

NOTES

YOUTUBE: TESTING THE SAFE HARBORS OF DIGITAL COPYRIGHT LAW

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I. INTRODUCTION

Over the past few years, a new generation of online services built around user-generated content has taken traditional major media by storm. This amalgam of “participatory Web” applications has been labeled with the catchall buzzword, “Web 2.0.”¹ Thus far, Web 2.0 encapsulates websites that provide services like blogs, wikis, social networking, photo sharing, and video sharing.² Some of the defining characteristics of Web 2.0 applications are “utilizing collective intelligence,” “providing network-enabled interactive services,” and “giving users control over their own data.”³ These characteristics clue us in on one of the most profound effects of Web 2.0 applications: “They replace the authoritative heft of traditional institutions with the surging wisdom of crowds.”⁴ The poster child of Web 2.0 is Wikipedia, an online encyclopedia whose content is shaped by the collective wisdom and folly of its users.⁵ Wikipedia has demonstrated its significance in the online space by far outpacing its straitlaced, corporate cousin, Encarta, in terms of growth and popularity.⁶ Additionally, social networking websites like Facebook and MySpace have made huge splashes in the online landscape because of their ability to help users connect, share information, and collaborate online.⁷

YouTube, an online service created in February 2005, was originally designed as a solution for a personal problem: how to easily share videos from a dinner party with a small circle of friends.⁸ Less than a year after it

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¹ Memorandum from Mary Madden & Susannah Fox, Riding the Waves of “Web 2.0” (Oct. 5, 2006), http://www.pewinternet.org/PPF/r/189/report_display.asp (last visited Mar. 21, 2007).

² *See id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See id.*

⁸ Heather Green, *YouTube: Way Beyond Home Videos*, BUSINESSWEEK ONLINE, Apr. 10, 2006, http://www.businessweek.com/magazine/content/06_15/b3979093.htm.

debuted, the website was showing thirty million videos a day and drawing millions of viewers from around the world.⁹ In July 2006, more than sixty-three million people (age fifteen and up) worldwide visited the website, approximately twenty-five percent of whom resided in the U.S.¹⁰ During the same period, it streamed a daily average of ninety-six million videos worldwide, with twenty-one million videos in the United States.¹¹ In October 2006, the popular online video service announced the news of its acquisition by Google for \$1.65 billion in stock, at which point it was streaming over 100 million videos per day.¹² In January 2007, YouTube controlled an incredible 43.3% share of the online video market and was ranked twelfth overall in domain traffic.¹³ Roughly one month later, YouTube attracted more U.S. Internet traffic than all fifty-six television cable and broadcast network websites combined, unofficially making it the leading entertainment website in the United States.¹⁴

Despite its rapidly burgeoning audience, YouTube continues to describe itself simply as “a way to get your videos to the people who matter to you.”¹⁵ YouTube informs new users of five primary capabilities: (1) “upload, tag and share your videos worldwide;” (2) “browse thousands of original videos uploaded by community members;” (3) “find, join and create video groups to connect with people with similar interests;” (4) “customize your experience with playlists and subscriptions;” and (5) “integrate YouTube with your website using video embeds or APIs.”¹⁶ Video embeds facilitate sharing by allowing users to copy and paste HTML code into their own websites, thereby inserting video players directly into their pages.¹⁷ Overall, this language depicts YouTube as a social entertainment network for individuals who want to share their “original” content—essentially, amateur videos created by users.

Amateur videos in YouTube’s library run the gamut from comedic performances to teenaged stunts and high jinks, song parodies and lip-synching sessions, animal tricks, sports bloopers, as well as more serious attempts at filmmaking.¹⁸ The website is acknowledged as an excellent vehicle for emerging artists to disseminate their works easily,¹⁹ but also features cruder clips of bondage, masturbation, and animal cruelty.²⁰

⁹ *Id.*

¹⁰ Press Release, comScore Networks, *comScore Data Confirms Reports of 100 Million Worldwide Daily Video Streams from YouTube.com in July 2006* (Oct. 11, 2006), <http://www.comscore.com/press/release.asp?press=1023>.

¹¹ *Id.*

¹² Catherine Holahan, *YouTube’s New Deep Pockets*, BUSINESSWEEK ONLINE, Oct. 10, 2006, http://www.businessweek.com/technology/content/oct2006/tc20061010_083340.htm.

¹³ Jason Miller, *YouTube Gives MySpace, TV Networks A Thumpin’*, WEBPRONNEWS, Feb. 28, 2007, <http://www.webpronews.com/topnews/2007/02/28/youtube-gives-myspace-tv-networks-a-thumpin>.

¹⁴ Posting of LeeAnn Prescott to Hitwise Intelligence Analyst Blogs, http://weblogs.hitwise.com/leeann-prescott/2007/02/youtube_traffic_up_14_since_vi.html (Feb. 23, 2007).

¹⁵ YouTube, *What Is YouTube?*, <https://www.google.com/accounts/ServiceLogin?service=youtube> (last visited Oct. 23, 2007).

¹⁶ *Id.*

¹⁷ YouTube, *Sharing YouTube Videos*, <http://youtube.com/sharing> (last visited Mar. 21, 2007).

¹⁸ May Wong, *Parents Cringe Over Online Amateur Videos*, INTERNATIONAL HERALD TRIBUNE, July 13, 2006, available at <http://www.iht.com/articles/2006/07/12/business/video.php>.

¹⁹ Dan Blacharski, *Blog Insights: YouTube and the Copyright Dilemma*, ITWORLD.COM, Feb. 5, 2007, <http://www.itworld.com/Tech/2987/nlsblog070206/>.

²⁰ Wong, *supra* note 18.

