Music Sues Two Online Video Sites*, *supra* note 5.

14. Universal sought up to \$150,000 plus costs for each successful claim of copyright infringement by Grouper.com and Bolt.com, resulting in millions of dollars of damages. *Id.* Indeed, the Bolt.com suit recently settled for \$10 million. McCarthy, *supra* note 2. Viacom has also recently brought forth an infringement action, this one against YouTube, claiming \$1 billion in damages. *Google Slams 'Sabotage Bid' by Viacom*, EVENING STANDARD (London), May 1, 2007.

15. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

16. See Stephen A. Hess, *Minesweeping the Digital Millennium Copyright Act "Safe Harbors"*, 33 COLO. LAW. 95, 95 (2004) (explaining the background of § 512 and stating that "[t]he 'safe harbors' set forth in § 512 exempt service providers from liability for copyright violations"); see also 17 U.S.C. § 512 (2007) (explaining the statutory criteria required for ISPs).

17. These requirements vary according to the activities in which the ISP engages. 17 U.S.C. § 512(a)-(d), (i).

apparent knowledge of infringing activity, (2) not receive a direct financial benefit related to the infringing activity when the ISP has the right and ability to control its users' actions, and (3) upon notice of infringing material or activity, "expeditiously" remove the infringing material.¹⁸ Many commentators have suggested that even though YouTube and other video-sharing sites implement policies to remove repeat infringers, inform their users of these policies, and remove copyrighted material upon notification by the copyright owner, the VSIs may still be liable for infringement.¹⁹

YouTube's potential liability is far from evident, however, because § 512 of the DMCA has not been thoroughly litigated and there is a paucity of case law interpreting its provisions. Consequently, as litigation proceeds in this area, courts could interpret the ambiguous language of this section in different ways. Two areas of the statute appear particularly ripe for litigation. First, ISPs are protected from litigation only if they are "[un]aware of facts or circumstances from which infringing activity is apparent."²⁰ Second, protection does not extend to ISPs who "receive a financial benefit directly attributable to the infringing activity."²¹ Depending on judicial interpretation of these phrases, VSIs could fall outside the ambit of the DMCA's safe harbor provisions. In fact, based on the current operational structures of these sites, it is possible that they have already breached the liability protection requirements and are no longer as safe from liability as they claim.

This Note examines YouTube's current position under the DMCA to determine whether VSIs are safe from liability under the Act's safe harbor provisions. With litigation on the horizon,²² answering this question is critical to determining the continuing viability of these popular sites. Part II of this Note discusses YouTube's current business framework under Google's command, the history of the DMCA, and the safe harbor provisions' applicability to YouTube. Part III analyzes the most common interpretations of these safe harbor provisions as applied to VSIs and discusses the likely

18. *Id.*

19. *See, e.g.,* Declan McCullagh & Anne Broache, *YouTube May Add to Google's Copyright Worries*, CNET NEWS.COM, Oct. 9, 2006, http://news.com.com/YouTube+may+add+to+Googles+copyright+worries/2100-1030_3-6124149.html (discussing how § 512 is "murky," making it unclear whether YouTube is safe from liability).

20. 17 U.S.C. § 512(c)(1)(A)(ii).

21. *Id.* § 512(c)(1)(B).

22. *See* McCullagh & Broache, *supra* note 19 (discussing the fact that YouTube is currently in litigation for copyright infringement—one of many, some predict, unless YouTube changes its policies).

outcome of an infringement action brought against YouTube or a similar entity. Finally, Part IV offers systematic changes that VSIs can enact to better protect themselves against liability arising from infringement actions and proposes a legislative solution that better aligns the interests of VSIs with the artists and corporations that own the copyrighted material.

II. COPYRIGHT LAW, THE DMCA, AND THE CREATION OF YOUTUBE AS A WORLD-WIDE PHENOMENON

A. *The Origins of YouTube in a Digital Age*

Just a few years ago, it was impractical to post video clips on websites, let alone share those clips with others freely and easily.²³ Photo-sharing websites were increasingly available, due in large part to the popularity of digital cameras, but video-sharing websites remained infeasible.²⁴ That quickly changed, however, as digital cameras became smaller and better at capturing video, and their associated video files became smaller and more easily transmitted, thereby increasing the demand for online video-sharing sites.²⁵ Simultaneously, broadband access increased dramatically, allowing users to connect to the Internet and to view and upload larger files, including videos, more quickly than ever before.²⁶ As demand and connection speeds increased, a greater number of sites came online, and soon there were many sites competing to acquire the largest user base.²⁷

YouTube entered the VSI market against this backdrop and quickly became one of the most popular sites on the Internet.²⁸ YouTube distinguished itself from other VSIs by making it easier to post videos online. Unlike some older VSIs that required users to download file-transfer software, supply information about the file

23. See Graham, *supra* note 8 (stating how one year ago, to post a video clip online free of charge one had to have knowledge of “computer code and [be] willing to post it on a personal website”).

24. *Id.*

25. *Id.*

26. One study reports that from December 2000 to August 2003, broadband access among U.S. Internet users increased from 6% to about 30%. MARY MADDEN ET AL., AMERICA'S ONLINE PURSUITS: THE CHANGING PICTURE OF WHO'S ONLINE AND WHAT THEY DO 5 (Lee Rainie ed., 2003), http://www.pewInternet.org/pdfs/PIP_Online_Pursuits_Final.pdf.

27. Graham, *supra* note 8.

28. Goldstein, *supra* note 5.

being uploaded, and obtain approval by the company before posting,²⁹ a YouTube user merely has to sign in, enter the name of the file, and click "upload." YouTube employees then scan the uploaded files for inappropriate content, such as pornography, excessive violence, or hate-crime footage videos. Still, YouTube has not yet employed a system to spot copyrighted works.³⁰

The company has, however, taken steps to protect itself from any possible legal claims. First, after acquiring YouTube, Google immediately cut licensing deals with large media companies, such as Universal Music Group and Sony BMG Music.³¹ In exchange for a share of advertising revenue, these media companies have authorized YouTube users to upload videos containing copyrighted works or pieces of these works.³² Second, YouTube has a termination policy in place for repeat copyright infringers.³³ Third, YouTube will immediately remove any videos when notified by the copyright owner that copyrighted files reside on the website.³⁴ Finally, the company plans to implement self-automated technology designed to detect copyrighted material.³⁵ The program will scan all of YouTube's movies using an "audio-signature technology that can spot a low-quality copy of a licensed music video or other content."³⁶ The company, however, will not delete the tagged files automatically.³⁷ Instead, the program will help copyright owners locate and identify their content, allowing them to decide what course to take.³⁸

Even with these precautionary measures in place, it is unclear whether YouTube will insulate itself from copyright infringement

29. Google Video, a video sharing Internet site created by Google prior to its purchase of YouTube, is one such example. Graham, *supra* note 8.

30. YouTube currently uses software that can identify pornographic videos, and has a staff in place to remove videos flagged by YouTube users as "objectionable." Woolley, *supra* note 6.

31. *YouTube Strikes Content Deals*, USA TODAY, Oct. 9, 2006, available at http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm.

32. *Id.*

33. Just a few months ago, after being notified by a series of Japanese companies that more than 30,000 videos on YouTube were infringing copyrights, YouTube immediately removed them. Mark Schilling, *Japan Org Warns YouTube*, DAILY VARIETY, Dec. 7, 2006, at 30. YouTube also plans on removing over 100,000 clips owned by Viacom. Catherine Holahan, *Viacom's High-Stakes Duel with Google*, BUS. WK., Feb. 2, 2007, available at http://www.businessweek.com/technology/content/feb2007/tc20070202_568443.htm?chan=top+news_top+news+index_businessweek+exclusives.

34. See, e.g., Schilling, *supra* note 33 (stating that YouTube removed infringing files when asked to do so by Japanese companies, but that the problem persisted).

35. Alex Veiga, *Rise of a Copyright Auto-Cop*, PHILA. INQUIRER, Oct. 22, 2006, at E06.

36. *Id.*

37. *Id.*

38. *Id.*

liability. First, YouTube is home to many video clips that use copyrighted material in ways that may be difficult for automatic scans to detect.³⁹ Second, YouTube hosts many clips, including rare and amateur videos, that contain copyrighted material owned by small, unknown artists or single individuals, as opposed to the mega-music and video companies with which Google is acquiring licenses.⁴⁰ Third, Google's lofty aspirations for YouTube may increase the site's vulnerability to liability. Not only has Google begun to advertise heavily on the site, but also it plans to increase its advertising in the future, as it grooms YouTube to become television's successor.⁴¹ Thus, the site may remain open to massive liability if it is not protected under the DMCA.

B. Copyright Law Prior to the DMCA

For more than a quarter of a century, U.S. copyright law has been governed largely by the United States Copyright Act of 1976 ("the Copyright Act").⁴² This act, under § 106, grants copyright owners a series of exclusive rights, including the rights to reproduce a copyrighted work, prepare derivative works, distribute copies, and perform or display a work publicly.⁴³ An individual who violates any of these exclusive rights, either directly or indirectly,⁴⁴ is deemed a copyright infringer and is subject to a host of remedial actions, including injunctions, statutory damages, and possibly even imprisonment.⁴⁵

39. For example, clips to "The Office" can be accessed through searching by the characters' or actors' names, or even by the song connected to the video montage, which makes uncovering copyrighted materials more difficult. *E.g.*, YouTube Home Page, *supra* note 3 (search for "Jim and Pam," "John Krasinski," or "You're My Best Friend") (last visited Sept. 17, 2007).

40. Ben Ratliff, *A New Trove of Music Video in the Web's Wild World*, N.Y. TIMES, Feb. 3, 2006, at E1.

41. See Justin Berton, *That Soft Blue Glow at Night May Not Be a TV Anymore*, S.F. CHRON., Nov. 5, 2006, at A1 (discussing the fact that online viewing may be the future of television, with Google the first step as the provider of such content by purchasing YouTube).

42. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (effective Jan. 1, 1978).

43. 17 U.S.C. § 106 (2007). See Lucy H. Holmes, *Making Waves in Statutory Safe Harbors: Reevaluating Internet Service Providers' Liability for Third-Party Content and Copyright Infringement*, 7 ROGER WILLIAMS U. L. REV. 215, 227-28 (2001) (discussing the rights granted in § 106, and the three theories of liability associated with it—direct liability, contributory infringement, and vicarious liability).

44. See *Pickholtz v. Rainbow Techs., Inc.*, 260 F. Supp. 2d 980, 989-90 (N.D. Cal. 2003) (discussing the distinction between direct and indirect infringement and claiming that action under one theory excludes the other if based on the same act).

45. 17 U.S.C. §§ 107, 501-06.

To directly infringe, one must copy, either willfully or inadvertently, "protected elements" of a copyrighted work.⁴⁶ These elements include those aspects of a copyrighted work that are original (e.g., owing their origin to the author) and that show "a minimal degree of creativity."⁴⁷ A creator demonstrates a possible infringer's lack of "minimal creativity" via evidence of direct copying or evidence (1) that the defendant had "access" to the work in question and (2) that his work was "substantially similar" to that of the plaintiff.⁴⁸

To indirectly infringe, one must be either a contributory infringer or vicariously liable for the acts of a direct infringer.⁴⁹ A contributory infringer is someone who substantially aids a direct infringer with knowledge of the infringing activity.⁵⁰ For example, a store owner may be liable as a contributory infringer if one of her employees sells illegal copies of copyrighted materials with the owner's knowledge. This is because the owner, by providing his employees with the actual business location, substantially participates in the infringing activity.⁵¹ A vicariously liable entity, on the other hand, "has the right and ability to control the infringer's acts and . . . receives a direct financial benefit from the infringement."⁵² For example, in a Seventh Circuit case, a dance club owner who hired a singer was found vicariously liable for the singer's performance of copyrighted works.⁵³ The court justified liability because the club owner had the ability to fire the singer as soon as she began singing copyrighted material, and he arguably received a direct financial benefit (in the form of more patrons coming to the club) for the singer's performance of the copyrighted work.⁵⁴

Even if one directly or indirectly infringes, he can still avoid liability if the infringement constitutes a "fair use" of the copyright owner's work. As will be discussed in detail below, a court balances

46. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000).

47. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

48. *Three Boys Music Corp.*, 212 F.3d at 481.

49. Although there is no statutory rule on indirect infringement, courts have accepted these common law theories to implement liability. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) (accepting these theories of liability).

50. *Id.* at 1373-75.

51. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that a flea market owner was liable for contributory infringement when he had knowledge of infringing activity going on because he provided the infringer, his booth operator, with the advertising, plumbing, parking, etc. that he needed to get patrons).

52. *Religious Tech. Ctr.*, 907 F. Supp. at 1375.

53. *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929).

54. *Id.* (holding the owner liable because the music was being played "for the profit of the proprietor of the dance ball").

four factors in order to decide whether a certain use of a copyrighted material constitutes a fair use: (1) the transformativity of the work, (2) the nature of the copyrighted work, (3) the amount of work copied, and (4) the potential market effect of the infringement.⁵⁵ If the court decides that such infringement was “fair,” then no liability will attach to the infringer.

These legal concepts seemed appropriate for most media until the advent of the Internet.⁵⁶ Indeed, “[t]he Net raise[d] many new questions to vex traditional concepts of who is responsible” for copyright infringement.⁵⁷ *Playboy Enterprises, Inc. v. Frena* first applied these principals in the Internet setting.⁵⁸ In that case, the defendant, Frena, owned and operated an online “bulletin-board” service (“BBS”) (the forerunner to ISPs) where his subscribers could upload, view, and download photographs.⁵⁹ One of his subscribers uploaded more than one hundred photographs owned by Playboy without the company’s authorization or permission.⁶⁰ Playboy then sued the defendant, who, upon notification of the alleged infringing material, deleted the photographs from the BBS.⁶¹ The court held that Frena violated Playboy’s copyright on the images, despite the fact that he did not actually copy or upload the photographs, because the defendant, through providing the bulletin board service, violated the plaintiffs’ public distribution and display rights under § 106.⁶² The court failed to realize that Frena was not actually distributing material embodiments of plaintiff’s work, but rather was providing a service allowing users to complete the actual distribution.⁶³ Nor did the court discuss whether Frena himself, as opposed to his subscribers, was responsible for displaying the copies.⁶⁴ As such, this case left copyright law in the Internet context largely unsettled.

A few years later, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, the court attempted to clarify the

55. See *infra* Part III.A.4 (discussing the fair use defense).

56. One exception is telephone companies and other service providers that provided “wires,” which allowed for the transmission of copies. Congress protected the wire providers by passing a “passive carrier” exemption. 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12B.01 (2006).

57. *Id.*

58. 839 F. Supp. 1552 (M.D. Fla. 1993).

59. *Id.* at 1554.

60. *Id.*

61. *Id.*

62. *Id.* at 1556-57.

63. NIMMER & NIMMER, *supra* note 56.

64. *Id.*

legal responsibilities of ISPs.⁶⁵ In *Netcom*, Dennis Erlich, a former Scientology minister, posted both published and unpublished writings owned by the Church of Scientology on an online forum accessed via a BBS that used Netcom's services to connect to the Internet.⁶⁶ To post a message, Erlich transmitted messages to the online BBS through his modem.⁶⁷ Netcom's software then automatically copied the message onto its own computer and others without any input from Netcom personnel.⁶⁸ The court found that Netcom was not directly liable for infringement because it had not "initiated the copying" and therefore did not "cause" the copying.⁶⁹ The court remarked, however, that Netcom may be liable for contributory infringement because it received a letter from the plaintiffs stating that Erlich was posting copyrighted material without permission and therefore had knowledge of the infringement, but took no action to remove the posts.⁷⁰

About the time that *Frena* was decided, Congress met to discuss the future of U.S. copyright law.⁷¹ In 1993, Congress created a Working Group on Intellectual Property Rights to "investigate the effects of emerging digital technology on intellectual property rights and make recommendations on any appropriate changes to U.S. intellectual property law and policy."⁷² In 1995, the Working Group finished its report (known as the "White Paper") suggesting that Congress apply existing copyright law broadly to digital transmissions and to the Internet in general.⁷³ The report also recommended that Congress adopt laws strongly protecting the copyrights of digital works in order to realize the Internet's full potential.⁷⁴ Many groups, especially ISPs, criticized this view, claiming that increased regulation would hinder technological innovation, and they negotiated with Congress to obtain favorable laws.⁷⁵ Influenced by these negotiations,

65. 907 F. Supp. 1361 (N.D. Cal. 1995).

66. *Id.* at 1365-66.

67. *Id.* at 1367.

68. *Id.*

69. In fact, the court compared Netcom's copying to that of the owner of a copying machine who lets the public use the machine to make copies. *Id.* at 1368-69. Note that although causation is not an element required to show a prima facie case of copyright infringement, the court was stretching here to find a method to protect the BBS so that BBSs in general would be able to operate without fear of infringement.

70. *Id.* at 1374.

71. "The process to update U.S. copyright law with respect to digital transmissions began in February, 1993." S. REP. NO. 105-190, at 2 (1998).

72. *Id.*

73. RALPH S. BROWN & ROBERT C. DENICOLA, COPYRIGHT 463-64 (9th ed. 2005).

74. *Id.*

75. See NIMMER & NIMMER, *supra* note 56 (mentioning how "representatives of content owners met at length with representatives of service providers in an attempt to formulate new

as well as the *Netcom* decision, Congress ultimately developed and adopted the DMCA in 1998.⁷⁶

C. The DMCA: A Safe Harbor for ISPs

With the passage of the DMCA, Congress intended to strike a balance between encouraging experimental technology and protecting copyright holders from infringement online.⁷⁷ Congress thus decided to “leave current law in its evolving state,” but to add to this law a series of “safe harbor” provisions providing ISPs with limited liability in certain circumstances.⁷⁸ As a result, the common law principles developed in *Frena*, *Netcom*, and successive cases remain important in determining if and when an ISP is a copyright infringer.⁷⁹ It is also imperative to understand the safe harbor provisions provided in the DMCA in order to grasp the potential liability of an ISP charged with copyright infringement.

To be eligible for safe harbor protection, ISPs must meet three threshold eligibility requirements. First, a service provider must “adopt[] and reasonably implement[]” a termination policy for repeat infringers.⁸⁰ Second, the ISP must “inform subscribers” that such a termination policy exists.⁸¹ Third, the ISP must “accommodate and . . . not interfere with standard technical measures” used by copyright owners to protect or track their own works.⁸²

standards to govern this domain” and how initial lack of agreement between the two sides stalled legislation in Congress).

76. Indeed, the House Judiciary Committee report stated that the DMCA:

[E]ssentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-line Communications Services, Inc.* In doing so, it overrules those aspects of *Playboy Enterprises, Inc. v. Frena*, insofar as that case suggests that such acts by service providers could constitute direct infringement, and provides certainty that *Netcom* and its progeny, so far only a few district court cases, will be the law of the land.

Id. (quoting H.R. REP. NO. 105-551, pt. 1, at 11 (1998) (citations omitted)).

77. See Mike Scott, Note, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 99, 99 (2006) (noting that “Congress recognized that this legal foundation needed to strike a delicate balance” between online service providers and copyright holders) (citing S. REP. NO. 105-190, at 21, 69 (1998); H.R. REP. NO. 105-551, pt. 2, at 21, 24-26, 58-59)).

78. S. REP. NO. 105-190, at 19.

79. “Section 512 is not intended to imply that a service provider is or is not liable as an infringer. . . . [T]he limitations of liability apply if the provider is found to be liable under existing principles of law.” *Id.*

80. Termination is only required under “appropriate circumstances.” 17 U.S.C. § 512(i) (2007).

81. *Id.*

82. These measures must also have been developed broadly by many different copyright owners, be available to all, and not impose substantial burdens or costs on the ISPs. *Id.*

Once these threshold requirements are met, the DMCA provides ISPs with liability protection if the ISP is involved in at least one of four stated activities. First, the DMCA protects ISPs from liability for copyright infringement occurring by way of an ISP “transmitting, routing, or providing connections for” copyrighted material or the “transient” storage of such material.⁸³ Second, the DMCA provides protection from copyright infringement for infringing material stored “on a system or network controlled” by the ISP.⁸⁴ Third, and most importantly for YouTube and other VSIs, the DMCA provides protection against copyright infringement for storing a copyrighted work “at the direction of a user of material that resides on a system or network controlled . . . [by] the service provider.”⁸⁵ Finally, protection extends to a provider who links its users to an “online location containing infringing material” by using a hyperlink, pointer, reference, or other online tool.⁸⁶ Each activity has a corresponding set of additional requirements an ISP must satisfy before protection is awarded.