Although YouTube reportedly relies on viewers to alert the website to objectionable videos—a style of community policing still used today by Internet stalwarts such as eBay and Craigslist²¹—some suggest that YouTube proactively filters pornography.²² Beyond typical entertainment fare, YouTube also proffers videos of a more utilitarian bent.²³ Amateur clips providing technical support and instructions on troubleshooting or software configuration have appeared on the website.²⁴ As such, the dizzying array of homemade video clips found on YouTube does justice to the website's trademark slogan, "Broadcast Yourself."²⁵

Despite YouTube's stated focus on user-generated content, the website also plays host to copyright-infringing content like music videos, sports highlights, news clips, excerpts from movies, and episodes of mainstream shows from current seasons.²⁶ Media pundits agree that YouTube's meteoric rise at least somewhat correlates to the incidence of infringing content on its website,²⁷ but current data does not paint a clear picture of exactly what drives YouTube's business. For example, thirteen of the twenty most viewed YouTube videos in February 2007 were professionally produced.²⁸ However, a contemporaneous study of search engine queries directing traffic to YouTube indicated that popular hunts focused on amateur videos.²⁹

In any case, the abundance of pirated content on YouTube puts the online service and its parent company in a precarious position. Much of the copyrighted content on the website has not been cleared for posting or distribution by the rightful owners,³⁰ yet YouTube users are able to watch this pirated content at their leisure and without the interruption of commercials. As a result, some content owners have voiced concerns over the website's policies on copyright protection.³¹ Major media companies, along with smaller players in the content industry, have expressed contrary viewpoints on the matter. Although many copyright owners have repeatedly expressed strong disapproval of YouTube, a growing number have come to

²¹ *Id.*

²² See, e.g., Scott Goldberg, *Analysis: Viacom Forces Google to Show its Cards*, DIGITAL MEDIA WIRE, Mar. 14, 2007, <http://www.dmwmedia.com/news/2007/03/14/analysis-viacom-forces-google-to-show-its-cards>.

²³ John Aagsalud, *YouTube is Entertaining But Also Highly Utilitarian*, HONOLULU STAR-BULLETIN, Mar. 12, 2007, available at <http://starbulletin.com/2007/03/12/business/technology.html>.

²⁴ *Id.*

²⁵ YouTube, <http://www.youtube.com/> (last visited Mar. 21, 2007).

²⁶ Green, *supra* note 8.

²⁷ See, e.g., *id.*; Declan McCullagh, *YouTube's Fate Rests on Decade-old Copyright Law*, CNET NEWS.COM, Mar. 13, 2007, http://news.com.com/2100-1028_3-6166862.html; Elise Ackerman, *Google to Filter YouTube*, OAKLAND TRIBUNE, Feb. 24, 2007, available at http://www.redorbit.com/news/technology/852150/google_to_filter_youtube/index.html.

²⁸ Kevin J. Delaney & Matthew Karnitschnig, *TV Industry Clouds Google's Video Vision*, THE WALL STREET JOURNAL ONLINE, Feb. 21, 2007,

http://wsjclassroomedition.com/archive/07apr/07apr_additional_videovision.pdf.

²⁹ THE AGE, *YouTube Fans Prefer Homemade Video: HitWise*, Feb. 24, 2007, <http://www.theage.com.au/news/Technology/YouTube-fans-prefer-homemade-video-HitWise/2007/02/24/1171734067522.html>.

³⁰ Green, *supra* note 8.

³¹ See, e.g., Kenneth Li & Michele Gershberg, *Viacom in \$1 Billion Copyright Suit Versus Google, YouTube*, REUTERS, Mar. 13, 2007, <http://www.reuters.com/article/internetNews/idUSWEN535120070313>.

embrace it as an efficient means of increasing exposure and awareness of their content.³²

In some cases, the disapproval of copyright owners has evolved into the pursuit of legal action. In January 2007, Twentieth Century Fox, a studio owned by News Corporation, filed a subpoena for YouTube in the U.S. District Court for the Northern District of California in an effort to learn who uploaded pirated copies of episodes from some of its popular television shows.³³ In March 2007, Magnolia Studios, a film studio owned by technology and media entrepreneur Mark Cuban, filed a subpoena for Google in a U.S. District Court in Dallas, Texas for the purpose of identifying users who placed its copyrighted videos on YouTube.³⁴

Moreover, YouTube has recently been hit with lawsuits alleging copyright infringement. In July 2006, journalist Robert Tur filed a lawsuit in U.S. District Court in Los Angeles, California seeking monetary damages and an injunction barring YouTube from any further use of his copyrighted material.³⁵ Tur claims that YouTube allowed its users to upload his copyrighted video footage without obtaining his authorization.³⁶ Among the footage in question is a video of trucker Reginald Denning's beating during the 1992 Los Angeles riots, which was allegedly posted on YouTube without Tur's permission and viewed more than one thousand times.³⁷ Tur is asking the court for \$150,000 per work infringed upon.³⁸ In response, YouTube stated that it was in compliance with all the provisions of the Digital Millennium Copyright Act ("DMCA") and therefore "entitled to the full protections of the safe harbor provisions of the Act."³⁹ All video clips identifiable as Tur's were also removed from its website.⁴⁰

YouTube has also been sued by media conglomerate Viacom, which has been one of its most vociferous critics thus far.⁴¹ Viacom, whose properties include but are not limited to MTV, Comedy Central, BET, Nickelodeon and Paramount Pictures, initially negotiated with YouTube so that it could be paid for its material to appear on the website.⁴² Some of Viacom's shows, such as "The Daily Show" and "The Colbert Report," have consistently appeared on YouTube's top-watched lists.⁴³ In the

³² See Ellen Lee, *Google Moves YouTube Ahead*, S.F. CHRON., Mar. 4, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/03/04/BUG1NODSLR1.DTL>.

³³ Cuban's Film Studio Subpoenas Google over Videos, REUTERS, Mar. 7, 2007, <http://www.reuters.com/article/idUSN0726738220070307>.

³⁴ *Id.*

³⁵ Greg Sandoval, *YouTube Sued over Copyright Infringement*, CNET NEWS.COM, July 18, 2006, http://news.com.com/2100-1030_3-6095736.html.