Although these conditions seem straightforward, the general language used throughout the Act leaves them open to multiple interpretations—especially because there has been little litigation over these provisions. For example, when is a termination policy “reasonably implemented”? Will any termination policy satisfy the requirement? What exactly are “standard technical measures” in a practical setting? When is a financial benefit directly attributable to infringing activity? These questions must be answered to determine if

83. Providers are protected so long as they are not responsible for initiating the transmission, the transmission is carried out by an automatic process, they do not select who receives the material, they do not allow the copies made to be accessible to anyone else, and the copied material is not modified in any way. *Id.* § 512(a). This provision is meant to protect ISPs such as AOL or NetZero, which provide users with access and connection to the internet.

84. Protection is granted so long as the provider is not responsible for posting the material online, the person who posted the material directs who is to receive the material, and the material is stored through an automated process. *Id.* § 512(b). This provision is meant to protect ISPs such as Yahoo, Google, and other search engines, which use software to automatically cache copies of websites for easier searching. *See Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 498 (E.D. Pa. 2006) (holding that Google was safe under § 512(b) for caching copies of websites for its search engine).

85. This protection extends so long as the service provider does not know that the material is infringing or is unaware of facts or circumstances that would suggest it was infringing, does not “receive a financial benefit directly attributable to the infringing activity,” and, upon notice of infringing activity, “expeditiously” removes such infringing material from the site. 17 U.S.C. § 512(c).

86. Protection extends so long as the provider does not have actual knowledge of the infringing material, does not receive a financial benefit from the infringing activity, and, upon notification, removes the infringing material. *Id.* § 512(d).

YouTube and other VSIs can avoid liability. As the following analysis suggests, YouTube may be entering dangerous territory.

III. OPENING YOUTUBE TO POTENTIAL LIABILITY VIA THEORIES OF COPYRIGHT INFRINGEMENT

A. YouTube's Liability Absent the Safe Harbor

As discussed in detail below, absent the DMCA's safe harbor, VSIs such as YouTube likely would be liable for copyright infringement under the theory of vicarious liability and perhaps under contributory infringement, but probably would not be liable for direct infringement. The first step in analyzing potential liability involves examining VSI liability in the absence of safe harbors, which will be discussed in this section. Sub-sections A1-A4 will discuss each theory of copyright liability mentioned above, as well as any possible fair use defense YouTube would have absent the DMCA. Thereafter, determining whether VSIs meet the requirements for safe harbor protection is imperative to deciding whether they would face liability for copyright infringement. This issue will be discussed in Section B of this Part.

1. Direct Liability

Even absent the protection afforded by the safe harbor provisions, YouTube and other VSIs likely would not be liable for direct copyright infringement. Before the DMCA's passage, two competing judicial ideologies governed whether ISPs could be directly liable for the activities of their users. One, expressed by the Middle District of Florida in *Frena*, held that ISPs could be direct infringers if there was ownership of the copyright, copying, and a violation of one of the exclusive rights in § 106 of the Copyright Act, even if the defendant was not the one who created the copy.⁸⁷ The court expressly stated that “[t]here is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself [sic].”⁸⁸

Under this interpretation, it is highly likely that, absent the DMCA, YouTube and other VSIs would be liable as direct infringers.

87. *Playboy Enters. Inc. v. Frena*, 839 F. Supp. 1552, 1555-59 (M.D. Fla. 1993).

88. *Id.* at 1556; *see supra* text accompanying notes 58-64 (stating the facts of *Frena*).

To begin with, the copies of copyrighted videos located on the VSIs are usually exact copies of work owned by someone else.⁸⁹ Thus, for a large majority of these videos, there is no doubt that copying has occurred, the works are substantially similar, and there is ownership of a copyright. These elements satisfy the basic requirements of infringement.⁹⁰ Just as *Frena* did not manually copy the photographs, the VSIs do not manually copy the videos in question; rather, an automated process creates the copies when a copyrighted work is uploaded by a user. Once uploaded, these videos can be viewed, although not downloaded, by millions of people.⁹¹ Consequently, it is clear that the VSIs, under *Frena*, breach the owner's right to publicly display the copyrighted works and therefore would be liable for direct infringement. Thankfully for VSIs, however, the majority of courts do not adhere to this view.

The other, more widely followed view, exemplified in *Netcom*, would exempt the VSIs from direct infringement liability under current circumstances.⁹² Recall in *Netcom* that one of the defendant's users posted unpublished, copyrighted manuscripts on the defendant's BBS.⁹³ Just as in *Frena*, the defendant did not carry out the actual copying; rather, the copies were created via an automated process when the user uploaded the files to the server.⁹⁴ However, unlike the *Frena* court, the *Netcom* court held that the defendant was not liable for direct infringement, despite making substantially similar copies and publicly displaying them on the BBS.⁹⁵ The court stated that because the defendant "did not take any affirmative action that directly resulted in copying plaintiffs' works," other than having an automated system that created temporary copies, the defendant did not actually initiate the copying and therefore could not be liable as a direct infringer.⁹⁶ These automated actions were "necessary to having a working system for transmitting Usenet postings to and from the

89. Although YouTube limits videos to ten minutes in length, many individuals get around this requirement by posting copyrighted material in ten-minute installments. *Google Quizzed over YouTube Plans*, BBC NEWS, Oct. 26, 2006, http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/6087976.stm.

90. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (explaining the requirements for infringement).

91. See Goldstein, *supra* note 5 (noting that clips are viewed over 100 million times daily).

92. Indeed, this view has been followed by the Fourth Circuit. See *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622 (4th Cir. 2001).

93. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1365-66 (N.D. Cal. 1995).

94. *Id.* at 1367-68.

95. *Id.* at 1383.

96. *Id.* at 1368-69.

Internet,” and as such, the defendant’s actions lacked “causation” as to the direct infringement.⁹⁷ Thus, the court concluded, the defendant could not be held liable as a direct infringer.

Under this view, it is clear that VSIs like YouTube would be free from liability as direct infringers. Just as third parties were responsible for posting the Scientology manuscripts in *Netcom*, third parties post the videos in question. More importantly, just as in *Netcom*, the copies created by the VSIs are made via an automated process initiated by the third-party user. To share videos online, such an automated process is necessary, and thus, it is imperative that service providers be offered some protection for copyrighted videos that they themselves did not copy. Therefore, under this view, VSIs are not direct infringers absent DMCA protection. Given that Congress accepted this view over *Frena’s* when it adopted the DMCA,⁹⁸ it is likely that the *Netcom* interpretation of direct liability for ISPs would control absent DMCA protection, and therefore, it is likely that VSIs would not be held liable as direct infringers if the safe harbor provisions were deemed inapplicable.

2. Vicarious Liability

Despite the fact that YouTube and other VSIs likely would not face direct infringement liability, it is highly likely that these sites would be liable under the theory of vicarious liability. Vicarious liability is a relatively recent creation, although its roots are grounded in the much earlier tort-and-agency-law concept of *respondeat superior*.⁹⁹ Unlike the theory of *respondeat superior*, the theory of vicarious liability extends past the employee-employer relationship. As stated by the Second Circuit in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, to prove vicarious liability for copyright infringement a plaintiff need only show that there was a direct infringer, that the defendant gained a direct financial benefit from the copier’s infringement, and that the defendant had the right and the ability to control the direct infringer.¹⁰⁰ The defendant need not have knowledge of the direct infringer’s actual infringement.¹⁰¹ In *Shapiro*, the

97. *Id.* at 1368-70.

98. *See supra* note 76 (quoting the House Judiciary Committee that the DMCA was meant to overrule *Frena* in many respects).

99. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (extending the normal agency rule of *respondeat superior* to copyright situations “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials”).

100. *Id.*

101. *Id.*

defendant, H.L. Green Company, was held liable for vicarious liability when one of its licensees, Jalen Amusement Company, sold illegally copied records to customers in its store.¹⁰² Because H.L. Green received a ten-to-twelve percent commission from the sales made in Jalen's stores and had a continuous relationship with Jalen via the license (indeed, the company had "unreviewable discretion" to fire any of Jalen's employees deemed to be acting improperly), the court held H.L. Green liable for copyright infringement, having received a direct financial benefit from the infringement and having the right and ability to control Jalen and its employees through the license agreement.¹⁰³

Just as H.L. Green was found liable for infringement via vicarious liability, YouTube and other VSIs, as they currently and prospectively operate, could be vicariously liable for copyright infringement absent safe harbor protection. Currently, a majority of VSIs post advertisements on their websites to garner revenue.¹⁰⁴ It is conceivable that given these sites' large audiences, posting an ad would be expensive. In addition, it is likely that as the number of users increases over time, the fee for advertising will increase proportionately. Assuming that users are drawn to these VSIs because they can access free copyrighted material,¹⁰⁵ there is a direct financial benefit attributable to VSIs based on the amount of infringing material on their sites. In short, the more copyrighted files the sites contain for viewing, the more users such a site will draw, and therefore, the more the VSI can charge for advertising. As such, it is highly likely that a court would find that VSIs are receiving a direct financial benefit from the infringing material under these circumstances.¹⁰⁶

It is also likely, though admittedly less clear, that a court would determine that YouTube has "the right and ability to control"¹⁰⁷ its users' behavior and therefore would hold YouTube vicariously liable absent safe harbor protection. Although the Ninth Circuit in *A&M Records v. Napster, Inc.* held that "[t]he ability to block

102. *Id.* at 307-09.

103. *Id.* at 306-09.

104. *See, e.g.*, YouTube Home Page, *supra* note 3; Crackle Home Page, <http://www.crackle.com> (last visited Sept. 25, 2007).

105. *See Google Quizzed over YouTube Plans, supra* note 89 (noting that "video-sharing website's rapid growth has been partly down to the thousands of clips from old TV shows uploaded illegally by its users").