³⁶ Leslie Simmons, *YouTube: News Service Infringement Claim 'Without Merit'*, THE HOLLYWOOD REPORTER, ESQ., July 19, 2006, available at http://www.hollywoodreporteresq.com/thresq/litigation/article_display.jsp?vnu_content_id=1002841475.

³⁷ Sandoval, *supra* note 35.

³⁸ Simmons, *supra* note 36.

³⁹ Sandoval, *supra* note 35.

⁴⁰ Simmons, *supra* note 36.

⁴¹ Paul R. La Monica, *Viacom Sues 'GooTube' for \$1 Billion*, CNNMONEY.COM, Mar. 13, 2007, http://money.cnn.com/2007/03/13/news/companies/youtube_viacom_reaction/.

⁴² Ellen Lee, *YouTube Removing Viacom TV Shows*, S.F. CHRON., Feb. 3, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/03/BUGJ8NU0FH1.DTL>.

⁴³ *Id.*

summer of 2006, the two companies even managed to strike a deal, which has since expired, in which YouTube would distribute videos from Viacom's MTV Networks.⁴⁴ Despite the promising outlook, a more comprehensive content deal fell through when Viacom reportedly demanded minimum payment guarantees nearing one billion dollars.⁴⁵

When negotiations broke down in February 2007, Viacom issued a demand for YouTube to take down more than 100,000 unauthorized clips of its copyrighted works.⁴⁶ At the time, Viacom also accused YouTube of retaining all of the revenue generated from its users' copyright infringement without extending fair compensation to those who invested their efforts into creating the copyrighted content.⁴⁷ In response, YouTube stated that although it took copyright issues seriously, Viacom actually benefited from having its shows displayed and promoted by YouTube's audience.⁴⁸ Somewhat surprisingly, even after YouTube submitted to Viacom's demand and took down the pirated material, the website sustained its surge in share of overall Internet visits in the U.S., shooting up fourteen percent over the first two weeks of February 2007.⁴⁹ However, a number of users whose videos did not infringe on Viacom's copyrights⁵⁰ reported that their videos were mistakenly taken down along with the infringing works.⁵¹

In March 2007, Viacom went one step further in filing a lawsuit against YouTube and Google (hereinafter referred to jointly as YouTube), asking for a permanent injunction requiring the employment of "reasonable methodologies to prevent or limit infringement" of its copyrights and monetary damages totaling at least one billion dollars.⁵² In its complaint, Viacom contends that over 150,000 unauthorized clips of its copyrighted programming have been uploaded onto YouTube and viewed 1.5 billion times.⁵³ The complaint lists claims for relief based on theories of liability that are treated separately: direct infringement, contributory infringement, vicarious infringement, and inducement.⁵⁴ As in the lawsuit brought by Tur, the DMCA appears central to the question of YouTube's liability.

The Viacom lawsuit represents the most formidable legal challenge yet to the video sharing website and has been characterized as a seminal event in relations between traditional media and the online sphere.⁵⁵ If Viacom is successful in getting the injunction, then the resulting precedent will

⁴⁴ Delaney & Karnitschnig, *supra* note 28.

⁴⁵ *Id.*

⁴⁶ See Lee, *supra* note 42.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Prescott, *supra* note 14.

⁵⁰ "Rook said not one frame or one piece of music from his film about a gay professional wrestler belonged to Viacom." Greg Sandoval, *Does YouTube Have a Control Problem?*, CNET NEWS.COM, Feb. 2, 2007, http://news.com.com/2100-1030_3-6156025.html.

⁵¹ See *id.* (relating how a documentary trailer and a video of a "friends and family" dinner were accused of violating Viacom's copyrights and removed from YouTube's website).

⁵² Viacom Int'l Inc. v. YouTube, Inc., Complaint at 5, (filed S.D.N.Y. Mar. 13, 2007) [*hereinafter* Complaint], available at <http://online.wsj.com/public/resources/documents/ViacomYouTubeComplaint3-12-07.pdf>.

⁵³ *Id.* at 3.

⁵⁴ See *id.* at 18-26.

⁵⁵ Li & Gershberg, *supra* note 31.

require website operators to police users' uploads for copyright infringement. Moreover, with industry experts predicting that other media companies will enter the fray,⁵⁶ Viacom's lawsuit may represent the opening salvo of a drawn-out battle faced by YouTube against a flood of plaintiffs. On the other hand, some suggest that the lawsuit is merely a tough negotiating tactic which will result in an out-of-court settlement⁵⁷ or a more attractive content deal,⁵⁸ in which case piggyback lawsuits may not follow automatically.

Pressure from overseas has also reared its head, most notably in the form of a demand from the Japan Society for Rights of Authors, Composers and Publishers ("JASRAC") that YouTube take down roughly 30,000 copyright-infringing clips from its site.⁵⁹ Although YouTube yielded to the demand in October 2006, pirated Japanese-language content remained available on the website months later.⁶⁰ In order to protect its interests, JASRAC also requested that YouTube enact a series of specific measures to deter copy infringement, namely that the online video service: (1) post Japanese-language notices warning against copyright infringement; (2) collect the names and addresses of uploaders; and (3) terminate the accounts of users who upload infringing material.⁶¹ Thus far, YouTube has complied with the first request only.⁶²

In spite of the flak that YouTube has drawn from traditional media companies, some television networks have overcome their initial wariness and shown a willingness to work with the online video service. NBC was the first major network to do so, concluding a now defunct deal last summer in which it would upload promotional clips of select shows like "Saturday Night Live" and buy advertising on the website.⁶³ In October 2006, YouTube also announced an agreement with CBS to offer short-form clips of news, sports, and other entertainment.⁶⁴ CBS was also the first television network to test YouTube's so-called "content identification architecture," which allowed the company to track unauthorized use of its copyrighted content.⁶⁵ Interestingly, CBS could elect to pull unauthorized content or permit the material to remain and share in the revenue produced from advertisements placed adjacent to it.⁶⁶ In other words, YouTube was incentivizing television networks to leave their content on the website, even if it was uploaded without their permission.

⁵⁶ La Monica, *supra* note 41.

⁵⁷ *Id.*

⁵⁸ Elinor Mills, *Copyright Quagmire for Google and YouTube*, CNETNEWS.COM, Mar. 14, 2007, http://news.com.com/2100-1030_3-6167281.html.

⁵⁹ Lee, *supra* note 42.

⁶⁰ Geoff Duncan, *YouTube To Post Japanese Copyright Warning*, DIGITAL TRENDS, Feb. 6, 2007, <http://news.digitaltrends.com/article12230.html>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Greg Sandoval, *NBC Strikes Deal with YouTube*, CNET NEWS.COM, June 27, 2006, http://news.com.com/NBC+strikes+deal+with+YouTube/2100-1025_3-6088617.html.

⁶⁴ Steve Donohue, *CBS Partners with YouTube*, MULTICHANNEL NEWS, Oct. 9, 2006, <http://www.multichannel.com/article/CA6379116.html>.

⁶⁵ *Id.*

⁶⁶ *Id.*

However, talks fell through with regard to a larger, multi-year deal that would have allowed YouTube users not only to watch CBS clips but also to splice those snippets into their own, homemade videos.⁶⁷ Under the incomplete deal, Google would have guaranteed over \$500 million in advertising revenue to CBS.⁶⁸ Instead, CBS and YouTube announced a more focused distribution deal in March 2007 that capitalized on the wild popularity of the annual college basketball tournament known as “March Madness.”⁶⁹ Although terms of the deal have not been disclosed, it was reported to include a revenue-sharing arrangement.⁷⁰ As discussed later in this Note, the majority of YouTube’s content deals appear to be targeted toward relatively narrow audiences, such as college basketball fans.

Nonetheless, in light of the pressure it is facing due to the presence of pirated material in its video library, YouTube has taken steps to provide better protection for copyright owners beyond merely responding to takedown notices. On its website, you can find YouTube’s “Terms of Use,” which include the following bolded language in regard to user submissions:

In connection with User Submissions, you further agree that you will not submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein.⁷¹

In addition, YouTube has rolled out tools to simplify the automated process of identifying infringing videos.⁷² For example, it has implemented a back-end procedure that fingerprints any infringing video that is taken down so that it can automatically reject these videos from being uploaded at a later time.⁷³ The company has also invested in user education by supplementing pages in the upload process with educational text about the type of content that can be uploaded.⁷⁴ This effort has allegedly resulted in a sharp reduction of users uploading infringing material.⁷⁵

Additionally, YouTube’s ten-minute limit on uploaded clips has been touted as an effective deterrent against users uploading entire episodes of television shows.⁷⁶ As discussed before, YouTube has also promised to post a Japanese-language notice on its website warning users against uploading pirated material.⁷⁷ YouTube’s website also offers tips on what makes a video copyright infringing and ineligible for upload⁷⁸ as well as directions

⁶⁷ Delaney & Karnitschnig, *supra* note 28.

⁶⁸ *Id.*

⁶⁹ Tim Gray, *YouTube Scores ‘March Madness’ Content Deal*, TECHNEWSWORLD, Mar. 16, 2007, <http://www.technewsworld.com/story/56355.html>.

⁷⁰ *Id.*

⁷¹ YouTube, Terms of Use, <http://www.youtube.com/t/terms> (last visited Oct. 23, 2007).

⁷² Posting of Heather Green to Blogspotting, http://www.businessweek.com/the_thread/blogspotting/archives/2006/04/youtube_cto_des.html (Apr. 3, 2006).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Duncan, *supra* note 60.

⁷⁸ YouTube, Copyright Tips, http://www.youtube.com/t/howto_copyright (last visited Mar. 21, 2007).

on how to file a copyright infringement notification.⁷⁹ Notwithstanding all of these efforts, the efficacy of YouTube's most basic form of copyright enforcement—taking down infringing videos—has recently been called into question due to the rise of copycat websites like Delutube that manage to retrieve these videos from YouTube's library for viewing and downloading by its own users.⁸⁰

In February 2007, YouTube announced plans to offer anti-piracy technology to companies that have distribution deals with the company.⁸¹ The tools are said to be offered only as part of broader negotiations on licensing deals, in contrast to News Corporation's popular online social network, MySpace, which offers copyright protection technology to all content owners.⁸² Both companies have licensed digital fingerprinting technology from California-based startup, Audible Magic, which claims that it can scan video clips for signature vectors to compare with vectors stored in a database.⁸³ This technology can reportedly find and remove videos based on audio music or soundtrack fingerprints embedded in files provided by media companies, while disallowing users from re-uploading the files in a different format.⁸⁴ Video identification would also facilitate revenue-sharing programs by helping content providers find their copyrighted works.⁸⁵ Nonetheless, while Audible Magic is known for its comprehensive database of over six million unique musical fingerprints,⁸⁶ it has not completed a database of audio fingerprints for movies and television shows,⁸⁷ nor has it finalized a corresponding database of video fingerprints.⁸⁸ Without these fingerprints, a television show dubbed with a homemade soundtrack would be passed over by a filter.⁸⁹ Audible Magic therefore needs the cooperation of major film and television studios in order to fill its fingerprint databases,⁹⁰ lending credence to YouTube's assertion that the process of copyright identification is not an automated process, but requires the cooperation of media company partners.⁹¹

This Note will evaluate the copyright infringement issues presently confronting YouTube, along with the remedies available to copyright

⁷⁹ YouTube, Copyright Infringement Notification, http://www.youtube.com/t/dmca_policy (last visited Mar. 21, 2007).

⁸⁰ Nate Anderson, *Delutube Offers Users a Way to View Deleted YouTube Videos*, ARS TECHNICA, Mar. 15, 2007, <http://arstechnica.com/news.ars/post/20070315-deleted-youtube-videos-still-available-on-the-web.html> (stating that “[c]lips are not apparently deleted from YouTube's database at the moment they are taken down (or they at least persist in YouTube's cache before being cleared)”).