106. In *MGM Studios, Inc. v. Grokster*, the Supreme Court suggested that a similar business model "confirm[ed] that [Grokster's] principle object was use of [its] software to download copyrighted works." 545 U.S. 913, 926 (2005).

107. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise,"¹⁰⁸ many other courts have suggested that this is only an accurate statement of the law when dealing with a "closed-universe system" search engine like Napster.¹⁰⁹ Recently, a California district court held that even though Google had the ability to de-link certain infringing images retrieved through its image search, the fact that Google operated in an open, web-based system where "remov[ing] a link from its search index d[id] not render the linked-to site inaccessible" meant that Google did not have "substantial input into or authority over the decision to serve or continue serving infringing content," and thus it lacked the right or ability to control such content.¹¹⁰

It would seem that YouTube falls within a gray area between Napster's closed-universe system and Google's open, web-based one. Although YouTube is open to the entire web and anyone can access and upload videos onto the site, once a given video is removed from YouTube's site, it is rendered inaccessible to all visitors. Thus, users must attempt to find that clip on other VSIs, of which only a handful exist, where the video may or may not be posted. Whereas with Google images, the infringing websites remain accessible despite efforts taken by Google to de-link the image from its site, infringing copies that are removed from YouTube's site actually cease to exist. This difference suggests that YouTube does in fact have a higher degree of control over the infringing copies on its site than Google does over its images.

Like Google, however, YouTube arguably would be unable to establish an automated system that could monitor whether each video uploaded onto the site was a copyrighted work owned by someone else. Although the company is exploring the idea of using software programs that detect known copyrighted works using auditory signals, it is doubtful that such software could be used for *all* copyrighted works on the site, and it is likely that YouTube's users would find ways around the system.¹¹¹

In sum, it appears that YouTube does have the right and the ability to control infringing activity on its servers, especially if it

108. 239 F.3d 1004, 1023 (9th Cir. 2001).

109. *E.g.*, Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 857-58 (C.D. Cal. 2006) (denying a preliminary injunction against Google for vicarious liability for infringement), *aff'd in relevant part*, Perfect 10 v. Amazon.com, Inc., 487 F.3d 701, 731 (9th Cir. 2007).

110. *Google, Inc.*, 416 F. Supp. 2d at 857-58.

111. Andy Beal, *Google Gives-up Building Own YouTube Filters, Follows MySpace's Lead*, Feb. 23, 2007, <http://www.marketingpilgrim.com/2007/02/google-gives-up-building-own-youtube-filters-follows-myspaces-lead.html> (noting that "Google has signed a deal with Audible Magic to screen uploaded videos for copyrighted content"). This additional filtering system suggests that YouTube does have a greater "right and ability to control" its users' posted content.

develops auditory-signal software. First, YouTube is capable of deleting infringing content immediately once notified of it.¹¹² Second, when such files are deleted, users are incapable of accessing the videos from the site. Finally, YouTube employees already carry out some screening for pornographic videos, hate videos, and similar files.¹¹³ Although it remains difficult for employees to examine every file to determine if it is copyrighted, screening of many videos is likely to occur.¹¹⁴ Thus, it is likely, though admittedly uncertain, that YouTube would be held vicariously liable absent safe harbor protection.

3. Contributory Infringement

YouTube could also be liable under the theory of contributory infringement, though this is even less likely. To be liable as a contributory infringer, one must have knowledge of infringing activity and must substantially participate in the underlying infringement.¹¹⁵ Knowledge of infringement can be constructive¹¹⁶ and is therefore an easily met standard. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court held that Sony's development and sale of the Betamax video recorder would have met this requirement if not for the fact that the Betamax could be, and in fact was, used for "substantial non-infringing uses."¹¹⁷ In that case, Sony knew that some users of the Betamax would illegally reproduce copyrighted materials with the video recorders.¹¹⁸ However, because these devices could be used for mere "time-shifting," or watching an already free or paid-for program at a different time, and this was deemed to be fair use,¹¹⁹ the video recorder was viewed by the Court as a "staple article of commerce" and as having substantial non-infringing uses. The

112. In fact, the company deleted over 30,000 Japanese anime videos in a very short period of time upon notification that they were copyrighted. Associated Press, *YouTube Deletes 30,000 Files After a Copyright Complaint*, N.Y. TIMES, Oct. 21, 2006, at C4.

113. Woolley, *supra* note 6.

114. Beal, *supra* note 111.

115. See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (stating that "one 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").

116. *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (noting "[w]hile the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner's rights, it nonetheless requires conduct by a person who causes in some meaningful way an infringement").

117. 464 U.S. 417, 439-42 (1984).

118. *Id.* at 439.

119. See *infra* Part III.A.4 (discussing the requirements for a fair use defense).

Court held that these non-infringing uses eliminated any constructive knowledge by Sony that users would employ the device to infringe.¹²⁰

There is no doubt that YouTube has constructive knowledge of users exploiting its website to infringe. The company has been notified numerous times about infringing content located on its servers and has removed thousands of infringing files.¹²¹ Additionally, if Sony was held to have participated substantially in the infringement just by selling and developing the Betamax video recorder, it seems logical to infer that YouTube has participated substantially in the infringing activity of its users just by providing the forum for users to post and comment on videos, including copyrighted videos.¹²² Thus, YouTube clearly has constructive knowledge that its site can be—and is—used to infringe.¹²³

YouTube, however, could be safe from liability for contributory infringement if it lacks constructive knowledge that its users are using its service to infringe, which YouTube can demonstrate, as a service with substantial non-infringing uses. Here, a court likely would hold that, just as Sony's Betamax recorder had substantial non-infringing uses and thus was a "staple article of commerce,"¹²⁴ YouTube's post-and-comment video service has substantial non-infringing uses because the site acts as a forum for users to share and comment on non-copyrighted, personal videos. In this light, not only does YouTube's service not infringe, but also it encourages creativity, which is one of the major goals of U.S. copyright law.¹²⁵ Additionally, as YouTube acquires more licensing deals with copyright content providers,¹²⁶ the percentage of non-infringing content on its servers

120. *Sony Corp. of Am.*, 464 U.S. at 442-47.

121. Indeed, this practice has continued since its sale to Google. See, e.g., *YouTube Deletes 30,000 Files*, *supra* note 112 (noting that YouTube deleted 30,000 files in response to a copyright infringement notice).

122. The substantial participation requirement is very easily met. Recall *Fonovisa, Inc. v. Cherry Auction, Inc.*, in which a flea market operator was found to have substantially participated in infringing activity carried out by one of its booth renters when it merely rented the booth to the bootlegger, knowing that he was going to sell illegal copies. 76 F.3d 259, 264 (9th Cir. 1996); see *supra* note 51 and accompanying text.

123. In fact, YouTube has an information page providing copyright information to users because the site had received so many questions regarding the matter. YouTube Copyright Tips, http://www.youtube.com/t/howto_copyright (last visited Aug. 24, 2007).

124. *Sony Corp. of Am.*, 464 U.S. at 456.

125. The "goals of the copyright law [are] 'to stimulate the creation and publication of edifying matter.'" *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 n.10 (1994) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990)).

126. See *Google Quizzed over YouTube Plans*, *supra* note 89 (noting that "YouTube has signed content deals with entertainment giants CBS, Universal Music Group, Sony BMG, NBC and Warner Music Group").

increases. As non-infringing content grows, it becomes increasingly likely that a court would hold that YouTube's service has substantial non-infringing uses and is a "staple article of commerce." Indeed, the *Sony* court agreed that using the Betamax to "time-shift" constituted a substantial non-infringing use, highlighting that where there was a high degree of copyright holder consent, there was no infringement.¹²⁷ Therefore, it is likely that YouTube's service would be held to have substantial non-infringing uses, and YouTube could be protected from infringement as a contributory infringer.¹²⁸

4. Fair Use Defense

Even if YouTube would be found liable under one or more of these infringement theories, it could (and likely would) argue that the copying carried out by its users was fair use and, therefore, that it should not be liable for the infringement. Section 107 of the Copyright Act provides that "the fair use of a copyrighted work . . . is not an infringement of copyright" and acts as an affirmative defense against claims of copyright infringement.¹²⁹ To determine whether a copyrighted work was copied for a fair use, a court must balance the following four factors: (1) "the purpose and character of the use," (2) "the nature of the copyrighted work," (3) the amount of the work used in relation to the whole, and (4) the potential market effect of the use.¹³⁰ Although these factors are each important, they are not necessarily treated equally under fair use analysis and, at different times, have been weighted more or less heavily in courts' fair use analysis.¹³¹ Today, it is generally accepted that determining the

127. *Sony Corp. of Am.*, 464 U.S. at 443 (noting that because time-shifting enlarges the audience, "a significant amount of [the copyrighted material] may be used in this manner without objection from the owners of the copyrights . . .").

128. Substantial noninfringing uses can be negated if it is shown that an individual actively induced people to use his or her product to infringe. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005) (holding 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"). Nevertheless, YouTube in no way actively induces people to post copyrighted files on its servers. It has an open policy against such posting, which suggests that it is not an active inducer.

129. 17 U.S.C. § 107 (2007).

130. *Id.*

131. For example, from about 1984 to 1994, factor four (market potential) was deemed by many, including the Supreme Court, to be the factor of most importance. See *Sony Corp. of Am.*, 464 U.S. at 448-52 (discussing the importance of the fourth factor); *Consumers Union of U.S., Inc. v. Gen. Signal Corp.* 724 F.2d 1044, 1050 (2d Cir. 1983) ("[The fourth] factor is 'widely accepted to be the most important.'" (quoting *Triangle Publ'ns. v. Knight-Ridder Newspapers*, 626 F.2d 1171, 1177 (5th Cir. 1980))). Today, as discussed below, factor one (purpose and character of the use) is more important. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,

purpose and character of the use, in particular whether such use was “transformative” as opposed to “superseding,” trumps the other three factors.¹³² However, given that each factor is important, a brief discussion of each is warranted.

When assessing purpose and character of the use of the copy, the court asks 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” such that new meaning is added to the work.¹³³ For example, under this test, the Supreme Court held that a parody of the song “Pretty Woman” was in fact transformative in nature because it added humor and critical commentary.¹³⁴ In YouTube’s case, although some of the infringing material posted by users is transformative in nature,¹³⁵ the majority is directly copied from an original source, such as a TV show. Thus, in YouTube’s case, depending on who brings the suit and which material is implicated, factor one of the fair use analysis could weigh in YouTube’s favor. However, many illegally posted videos on YouTube consist of simple, direct copies of video clips or sound bites used in a non-transformative manner, and consequently, the first factor likely would weigh towards holding YouTube liable.