⁸¹ Kenneth Li, *YouTube Anti-piracy Software Policy Draws Fire*, REUTERS, Feb. 16, 2007, <http://www.reuters.com/article/technologyNews/idUSN1321663620070217>.

⁸² *Id.*

⁸³ Anick Jesdanun, *My Space to Launch Video Filtering System*, USA TODAY, Feb. 12, 2007, available at http://www.usatoday.com/tech/news/2007-02-12-myspace-filter_x.htm; Alexandra Berzon, *YouTube Licenses Copyright Protection Technology*, RED HERRING, Feb. 23, 2007, <http://www.redherring.com/Home/21435>.

⁸⁴ *Id.*

⁸⁵ See Sunshine Mugarbi, *Fixing YouTube*, RED HERRING, Feb. 12, 2007, <http://www.redherring.com/Home/21288>.

⁸⁶ *Id.*

⁸⁷ Ackerman, *supra* note 28.

⁸⁸ Mugarbi, *supra* note 85.

⁸⁹ Ackerman, *supra* note 28.

⁹⁰ Mugarbi, *supra* note 85.

⁹¹ Li, *supra* note 81.

holders. Part II will describe and analyze the pursuit of legal actions against YouTube and will evaluate whether YouTube will be held liable for copyright infringement. Part III will discuss the problematic effects of YouTube's potential liability for copyright infringement. Finally, Part IV will discuss alternative remedies available to copyright owners, including those major media companies with significant assets at stake.

II. PURSUIT OF LEGAL ACTION AGAINST YOUTUBE

Copyright law in the U.S. extends protection to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁹² The category of “original works of authorship” encompasses motion pictures and other audiovisual works.⁹³ Under this protection scheme, the authors of creative works are rewarded with a set of exclusive rights, violations of which constitute copyright infringement and entitle the copyright owner to monetary or injunctive relief.⁹⁴

The three exclusive rights under U.S. copyright law that are most relevant to YouTube are the rights “to reproduce the copyrighted work,” “to perform the copyrighted work publicly,” and “to display the copyrighted work publicly.”⁹⁵ Thus, a YouTube user is required to obtain consent from a copyright owner—in the form of a licensing agreement—before being authorized to act within the scope of any of these exclusive rights. Nevertheless, ample proof exists of YouTube users infringing the rights of copyright owners on YouTube's website. Due to the complex nature of statutory and common law that applies to YouTube, a number of issues will need to be wrangled with during the upcoming lawsuits against the company. This Note will focus on analyzing Viacom's claims of copyright infringement against YouTube, which duplicate and expand on the claims made by Tur.

A. THEORIES OF LIABILITY FOR COPYRIGHT INFRINGEMENT

Traditionally, three forms of copyright infringement have existed under U.S. copyright law—direct, contributory, and vicarious—all of which YouTube has been accused of committing. Direct infringement entails the “unauthorized exercise of one of the exclusive rights of the copyright holder . . .”⁹⁶ Neither intent, nor a particular state of mind is necessary for a finding of direct infringement,⁹⁷ making it generally a strict liability

⁹² 17 U.S.C. § 102(a) (2007).

⁹³ *Id.* § 102(a)(6).

⁹⁴ *Id.* § 501.

⁹⁵ *Id.* § 106.

⁹⁶ *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

⁹⁷ *Id.*

offense.⁹⁸ In comparison, a more lenient standard applies to contributory and vicarious infringement.

Contributory infringement and vicarious infringement are classified together under the rubric of secondary infringement. Although neither of these doctrines is expressly articulated in the Copyright Act of 1976, both have been developed under the guidance of the courts. As a result, copyright law now provides that liability may be assigned not only to cases where the defendant alone violated one or more of the plaintiff's exclusive rights, but also to a defendant who did not even "tak[e] part in the final act" of infringement.⁹⁹ Such secondary liability may attach when the infringing conduct occurs in the context of an ongoing relationship between a direct infringer and a passive defendant who "was in a position to control the use of copyrighted works" by the direct infringer.¹⁰⁰

Contributory infringement, founded upon the premise that "one who directly contributes to another's infringement should be held liable,"¹⁰¹ parallels the criminal act of aiding and abetting.¹⁰² In order to prevail under the theory of contributory infringement, a copyright owner must first prove that a third party has directly infringed upon his copyright.¹⁰³ The owner is then required to establish that the defendant has knowledge of the infringing activity and induces, causes, or materially contributes to the infringing conduct.¹⁰⁴ The aforementioned knowledge element is objective and fulfilled only when the defendant knows or has reason to know of the infringing activity.¹⁰⁵ The archetypal contributory infringement case is that of the "flea market," where swap meet operators are aware that participating vendors are selling counterfeit recordings (thus satisfying the "knowledge" prong), yet still lend support without which the direct infringement would have been severely limited or prevented completely (thus satisfying the "material contribution" prong).¹⁰⁶ These operators would be held contributorily liable to the copyright owners of the recordings.¹⁰⁷

Vicarious infringement, which is derived from the principle of *respondeat superior*,¹⁰⁸ is analogous to contributory infringement in that both theories involve another party. As such, a copyright owner who claims vicarious infringement must first establish that a third party has directly

⁹⁸ See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (upholding district court finding that "'innocent copying' can nevertheless constitute an infringement"); *Olan Mills, Inc. v. Linn Photo Co.*, 795 F. Supp. 1423, 1437 (N.D. Iowa 1991), *rev'd on other grounds*, 23 F.3d 1345 (8th Cir. 1994) ("No scienter need be shown to prove infringement.").

⁹⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984) (quoting *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911)).

¹⁰⁰ *Id.* at 437.

¹⁰¹ *Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 932 (N.D. Cal. 1996).

¹⁰² *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

¹⁰³ *Maphia*, 948 F. Supp. at 932.

¹⁰⁴ *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

¹⁰⁵ *Maphia*, 948 F. Supp. at 933.

¹⁰⁶ Mike Scott, Note, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99, 105 (2006).