The second factor, the nature of the copyrighted work, likely also would favor liability.¹³⁶ This factor asks the court to examine whether the original material copied deserved core copyright protection.¹³⁷ Original creative works used for entertainment purposes, non-published works, and non-informational works fall into this category.¹³⁸ Here, although the works posted on YouTube usually have already been published (and therefore deserve less protection than, say, unpublished works),¹³⁹ a majority of the videos originally were created to provide entertainment, which suggests they are

579 (1994) (noting that whether the purpose and character of a use is “transformative” is more important than whether the use has a market impact).

132. See *Campbell*, 510 U.S. at 579.

133. *Id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1841)).

134. *Id.* at 579-82.

135. Some users alter copyrighted pieces by adding their own commentary over them, mixing copyrighted songs with home videos, for example. See, e.g., YouTube Home Page, *supra* note 3 (search for “beatboxing flute super mario brothers theme” to watch a movie of a flute performance of the super Mario brothers theme, which is copyrighted by Nintendo) (last visited Sept. 18, 2007).

136. 17 U.S.C. § 107 (2007).

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

138. *Id.*

139. See *Haper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551-52 (1985) (noting that the copying of unpublished works makes it difficult to acquire a fair use defense).

deserved of greater protection under the law. Thus, these videos clearly fall within the core provision of copyright law and it is likely that a court would weigh this factor for holding YouTube liable.

YouTube may have better luck arguing that the copied works did not take substantial portions or amounts of the original works and therefore satisfy the "relation to the whole" factor.¹⁴⁰ Under this factor, a court examines whether a substantial amount of an original work was copied or whether the "heart" of the work was copied.¹⁴¹ Here, YouTube would argue that video clips posted on the site can be only ten minutes in length, and many of the copied videos are only three to four minutes long.¹⁴² Arguably, these small clips are not substantial takings of the underlying copyrighted work because the portion posted is a small percentage of the length of the original. In many cases, however, the clips posted are the most memorable moments of a particular TV episode, movie, or performance. These videos may be seen as substantial copies of the originals because they copy the "heart" of the work at issue. Additionally, users can upload entire works in ten-minute installments, thereby evading YouTube's limitation.¹⁴³ Consequently, although this factor initially appears to bolster YouTube's defense, it is likely that a court would hold that such takings are substantial.

Turning to the fourth requirement, the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.* stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyrighted work. . . ."¹⁴⁴ Thus, if an infringing copy would affect the market for a particular copyrightable work in any way, such a copy would be presumptively unfair. In YouTube's case, the copied videos likely have a significant impact on the market of the original works; thus, this factor would weigh against YouTube's fair use defense. Because most of the posted videos are exact copies of works of entertainment, they directly compete with sales of these works (e.g., DVDs, iTunes, TV shows). This disruption is even more evident for rare works, such as old TV performances of famous bands. Few people have the copyright to these works, and therefore the impact on the copyright owners is great. Free access to these video performances

140. 17 U.S.C. § 107.

141. *Campbell*, 510 U.S. at 587. See also *Harper & Row*, 471 U.S. at 565 (remarking how taking the "heart of the book" was a substantial taking of a copyrighted book).

142. See *Google Quizzed over YouTube Plans*, *supra* note 89 (noting that YouTube allows the posting of clips up to ten minutes in length).

143. *Id.*

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

completely disrupts this market. It would thus seem that YouTube does not fall under the fourth factor's ambit.¹⁴⁵ In sum, YouTube does not have a valid fair use defense, and it is likely that absent safe harbor protection, it would be liable for copyright infringement.

B. Is YouTube as Safe as it Claims to Be?

Given that VSIs such as YouTube likely would be liable under traditional theories of copyright infringement, determining whether YouTube meets the requirements for safe harbor protection is integral to analyzing whether it is open to liability under its current operational framework. These requirements, found in 17 U.S.C. §§ 512(c) and 512(i), have not been litigated heavily and, as such, the analysis below hypothesizes one possible outcome. The following section will discuss whether YouTube satisfies the threshold eligibility requirements for safe harbor protection and then will explore whether it meets the additional requirements set forth in § 512(c). As explained below, it is unclear whether YouTube, as it currently stands, would fall short of meeting the requirements for safe harbor protection, but it seems likely that, as Google grooms YouTube to be the future of television, it inadvertently will steer the digital giant into a legal iceberg.

1. Threshold Eligibility Requirements for Safe Harbor Protection

Protection from liability via any of the safe harbor provisions laid out in § 512 of the DMCA is afforded only if the ISP (1) has "adopted" and "implemented" a termination policy for account holders who are repeat infringers, (2) has notified users of such a policy, and (3) "accommodates and does not interfere with standard technical measures."¹⁴⁶ As discussed below, it is clear that under YouTube's current operational framework, the company complies with these relatively weak threshold requirements.

Because meeting the first two requirements is relatively easy, YouTube and all of the other VSIs clearly comply with them by adopting, implementing, and informing account holders of a termination policy for repeat infringers. In *In re Aimster Copyright*

145. Today, however, this factor does not matter as much, considering that the court is more interested in looking at the transformative nature of a given work. *See supra* text accompanying note 131. It follows that something that is transformative per factor one will not have a substantial effect on the market for the copyrighted work because it will likely be in a market of its own.

146. 17 U.S.C. § 512(i) (2007).

Litigation, an Illinois district court found that Aimster had adopted a policy against repeat infringers by informing users via the copyright notice on its website that it expected them to conform to all copyright laws, provided a detailed form for copyright owners to notify Aimster of infringing files, and stated in the policy that “users who are found to repeatedly violate copyright rights of others may have their access to all services terminated.”¹⁴⁷ Thus, the law requires a bare minimum for an ISP to have adopted and notified users of a termination policy for repeat infringers.

YouTube and the other VSIs have clearly satisfied the termination requirement. YouTube’s Terms of Use not only provide that users who upload files onto the site agree not to submit copyrighted files, but also state that “YouTube will also terminate a User’s access to its Website, if they [sic] are determined to be a repeat infringer” and provide detailed instructions on how a copyright owner can send YouTube notice of infringing activity.¹⁴⁸ This policy closely parallels that of Aimster and likely would satisfy the adoption and informational requirements of § 512(i)(1)(A).

Litigants, however, may accuse YouTube and the other VSIs of ineffectively implementing their repeat infringer policies. In *In re Aimster Copyright Litigation*, Aimster was not afforded safe harbor protection partially because it was found not to have implemented a repeat infringer policy effectively.¹⁴⁹ In that case, the repeat infringer policy was incapable of implementation because Aimster’s encryption system rendered impossible determining which users were uploading which files onto its servers.¹⁵⁰ Therefore, the plaintiffs could not “demonstrate that any particular user [wa]s actually *transferring* any of [the infringing] files (which *would* be an infringing activity),” and thus no user could be found to be a repeat infringer.¹⁵¹

Unlike in *Aimster*, however, a court likely would find that YouTube and the other VSIs have implemented their repeat infringer policies effectively. Although there is no data indicating how many repeat infringers have had their video-sharing accounts terminated, by simply requiring the creation of a user account, YouTube and other VSIs can track which users are notified repeatedly of infringement.¹⁵² Even though repeat infringers simply can create new user accounts

147. 252 F. Supp. 2d 634, 658-59 (N.D. Ill. 2002).

148. YouTube Terms of Use, <http://www.youtube.com/t/terms> (last visited Aug. 24, 2007).

149. *Aimster*, 252 F. Supp. 2d at 659.

150. *Id.*

151. *Id.*

152. See Join YouTube, http://www.youtube.com/signup?next=/my_videos_upload%3F (last visited Aug. 24, 2007) (directing nonmembers to create a YouTube account).

using different e-mail addresses and usernames to upload the same infringing files, courts are unlikely to find that YouTube and the other VSIs did not implement a termination policy effectively because the user, as identified by his or her username, would always be subject to proper termination under the policy. Therefore, YouTube and the other VSIs likely would satisfy this initial eligibility requirement for safe harbor protection.

Similarly, YouTube likely would satisfy the third eligibility requirement. Section 512(i) states that in addition to adopting a termination policy for repeat infringers, ISPs must also “accommodate and . . . not interfere with standard technical measures,” which are defined as “technical measures that are used by copyright owners to identify or protect copyrighted works.”¹⁵³ To be classified as a standard technical measure, the measure must have been developed in a “voluntary, multi-industry standards process” and have been accepted by a broad consensus of copyright owners and service providers.¹⁵⁴ Additionally, the measures must be made reasonably available in a non-discriminatory fashion to all without imposing substantial costs on ISPs.¹⁵⁵

Currently, there is very little authority discussing whether standard technical measures exist in any context, let alone in the video-sharing arena.¹⁵⁶ However, it is clear from the language of § 512(i) outlined above that standard technical measures are not meant to be created easily. For example, each measure must be adopted through a broad consensus between ISPs and copyright owners.¹⁵⁷ In general, ISPs and copyright owners will disagree on particular measures because they have competing incentives. Because ISPs seek to attract the public to gain advertising revenue, they will try to minimize copyright protection so that potential users can view, edit, hear, or see copyrighted material freely. Copyright owners, on the other hand, want the most protection possible so that creators can reap the benefits of their efforts. This conflict of interest makes a

153. 17 U.S.C. § 512(i) (2007).

154. *Id.*

155. *Id.*

156. A LexisNexis search for “standard technical measures” retrieved only nine cases, all of which simply used the term when quoting the language directly from 512(i). None of these cases discussed “standard technical measures” in any detail. *E.g.* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1115 (9th Cir. 2007); *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004); *Tur v. Youtube, Inc.*, No. CV 06-4436 FMC (AJWx), 2007 U.S. Dist. LEXIS 50254, at *7-8 (C.D. Cal. 2007); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1099 (W.D. Wash. 2004); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002).

157. 17 U.S.C. § 512(i); *see also* NIMMER & NIMMER, *supra* note 56, § 12B.02 (discussing the likelihood that standard technical measures will come into existence).

concurrence between the ISPs and copyright owners nearly impossible, and thus, it is likely that there never will be any standard technical measures required for VSIs.¹⁵⁸ Therefore, YouTube and the other VSIs meet these threshold requirements for safe harbor eligibility.

2. Core Eligibility Requirements Under § 512(c)

In addition to the safe harbor threshold requirements, YouTube must meet the core eligibility requirements of DMCA § 512. Because YouTube does not “transmit[], rout[e], or provid[e] connections for” copyrighted material or the “transient” storage of such material,¹⁵⁹ does not store infringing material “on a system or network controlled” by the ISP,¹⁶⁰ and does not link its users to an “online location containing infringing material” by using a hyperlink, pointer, reference or other online tool,¹⁶¹ the only core requirements VSIs must satisfy are the three safe harbor requirements parsed out in § 512(c). This section requires that ISPs not (1) have actual or apparent knowledge of infringing activity, (2) receive a direct financial benefit from the infringing and have the right and ability to control the content of users’ postings, or (3) allow infringing files to remain on the server upon notification that such files exist.¹⁶²

a. Actual or Apparent Knowledge

Section 512(c)(1)(A) of the DMCA provides that ISPs shall not be liable for copyright infringement if they (1) do not “have actual knowledge” that there is infringing material or activity using the material on their systems or networks, (2) “in the absence of such actual knowledge, [are] not aware of facts or circumstances from which infringing activity is apparent,” and (3) once acquiring any

158. In fact, the DMCA was enacted largely to “balance copyright owners’ interests in protecting their rights with the need to foster the Internet as an important medium of free expression, cultural exchange, and commerce.” Jordana Boag, Comment, *The Battle of Piracy Versus Privacy: How the Recording Industry Association of America (RIAA) Is Using the Digital Millennium Copyright Act (DMCA) as Its Weapon Against Internet Users’ Privacy Rights*, 41 CAL. W. L. REV. 241, 245 (2004) (quoting Verizon Internet Services Inc.’s Motion to Expedite at 5, Recording Indus. Ass’n of Am. v. Verizon Internet Servs., Inc., 257 F. Supp. 2d 244 (D.D.C. 2003) (No. 03-7015)). The fact that it took legislative action to reach an agreement between copyright holders and ISPs suggests that similar action is required for there ever to be agreement as to what constitutes a standard technical measure.

159. 17 U.S.C. § 512(a).

160. *Id.* § 512(b).

161. *Id.* § 512(d).

162. *Id.* § 512(c).

knowledge or awareness of infringing activity, “act[] expeditiously to remove” the material.¹⁶³ Many cases discuss the actual knowledge requirement and almost everyone acknowledges that the standard is difficult to meet, meaning that more often than not, an ISP will *not* have actual knowledge of infringing activity.¹⁶⁴ As David Nimmer stated in his Copyright treatise, “[the] actual knowledge standard is high, and by itself does not reach an entity that willfully ignores blatant indications of infringement.”¹⁶⁵ To have actual knowledge of infringing material or activity, direct notice of the activity or material is almost always required, though not expressly so.¹⁶⁶ Absent notice, proving actual knowledge is difficult—one must show that the ISP knew about the *specific* infringing material or activity in question, not that the ISP merely knew about or had notice of other infringing material or activity on its servers.¹⁶⁷

Given the difficulty in meeting the actual knowledge standard, it is likely that YouTube and other VSIs would not be found to have knowledge of infringing activity on their servers. Although YouTube has actual knowledge that some infringing files exist on its servers (because some users repost the same copyrighted videos that YouTube already has been asked to remove), a court likely would still find that YouTube lacked actual knowledge as to the newly reposted files. As discussed above, the actual knowledge standard does not take into account whether YouTube *should have known* that such infringing files were indeed infringing or that a given user’s activity was infringing; rather, the standard requires actual knowledge as to each separate occurrence of infringement, even if a file is simply reposted. Because YouTube’s video uploading is completely automatic, it could argue successfully that it did not have actual knowledge that the infringing files had been posted again because it was not notified of the post.

It is equally certain that YouTube would be able to meet the second requirement of § 512(c)(1)(A)—lack of awareness of facts or circumstances from which infringing activity is apparent.¹⁶⁸ According to Nimmer, this prong requires courts to perform a “red flag” test that looks to “whether the service provider deliberately proceeded in the

163. *Id.*

164. *See, e.g., Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107-08 (W.D. Wash. 2004) (commenting that notice, although not required by the DMCA, is the principle way of showing actual knowledge and that it is difficult to prove such knowledge absent proper notice).

165. NIMMER & NIMMER, *supra* note 56, § 12B.04.

166. *Corbis Corp.*, 351 F. Supp. 2d at 1107-08.

167. *Id.*

168. 17 U.S.C. § 512(c)(1)(A)(ii).

face of blatant factors of which it was aware” and not whether the service provider knew or should have known that there was infringing material, on or activity taking place via, its servers.¹⁶⁹ This “red flag test” has two elements, one subjective and one objective.¹⁷⁰ The subjective element asks whether the service provider was aware of a particular red flag (e.g. infringing material or activity), while the objective element asks whether a reasonable person under similar circumstances would have treated the facts in question as a “red flag.”¹⁷¹ Apparent knowledge is difficult to prove, and “requires evidence that a service provider ‘turned a blind eye to ‘red flags’ of obvious infringement.’”¹⁷²

Under YouTube’s operational framework, it is unlikely that YouTube would be found to have apparent knowledge of infringing material or activity. Applying the two-step test to the general facts at hand, YouTube does not have apparent knowledge of infringing material or activity, despite the fact that it must be aware that infringing activity generally takes place on its servers on a daily basis. A court likely would find that a reasonable person would treat the facts here as a red flag, and thus, YouTube would fail the objective test for apparent knowledge. Arguably, a reasonable person would know that YouTube is host to myriad copyrighted videos. YouTube’s users probably constitute “reasonable people,” and they visit the site to watch copyrighted videos. Therefore, a court would likely find that a reasonable person would take YouTube’s popularity into account, along with the plethora of news stories that suggest copyrighted files are on YouTube’s servers, and would decide that a reasonable person would have been aware that YouTube was being used for infringement purposes.

Despite this outcome, YouTube likely still would not be held to have apparent knowledge because it lacks subjective knowledge of infringement. The subjective prong asks whether the ISP is aware of a *particular* infringing activity or file, not whether it should have known of infringing activity in general.¹⁷³ Thus, a plaintiff would have to show that YouTube was aware that a particular infringing file or

169. NIMMER & NIMMER, *supra* note 56, § 12B.04; see *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 702-03 (D. Md. 2001) (accepting the “red flag” test).

170. NIMMER & NIMMER, *supra* note 56, § 12B.04.

171. *Id.* (quoting S. REP. NO. 105-190, at 44 (1998)).

172. *Corbis*, 351 F. Supp. 2d at 1108 (quoting H.R. REP. No. 105-551, pt. 2, at 42). Nimmer even quipped that “the ‘flag’ must be brightly red indeed—and be waving blatantly in the provider’s face—to serve the statutory goal of making ‘infringing activity . . . apparent.’” NIMMER & NIMMER, *supra* note 56, § 12B.04.

173. NIMMER & NIMMER, *supra* note 56, § 12B.04.

activity was on, or taking place on, its servers and that YouTube did nothing to remove or deny access to it. Because YouTube does not screen every one of its files, it would be difficult to prove that it was aware of a particular infringing file or particular activity by a specific user. The uploading process, YouTube would argue, is completely automated, and consequently, the company lacks facts that would make it aware that a particular infringing file was located on its servers. Thus, it likely would not meet the subjective element of this test.

Because YouTube probably would be deemed not to have actual or apparent knowledge as to infringing activity or material on its site, the third prong of § 512(c)(1)(a) is irrelevant.¹⁷⁴ This prong only applies once an ISP has obtained such knowledge as described above.¹⁷⁵ Because YouTube arguably does not have such knowledge, the fact that it does not remove the infringing files on its servers absent notification by a copyright holder is irrelevant. However, if a court found that YouTube has apparent or actual knowledge, it is likely that YouTube would fall outside the safe harbor provisions' protective ambit.

b. Financial Benefit and Right and Ability to Control

As discussed above,¹⁷⁶ YouTube apparently receives a direct financial benefit from the infringing activity of its users and has the right and ability to control their activity and postings, at least in the context of vicarious liability. Thus, it "receive[s] a financial benefit directly attributed to the infringing activity, in a case in which the service provider has the right and ability to control such activity."¹⁷⁷ However, as Nimmer notes, Congress intended for the safe harbor to extend to those who could be held vicariously liable.¹⁷⁸ Therefore, Congress must have meant for § 512(c)(1)(b) to codify something

174. This section provides that "upon obtaining such knowledge or awareness, [an ISP must] act[] expeditiously to remove, or disable access to, the material." 17 U.S.C. §512(c)(1)(A)(iii) (2007).

175. *Id.*

176. *See supra* Part III.A.2 (discussing vicarious liability).

177. 17 U.S.C. § 512(c)(1)(B).

178. NIMMER & NIMMER, *supra* note 56, § 12B.04; *but see* *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 704 (D. Md. 2001) (noting that because § 512(c)(1)(b) codified both elements of vicarious liability, Congress intended there to be no protection for vicarious infringers). The Fourth Circuit, however, in affirming the outcome in *Costar*, mentioned that vicarious and contributory infringing ISPs could "still look to the DMCA for a safe harbor if it fulfilled the conditions therein," *Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004), which suggests that the DMCA does protect vicarious infringers to some extent.

beyond the elements of vicarious liability. The legislative history states that, in determining whether an ISP received a direct financial benefit, "courts should take a common-sense, fact-based approach, not a formalistic one."¹⁷⁹ Consequently, a legitimate business would fall outside of this category as long as both the infringer and non-infringer pay the same fee to use the service or if the fee is not "plainly tied to providing direct access to infringing material."¹⁸⁰ In short, this requirement seems more difficult to prove than the "direct financial benefit" requirement under vicarious liability, and it would seem that YouTube is therefore safe under this element.