¹⁰⁷ *Id.* (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

¹⁰⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (citing *Fonovisa*, 76 F.3d at 262). *Respondeat superior* is the legal principle that holds an employer responsible for the actions of its employees.

infringed upon his copyright.¹⁰⁹ Upon proof of direct infringement by another, vicarious liability exists “when (1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringement.”¹¹⁰ These cases are often determined by their degree of resemblance to landlord-tenant cases, in which landlords who lacked knowledge of infringing acts by tenants and exercised no control over leased premises are not held liable, or “dance hall cases,” in which venue operators can be held liable for infringing performances on premises that they could control and from which they directly received a financial benefit.¹¹¹

The theories of contributory and vicarious infringement have significantly impacted technologies that can be used both to infringe and not to infringe copyrights. One of the most important precedents on secondary infringement is the Supreme Court’s 1984 decision in *Sony Corp. of America v. Universal City Studios*.¹¹²

1. *Sony’s Substantial Noninfringing Uses Test*

In *Sony*, Universal sued Sony over its manufacture and sale of videocassette recorders (“VCRs”), claiming that Sony was liable for contributing to the infringement of consumers who purchased VCRs and used them to tape television broadcasts. The Supreme Court by a narrow majority declined to impose secondary liability on Sony by importing a principle from patent law—the traditional “staple article of commerce” doctrine seen in contributory patent infringement cases. This doctrine was rearticulated in a novel approach toward infringement: “[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”¹¹³ The opinion goes on to predicate avoidance of contributory infringement on a product’s capability of “substantial noninfringing uses.”¹¹⁴ Because the Court determined that a VCR was capable of substantial noninfringing uses, Sony was found not liable for the infringing uses by VCR owners.

Although the Court in *Sony* was confronted only with a claim for contributory infringement,¹¹⁵ its import may be applied to vicarious infringement as well. Due to the Court’s interchangeable use of the terms “vicarious” and “contributory” in referring to secondary infringement,¹¹⁶ the opinion suggests that its analysis would also bar Sony from being liable under the theory of vicarious infringement.¹¹⁷ By creating the test for substantial noninfringing uses, the Court attempted to reconcile the need to sufficiently protect copyright owners and “the rights of others freely to

¹⁰⁹ *See id.*

¹¹⁰ *Gordon v. Nextel Communs.*, 345 F.3d 922, 925 (6th Cir. 2003).

¹¹¹ *See Fonovisa*, 76 F.3d at 262.

¹¹² *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

¹¹³ *Id.* at 442.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 435 n.17.

¹¹⁶ *See, e.g., id.* at 437–38 n.18.

¹¹⁷ *See id.*

engage in substantially unrelated areas of commerce.”¹¹⁸ With regard to this delicate balance, one of the Court’s goals appeared to be the prevention of content owners from unduly controlling the advancement of new technologies affecting copyrighted works.¹¹⁹

Recently, secondary infringement has been well publicized as courts have been compelled to decide a rash of peer-to-peer (“P2P”) cases.¹²⁰ In effect, these decisions have curtailed the protection that *Sony* offers to developers of new technologies, though the degree of curtailment is still unclear. Of these cases, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹²¹ has been interpreted the least and therefore calls for exploration.

2. Grokster’s Inducement Theory

In *Grokster*, the Supreme Court handed down a unanimous decision, introducing a new theory of secondary infringement that creates liability for intentionally inducing copyright infringement.¹²² The case involved two P2P software vendors, Grokster and StreamCast, which released free file sharing programs that did not require central servers for information storage.¹²³ The vendors sold advertising that was conveyed through the free file sharing programs,¹²⁴ which were employed by users primarily to distribute copyrighted music.¹²⁵ Consequently, a group of copyright owners—including motion picture studios, recording companies, music publishers, and songwriters—filed lawsuits against both companies claiming both contributory and vicarious infringement of their copyrights.¹²⁶ These lawsuits were later consolidated into a single claim that was eventually decided by the Supreme Court.¹²⁷

The Court found compelling evidence of actual infringement on a massive scale by recipients of the defendants’ software programs.¹²⁸ A statistical study commissioned by MGM concluded that nearly ninety percent of the files on Grokster’s network consisted of pirated material.¹²⁹ Although this figure was disputed, both companies conceded that most downloads from their networks were infringing.¹³⁰ However, Grokster and StreamCast claimed that they could not be held liable for secondary infringement because their software programs were designed in such a way that the companies were entirely unable to acquire knowledge of any

¹¹⁸ *Id.* at 442.

¹¹⁹ Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1356 (2004).

¹²⁰ *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004); *MGM Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

¹²¹ 125 S. Ct. 2764 (2005).

¹²² *See id.* at 2778–79.

¹²³ *Id.* at 2770–71.

¹²⁴ *Id.* at 2774.

¹²⁵ *Id.* at 2771.

¹²⁶ *Id.* at 2771.

¹²⁷ *Id.* at 2771 n.2.

¹²⁸ *Id.* at 2772.

¹²⁹ *Id.*

¹³⁰ *Id.*

specific infringing actions.¹³¹ Relying on the decision in *Sony*, they also argued that their programs were capable of substantial noninfringing uses.¹³² As discussed above, the Supreme Court in *Sony* held that a distributor of a product used for copyright infringement is not liable for secondary infringement, due in part to the fact that its product is additionally capable of performing substantial noninfringing uses.¹³³

Just as the “staple article of commerce” doctrine was imported in *Sony*, the Supreme Court in *Grokster* chose to borrow the inducement doctrine from patent law.¹³⁴ It held that:

[o]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device’s lawful uses.¹³⁵

In doing so, the Court drew an important distinction between the types of evidence that would lead to a finding of secondary infringement. First, it acknowledged that a product’s substantial noninfringing uses obviated the possibility of imputing knowledge of third-party infringement to the product’s distributor based merely on the product’s capability of infringing use.¹³⁶ However, it also set forth that passing the test for substantial noninfringing uses did not preclude the establishment of liability through other forms of evidence.¹³⁷ In particular, a product’s distributor could still be held liable where there was evidence supporting actual intent to cause infringing use.¹³⁸ The *Grokster* case thereby established that a defendant’s intent is a crucial factor in the analysis of secondary infringement.