Currently, advertising revenue does not constitute a direct financial benefit associated with infringing activity as it is analyzed under § 512(c)(1)(b), although this too remains unclear.¹⁸¹ However, given that Google is grooming YouTube as the future of television, it is possible that, given time, YouTube will acquire more control over users of the site, will obtain even more direct gains from advertising revenue and the like, and ultimately would face liability under § 512(c)(1)(b).¹⁸²

It is also likely that, with time, YouTube will satisfy § 512(c)(1)(b)'s right and ability to control requirement. The Central District of California held in *Hendrickson v. EBay, Inc.* that right and ability to control cannot simply mean removing or blocking access to infringing files, given that such activity was already required elsewhere in the statute.¹⁸³ Whereas right and ability to control for vicarious liability is relatively easy to prove, it seems that in the

179. NIMMER & NIMMER, *supra* note 56, § 12B.04 (quoting H.R. REP. NO. 105-551, pt. 2, at 54 (1998)).

180. *Id.*

181. Indeed, for there to be a "direct financial benefit" under vicarious liability, the court must ask only "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." *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). *See also* *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (noting that because Napster's future revenue was "directly dependent on 'increases in user-base,'" and because "[f]inancial benefit exists where the availability of infringing material 'acts as a "draw" for customers,'" Napster was found to receive a direct financial benefit from infringing activity in the context of vicarious liability (quoting *Fonovision, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996))).

182. Although the Ninth Circuit in *Napster* held that this type of system constituted a direct financial benefit under the theory of vicarious liability, *Napster*, 239 F.3d at 1023, it is likely that, given the stricter requirements imposed by § 512(c)(1)(b), the court would find that this was not enough to constitute a direct financial benefit under this section.

183. "Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA." *Hendrickson v. EBay, Inc.*, 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001).

context of § 512(c)(1)(b), doing so is slightly more difficult because the section was meant to protect entities that would otherwise be held to be vicariously liable.

Given this high threshold for showing direct financial benefit and right and ability to control, YouTube, as it currently operates, probably would satisfy these requirements and therefore fall under safe harbor protection for the immediate future. It can be argued, however, that by acquiring licensing deals and incorporating digital-signature recognition software into its site, YouTube has already established a “right and ability to control” its users that will satisfy § 512(c)(1)(b). Additionally, YouTube screens some videos and even posts “adult warnings” for material that it deems to be for mature audiences. All of this evidence suggests that YouTube, even as it currently operates, may have sufficient right and ability to control its users, their activity, and the content that they post.

c. Expeditious Removal of Infringing Material

YouTube likely would satisfy this third and final factor required for safe harbor protection. Under § 512(c)(1)(c), ISPs must, upon notification of infringement, expeditiously remove the infringing material or disable access to it.¹⁸⁴ To date, YouTube has complied with this provision in every case of notification. It has quickly removed videos of *Saturday Night Live* sketches, Comedy Central TV shows, and more than 30,000 Japanese anime videos.¹⁸⁵ YouTube could be charged with noncompliance only if “expeditiously removing” files from a server means doing so permanently. YouTube currently does not prevent users from reposting infringing videos almost immediately after their removal, especially if a user posted a given video under a different title. Thus, it does not act to permanently remove this material from its site or “disable access to it.”¹⁸⁶

A court likely would find the above statutory interpretation lacking, given that the language says nothing about a permanent removal. Taken in context with the other paragraphs of § 512(c), this

184. 17 U.S.C. § 512(c)(1)(C) (2007).

185. “Lazy Sunday,” a *Saturday Night Live* skit, was removed from YouTube in January 2007 after the site was asked to pull the video. Jason Pontin, *Millions of Videos, and Now a Way to Search Inside Them*, N.Y. TIMES, Feb. 25, 2007, at 33; see also Associated Press, *supra* note 112 (commenting on YouTube’s removal of 30,000 Japanese videos).

186. See *Viacom Peeved About Clips on YouTube*, CBC NEWS, Feb. 2, 2007, <http://www.cbc.ca/technology/story/2007/02/02/tech-youtube.html> (noting that even after YouTube removed a clip in September 2006, “the clip still appeared periodically as users kept reposting it,” which suggests that YouTube was having problems with its copyright filters “designed to prevent the unauthorized distribution of copyrighted materials”).

provision suggests that copyright owners must make a separate notification to an ISP each time they find infringing material on the site.¹⁸⁷ YouTube would argue that the statute reads “upon notification of claimed infringement” and that these are new cases of infringement, not those of which it had originally been notified. Consequently, YouTube would not be required to remove expeditiously the reposted videos until notified that the videos are back on the site. Given that the statute so clearly requires ISPs to remove only “the material that is claimed to be infringing” in the notification,¹⁸⁸ a court likely would follow this interpretation of the requirement. Under this lenient reading, YouTube likely meets the criteria established by this provision and thus would not be exempt from safe harbor protection, though, as suggested, the conclusion is not entirely certain.

IV. CREATING A COMPREHENSIVE SOLUTION TO BALANCE THE INTERESTS OF COPYRIGHT OWNERS AND VSIS

Given YouTube’s current operational framework, it would appear, as discussed in detail above,¹⁸⁹ that it is probably safe from liability. However, as Google augments YouTube’s business model, adds more advertising to the site, and develops and implements software to automatically search YouTube’s servers for copyrighted works, this likely will change. Although copyrighted videos would get weeded out more efficiently through these novel digital-signature software programs, it is likely that video “mash-ups,”¹⁹⁰ which may be derivative works of copyrighted works (and therefore in violation of the derivative work right granted in § 106(2)),¹⁹¹ will pass under the radar and that users will find ways around the software protection and will repost copyrighted material. Indeed, the site probably never will be devoid of copyrighted files.¹⁹² Consequently, the following

187. Congress has remarked that notification is not required for an ISP to be required to expeditiously remove infringing files. See NIMMER & NIMMER, *supra* note 56, § 12B.04. Nevertheless, as discussed above, notification is the key way in which actual knowledge (and even apparent knowledge in many circumstances) is attributed to the ISP so as to even be required to remove files in the first place.

188. 17 U.S.C. § 512(c)(1)(C).

189. See *supra* Part III (commenting on YouTube’s liability under traditional theories of copyright and under the DMCA’s safe harbor provisions).

190. A “mash up” is “[a] new sound recording produced entirely of preexisting sound recordings.” Aaron Power, *The Mouse That Roared: Addressing the Post-Modern Quandary of Mash-Ups Through Traditional Fair Use Analysis*, 8 VAND. J. ENT. & TECH. L. 531, 532 (2006). This practice can be done with video files as well.

191. 17 U.S.C. § 106.

192. For example, almost three months after searching for *Animaniacs* videos on YouTube for this note’s introduction, the same video clips are still present.

questions remain: (1) what should YouTube do to protect itself from liability in the future, (2) should we welcome YouTube's liability or pass new regulations that would protect YouTube and other similarly situated VSIs, and (3) if such regulations are passed, what should they entail?

A. *YouTube Can Take Action to Avoid Liability*

YouTube already is taking important first steps to protect itself from liability. As noted above, the company has entered into a series of licensing agreements with companies such as Warner Music and Sony BMG in which YouTube shares some of its advertising revenue in return for licenses to post copyrighted files owned by these companies.¹⁹³ YouTube should continue to pursue these agreements with as many companies as possible, but should focus on large companies with the greatest amount of copyrighted material, so as to protect itself as fully as possible from liability. This business framework is a win-win situation for all involved. Customers will use YouTube knowing that it is a safe place to view copyrighted material. This legitimacy will allow Google to charge more for advertising and ultimately to pay for more licenses from these companies. Reciprocity also clears Google of any liability for most of the copyrighted work now present on the site.¹⁹⁴

At the same time, YouTube should attempt to obtain greater user identification, such as a name and a street address, when a visitor uploads a video. Currently, YouTube requires only an e-mail address.¹⁹⁵ If YouTube demanded more information, and specified in its Terms and Conditions that it will share such information with the owner of a copyrighted work if an infringement suit is filed, people would be less likely to upload copyrighted work for fear of a direct infringement suit being brought against them. Although this precaution would not stop dedicated infringers from entering faulty information, it likely would deter the average poster from doing so, and it could have a quantitative impact on the number of illegally posted copyrighted videos. Moreover, this practice would not increase

193. *Viacom Confronts YouTube on Videos*, INT'L HERALD TRIB., Feb. 3, 2007, at 13.

194. Google/YouTube, therefore, should be more willing to pay for these licenses as well. Recently, negotiations between the company and Viacom broke down, after which Viacom, having joined with another VSI, ordered YouTube to remove over 100,000 videos which contained Viacom's content. *Id.*; see also Dan Mitchell, *Sharing the Wealth at MTV*, N.Y. TIMES, Feb. 24, 2007, at C5 (noting that Viacom left its deal with YouTube in favor of another company, Joost).

195. Join YouTube, *supra* note 152.

YouTube's right and ability to control what gets posted on the site, because YouTube would not be selecting the videos displayed on its site,¹⁹⁶ but rather would serve as an *ex ante* control. As such, YouTube would remain protected under the safe harbor provisions if it implemented this procedure. In sum, an increased number of licenses, the implementation of digital signature technology, and ending user anonymity would help to alleviate the possible threat of liability for infringement suits in YouTube's future.¹⁹⁷

B. Public Policy Issues Regarding VSIs' Possible Copyright Liability

Ultimately, subjecting YouTube to liability from copyright owners could destroy a major facilitator of American creativity and an informational archive. U.S. copyright law's goal is to provide authors with a monopoly over their creative work *so as to incentivise them to create* more.¹⁹⁸ Placing copyrighted files into the public domain aids this goal by providing members of the public with a large, creative foundation from which to build their own ideas. YouTube, as it currently operates, provides a marketplace for the sharing of ideas and creative expression. Future "authors" can post their work and receive immediate public feedback. This environment fosters new and improved creative products, especially when authors take the public's constructive criticism into account. New work is created daily, largely because the creators know that they can share their work with a wide audience for free. At the same time, many creators post on YouTube because the site is immensely popular—a popularity that stems partially from its free copyrighted videos, in addition to these new and unique works.¹⁹⁹ Subjecting YouTube to liability for the infringing videos could potentially bankrupt the company and destroy this forum of creative sharing.²⁰⁰ Such an outcome should be avoided, especially

196. See *supra* Part III.B.2(b) (discussing right and ability to control).

197. One drawback of implementing digital signature technology to locate copyrighted files, as YouTube plans to do, Beal, *supra* note 111, is that a court may view this action as taking on more of a right and ability to control the posted content, thereby opening YouTube to liability under § 512(c)(1)(b).

198. "[T]he economic philosophy behind the [Copyright] Clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)).

199. "Many of YouTube's most widely watched videos already include copyrighted music, raising the specter of a legal showdown with record labels and artists seeking to protect their right to be paid for the material." Michael Liedtke, *YouTube, Warner Music Sign Deal*, S. FLA. SUN-SENTINEL, Sept. 19, 2006, at 1D.

200. Note that although new video sharing internet sites could fill the void left behind if YouTube were to go bankrupt (much like Morpheus did after Napster was shut down),

considering that fostering creativity is one of copyright law's major goals.

Free access to copyrighted material, however, seems unfair considering that YouTube, instead of the copyright owners, reaps the profits stemming from these videos through advertising revenue. What incentives do "authors" have to create if they are unable to profit from their creative labor? Although having videos posted on YouTube will not eliminate an author's revenue, the authors, and not YouTube, should be the ones receiving the financial benefits of users viewing *their* material. Thus, imposing liability seems fair and just, in order to protect the creators of the copyrighted works.

C. Proposed Legislative Solution

Society should embrace a middle-ground solution that takes into account the infeasibility of governing every file posted on VSIs, but at the same time holds them to a slightly higher standard than the DMCA imposes. A new two-part test should be implemented (in addition to the threshold eligibility requirements in § 512(i)²⁰¹) that would help courts decide if a VSI should be protected from copyright infringement liability via safe harbor protection. First, courts should ask whether a reasonable person would have known, or should have known, about infringing activity or material taking place generally on a given ISP's servers. If the first question is answered in the affirmative, courts should then ask whether the VSI has adopted reasonable, good faith filtering technology or practices to search, locate, and permanently remove copyrighted files. If so, and a copyright file still slips through the system, the court should then ask whether the VSI has been notified to remove the specific copyrighted file by a copyright owner and expeditiously removed such file upon notification. As discussed in detail below, this test is more streamlined than the one offered by the DMCA, it closes up some loopholes in the statute, and it ultimately holds VSIs responsible for the content on their sites.

The first part of this solution would lower the knowledge requirement currently in place under § 512(c)(1)(a). Proving that an ISP must have actual or apparent knowledge about a particular

eventually all of these sites would likely be subject to the same liability and therefore shut down (as Morpheus did a few years after Napster), forcing major changes in the business model of these companies. Such new models could mirror that of iTunes and the new Napster, charging users a fee to post videos and access copyrighted material. Although the forum would still remain open, it likely would be bampereed severely.

201. See *supra* Part III.B.1 (discussing these threshold eligibility requirements).

infringing file or particular activity is almost impossible absent prior notification. The current standard forces copyright owners to police VSIs to see if their work has been posted, when it likely would be much less costly and much more efficient for VSIs to police themselves on this issue, using digital signature technology or other video filters. The first part of this test would be very broad and likely would be satisfied by every VSI on the market, because it only compares VSIs to a reasonable, objective standard. Consequently, if a reasonable person—whether through news sources, the VSI site itself, or any other means—would recognize that a VSI was being used for the posting of infringing files, a VSI would satisfy this part of the test. Ultimately, this lowered requirement would force VSIs to enact more licensing agreements with companies, allowing the money received from advertising revenue to flow back to the copyright holder. At the same time, this knowledge standard provides some protection to ISPs, which could not have been aware that copyrighted files were being posted on their sites.

Given that the knowledge standard would be reduced, it would not be as important to condition liability on a direct financial benefit or the right and ability to control the user. Therefore, this solution will not consider these DMCA liability requirements.²⁰² Indeed, because this solution supposes that VSIs will begin to police themselves more effectively to weed out copyrighted materials posted by users, they must have more control over what their users can post in the first place. Under this proposal, the VSIs almost certainly will have the right and ability to control their users. The solution should not make liable those entities that are trying to comply with its provisions. At the same time, showing that the company is receiving a direct financial benefit from infringing activity is less important in and of itself. Rather, such evidence could be used to show that the VSI knew or should have known that infringing activity was taking place on its servers, therefore satisfying the first part of this new test. Thus, a separate prong asking whether VSIs are receiving a direct financial benefit from the infringing activity or material in a context where they had the right and ability to control the users is not important.

If a VSI should have known of infringing activity on its server, the court should ask whether the VSI adopted a reasonable, good faith filtering or screening technology or practice to search, locate, and permanently remove copyrighted files from its server. If not, the VSI should be liable for infringement. If a reasonable filtering system is in place, and a copyright owner still finds his work on the VSI, the court

202. 17 U.S.C. § 512(c)(1)(B) (2007).

should ask whether the VSI had been notified to remove the specific copyrighted file by a copyright owner and expeditiously removed such file. If so, no liability should ensue.

This second part of the test significantly differs from the DMCA's. First, unlike the DMCA, it requires the permanent removal of a copyrighted file by the VSI. Given that this solution encourages self-policing, no longer should VSIs be allowed to say that they removed infringing files from their servers when the same file simply can be reposted a day later. This ensures copyright owners that once they bring the presence of an infringing file to a VSI's attention, that file will no longer be present on the site, thereby reducing the costs of the copyright owner associated with policing these sites. It would seem easier for VSIs to block the uploading of a file and therefore prevent its reposting, perhaps by using a software program or having employees manually check uploaded files, than it would be for a copyright owner to check continuously all of the VSIs to see if its copyrighted material has been posted illegally. The copyright owner should not have to keep checking the site because he is not the one with "unclean hands." Because the test only requires a good faith effort on the part of VSIs to examine their files, they would be protected if copyrighted files still slipped through the cracks. Thus, VSIs should have the burden of checking the site for copyright infringement because they receive the monetary benefits and have more information about current postings, and because it is virtually impossible for a copyright owner to check every Internet site for a copyright violation.

Moreover, the solution protects VSIs from liability for many illegal derivative works or rare, copyrighted works posted by users that slip through the good faith filtering process. In the case of a rare copyrighted file, the file's obscurity makes it less likely that a VSI should have known that it was infringing. Also, it is more difficult to acquire licenses for rare files, given that the copyright has often shifted hands numerous times and finding the original owner of the copyrighted file can be quite difficult.²⁰³ Thus, it is more likely that such a file would slip through a good faith filtering process and that an owner would not notify a VSI to remove it. Without this section, if VSIs wanted to allow posting of this material, they would have to spend an exorbitant amount of time and money finding the copyright

203. See Steven Hetcher, *The Half-Fairness of Google's Plan to Make the World's Collection of Books Searchable*, 13 MICH. TELECOMM. & TECH. L. REV. 1, 71-76 (discussing the transaction costs associated with orphan books).

holder to acquire the license for the video.²⁰⁴ This expense would greatly deter VSIs from allowing the posting of these videos and would result in a large number of rejected videos. Such a market solution would result in a great disservice to the public, which might not ever again see these rare videos. Without a forum for free sharing, these clips or videos may be forgotten or lost by the time they would move into the public domain under copyright law. In essence, then, this solution protects VSIs that are attempting to police themselves.

At the same time, VSIs should be free from liability for works that are transformative in nature so as to constitute a derivative, new creation. As Professor Wendy J. Gordon argues, “a person who makes transformative use, in a context where the use is not ordinarily accompanied by pre-use negotiation or licensing, should be free of liability.”²⁰⁵ Gordon suggests that by focusing on the defendants’ “ordinary expectations involving market involvement,” the majority of people using copyrighted material just to copy it would be liable for infringement, while those who actually created something new, and therefore furthered the goal of copyright, would be protected.²⁰⁶ Because a reasonable screening system may fail to detect users’ transformative, derivative works that only use parts of a copyrighted work, VSIs would be protected from liability under this test (unless, of course, the original copyright owner asked the VSI to remove the copyrighted file). This would allow “mashers” and the like to continue posting creative new files on VSIs, without the VSIs being subject to copyright infringement liability.

In short, although this solution is perhaps stricter on VSIs than § 512(c), it better balances the interests of copyright owners and VSIs in the long run. Currently, it is easy to post copyrighted material on VSIs and for VSIs to acquire the revenue associated with such postings through advertising fees. The money is flowing in the wrong direction, as the VSI receives the revenue instead of the copyright owner. This solution attempts to redistribute responsibility between VSIs and copyright owners by forcing VSIs to police themselves or risk liability so that they are better incentivized to contact copyright owners and create licensing agreements with them. Although this solution could result in VSIs charging users to fund the licensing fees, most users probably would be willing to pay a small amount to access

204. Note, however, that there exists a “plausible argument” that infringers of “orphan” books should be free from liability via fair use defense. *Id.*

205. Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 90 (2004).

206. *Id.*

copyrighted materials legally (think iTunes), and a two-tier system could be established that would allow free access to home videos posted by users while charging to view copyrighted material. Ultimately, this solution would better align interests and would support the main goals of copyright law: to spur creativity and to protect copyrighted work from unauthorized use.

V. THE FUTURE OF YOUTUBE

At its current heading, YouTube, *The Digital Titanic*, is drifting towards an iceberg and will soon be leaving the placid safe harbor of the DMCA and entering the rocky seas of copyright liability. Although it remains unclear whether YouTube and other VSIs ultimately would be liable for copyright infringement as they currently operate, their potential liability should persuade VSIs to take present action to protect themselves against million-or-billion-dollar civil damages. The biggest battles will be fought over whether VSIs, as they currently exist, receive a direct financial benefit from copyrighted materials and whether they have the right and ability to control what their users post. It is unclear how much protection Congress sought to afford vicarious infringers when it codified these requirements in § 512(c) of the DMCA.

Assuming that litigation against VSIs is successful, society at large likely will *not* be better off. Legal liability would effectively drown a great source of American creativity and information sharing. Consequently, Congress should adopt a new two-part test that requires VSIs to take more responsibility for the files their users post, but still provides ample protection for these VSIs if rare, derivative, or skillfully hidden files still manage to find their way onto VSIs' servers. This helps correct the "money flow" problem currently plaguing this market area and will better distribute the wealth garnered by artists' creative labor.

*Trevor Cloak **

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