Intent to cause third-party infringement was evidenced most notably in three ways. First, *Grokster* and *StreamCast* clearly attempted to avail themselves to former *Napster* users—a target market that was sure to infringe copyrights, given the means.¹³⁹ Their actions exemplified classic inducement where an “advertisement or solicitation . . . broadcasts a message designed to stimulate others to commit violations.”¹⁴⁰ Second, the companies’ advertising revenue was directly correlated to high-volume use of their software.¹⁴¹ Since the majority of file transfers on their networks were infringing, both companies gained financially from a higher quantity

¹³¹ *Id.* at 2771–72.

¹³² *Id.* at 2772.

¹³³ Although the majority of VCR owners used their VCRs to infringe on copyrights, *Sony* was not held liable for secondary copyright infringement because its product had substantial noninfringing uses and there was no evidence to suggest that the company intended to market the infringing uses of its product. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984).

¹³⁴ *Grokster*, 125 S. Ct. at 2780.

¹³⁵ *Id.* at 2767.

¹³⁶ *Id.* at 2778.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2779–80. In *Grokster*, evidence came to light that defendant marketed itself to users as a replacement for *Napster*, another peer-to-peer software company that had recently been held liable for copyright infringement. *Id.* at 2773.

¹³⁹ *Id.* at 2780–81.

¹⁴⁰ *Id.* at 2780.

¹⁴¹ *Id.* at 2781–82.

of infringing material.¹⁴² The opinion noted, however, that this evidence alone would not support liability.¹⁴³ Third, they did not attempt to prevent infringement.¹⁴⁴ Neither company made efforts to develop filtering mechanisms to contain infringing use of its software; StreamCast actually went so far as to block copyright owners from monitoring infringement on its network.¹⁴⁵ Regarding the lack of proactive steps taken by the defendants, the Court added that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement.”¹⁴⁶

Thus, the inducement rule was built not to penalize ordinary commerce in the form of legitimate product distribution, but to premise liability on intentional, culpable expression and behavior.¹⁴⁷ The Court also mentioned the need to maintain balance between supporting creative pursuits and protecting innovation in new technologies,¹⁴⁸ echoing a similar sentiment expressed in the *Sony* holding. In its analysis, the Court ultimately determined that this balance favored copyright holders because of the great number of infringing copies and the marked difficulty of obtaining relief against all direct infringers.¹⁴⁹

The inducement theory shaped in *Grokster* will undoubtedly have a major impact on P2P file sharing networks, but its effect will also be felt by developers of other new technologies. Since the Supreme Court has drawn a new roadmap to secondary liability that can be construed as completely independent from contributory infringement, its decision will reverberate across the landscape of hardware manufacturers and software developers whose products or services come into contact with copyrighted content.¹⁵⁰ Likewise, online service providers (“OSPs”) like YouTube face the specter of inducement-based liability though they too have little control over the conduct of end users. In the effort to avoid inducement liability without a great deal of interpretation on the matter, these companies may want to reconsider their internal practices or restructure their business models.¹⁵¹

Moreover, in light of the indistinct and untested bounds of the intent standard seen in *Grokster*, lower courts will likely run into trouble while plumbing its depths. Having been delineated subjectively thus far, the intent standard leaves room for technology companies to profess innocent motivations behind activities tainted by third-party copyright infringement.¹⁵² By avoiding the factors mentioned in the *Grokster*

¹⁴² *Id.* at 2774.

¹⁴³ *Id.* at 2782.

¹⁴⁴ *Id.* at 2774.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2781 n.12.

¹⁴⁷ *Id.* at 2780.

¹⁴⁸ *Id.* at 2775.

¹⁴⁹ *Id.* at 2776.

¹⁵⁰ Galen Hancock, Note, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.: Inducing Infringement and Secondary Copyright Liability*, 21 BERKELEY TECH. L.J. 189, 201 (2006).

¹⁵¹ *See id.*

¹⁵² *Id.* at 212.

decision, which may prove to be a fairly light burden,¹⁵³ these companies may be able to escape inducement liability. Nonetheless, *Grokster* may impose significant costs on OSPs that need to drastically alter their business operations in order to minimize their interaction with pirated content.¹⁵⁴

On the flip side, *Grokster* was not entirely a boon to content owners because it failed to require that noninfringing uses be the primary uses of a product and that content filtering be built into products.¹⁵⁵ As such, members of the content industry will try to combat infringement through other avenues.¹⁵⁶ Major media companies will continue to promote their websites as worthy alternatives to online services like YouTube. Copyright owners both large and small will continue to seek content deals that will compensate them for the viewing of their copyrighted works. They will also persist in their attempts to identify and sue individual infringers, although the high volume of these users will be a difficult hurdle to overcome.

Ultimately, intentional inducement of direct infringement leads to secondary liability for copyright infringement. As of yet, it is unclear whether this theory exists as an alternative to the traditional theories of copyright infringement or as an enlargement of contributory infringement. As this Note will discuss, the role inducement plays within the larger framework of secondary liability will be crucial to the extent of protection YouTube is potentially afforded under the DMCA safe harbor provisions.

B. THE DMCA SAFE HARBORS

In 1998, Congress ratified as part of the DMCA statutory limitations on the liability of companies providing online services. In essence, if a company qualifies as an OSP under the statutory definition¹⁵⁷ and meets two basic requirements for eligibility,¹⁵⁸ then it may be exempted from liability for copyright infringement with respect to four categories of activities, subject to varying conditions. Simply put, a select group of OSPs are afforded safe harbor from liability for copyright infringement. For those entities that fail to meet any of the criteria for safe harbor, the ordinary principles of copyright law apply.

The DMCA safe harbors reflect a compromise between the demands of copyright holders and the concerns of the Internet industry,¹⁵⁹ including OSPs that host content uploaded by users. Prior to the DMCA's passage, OSPs had become the favored targets of lawsuits by copyright owners.¹⁶⁰

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See 17 U.S.C. § 512(k) (2007) (defining "service provider").

¹⁵⁸ See *id.* § 512(i) (requiring OSPs to adopt and reasonably implement policies of terminating subscribers who are repeat infringers and to accommodate standard technical measures used to identify and protect copyrighted works).

¹⁵⁹ Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 15, 28 (2006).

¹⁶⁰ *Id.* at 27.

Thus far, courts have interpreted the definition of OSP broadly to include not only conventional Internet service providers like AOL,¹⁶¹ but also online merchants like Amazon¹⁶² and eBay¹⁶³ and an online publisher of real estate advertisements.¹⁶⁴ Due in part to their deep pockets, easy identifiability, and potential ability to act as gatekeepers,¹⁶⁵ OSPs were repeatedly held liable for infringing materials distributed by their subscribers under the doctrines of contributory and vicarious infringement.¹⁶⁶ Congress therefore created safe harbors because of the recognized need for reduction of liability in special instances.¹⁶⁷ Caught in the middle of copyright wars, OSPs were in effect co-opted by the DMCA to join in the enforcement efforts of copyright owners.¹⁶⁸ Thus, the DMCA safe harbor provisions attempt to balance the interests of OSPs beleaguered by lawsuits and content industries facing piracy on an unprecedented scale.¹⁶⁹

The DMCA defines an OSP as “a provider of online services or network access, or the operator of facilities therefor,”¹⁷⁰ which can be interpreted expansively to encompass services hosting or distributing third-party content.¹⁷¹ Eligibility for safe harbor hinges on the fulfillment of two conditions—namely that the OSP:

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.¹⁷²

With regard to a policy of terminating accounts of repeat infringers,¹⁷³ courts have not yet set firm guidelines as to what constitutes reasonable implementation for an OSP.¹⁷⁴ As for “standard technical measures,” the

¹⁶¹ *Ellison v. Robertson*, 357 F.3d 1072, 1081 (9th Cir. 2004) (affirming the district court ruling that AOL was eligible for safe harbor protection as a “conduit service provider”).

¹⁶² *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) (“There is no doubt that Amazon fits within the definition.”).

¹⁶³ *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal.) (“eBay clearly meets the DMCA’s broad definition of online ‘service provider.’”).

¹⁶⁴ *See CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 556 (4th Cir. 2004).

¹⁶⁵ *Elkin-Koren*, *supra* note 159, at 26.

¹⁶⁶ *Id.* at 27.

¹⁶⁷ Working Group on Intellectual Property Rights, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure* at 123 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/>.

¹⁶⁸ *Elkin-Koren*, *supra* note 159 at 72.

¹⁶⁹ *Id.*

¹⁷⁰ 17 U.S.C. § 512(k)(1)(B) (2007).

¹⁷¹ *See, e.g., Lemley & Reese*, *supra* note 119, at 1369–70.

¹⁷² 17 U.S.C. § 512(i)(1).

¹⁷³ Courts have found that an OSP’s capacity to terminate user accounts or disable access to infringing material does not disqualify the OSP from safe harbor under § 512(c)(1)(B). *See, e.g., Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (stressing that OSPs do not lose safe harbor by engaging in voluntary practices to reduce infringing activity).

¹⁷⁴ *See Perfect 10, Inc. v. CCBill, LLC*, 2007 U.S. App. LEXIS 12508 (9th Cir.) (noting that reasonable implementation does not require an OSP to affirmatively police its users for evidence of repeat infringement); *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004) (where allowing notices to be sent to an outdated email address raised questions of fact as to reasonable implementation); *Corbis*

DMCA defines these as methods used to identify and protect copyrighted works.¹⁷⁵ These measures must be “developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”¹⁷⁶

For the safe harbor to apply, the activities of an eligible OSP must fall under one of the following rubrics: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at direction of users; or (4) information location tools.¹⁷⁷ The first safe harbor, in § 512(a), protects OSPs that merely transmit or act as a conduit for a third party’s material over a network.¹⁷⁸ The second safe harbor, in § 512(b), protects OSPs that temporarily store online material on their own system for the purpose of later transmitting it to users who request it.¹⁷⁹ The third safe harbor, in § 512(c), protects OSPs that store information on their own system at the direction of its users.¹⁸⁰ The fourth safe harbor, in § 512(d), protects OSPs that offer tools such as indices, directories, and search engines that link users to an online location containing infringing material or activity.¹⁸¹ If an OSP fits into one of these categories, the DMCA will shield it “from liability for all monetary relief for direct, vicarious, and contributory infringement”¹⁸² as long as it meets a list of harbor-specific conditions. It is important to note, however, that the DMCA does not contemplate inducement-based liability because the statute was enacted before *Grokster* was decided in 2005.

Out of the four safe harbor provisions, § 512(c) describes activities closest in nature to the core actions of YouTube, which essentially hosts third-party content. YouTube exemplifies a “forum in which material may be posted at the direction of users.”¹⁸³ Even if YouTube is held to fall under § 512(d) due to its search capability, the conditions specific to these two safe harbors are by and large identical.¹⁸⁴ Therefore, YouTube is shielded from liability for direct, vicarious, and contributory infringement if it:

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such

Corp. v. Amazon.com, 351 F. Supp. 2d 1090, 1103 (W.D. Wash. 2004) (holding that imperfect implementation does not automatically merit disqualification from safe harbor).

¹⁷⁵ 17 U.S.C. § 512(i)(2).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 512(a)–(d).

¹⁷⁸ *See id.* § 512(a).

¹⁷⁹ *See id.* § 512(b).

¹⁸⁰ *See id.* § 512(c).

¹⁸¹ *See id.* § 512(d).

¹⁸² Julie Erin Land, *Legislative Update: The Risks of Using Secondary Liability Legislation as a Means of Reducing Digital Copyright Infringement*, 15 DEPAUL-LCA J. ART & ENT. L. & POL’Y 167, 191 (quoting S. REP. NO. 105-190, at 40 (1998)).

¹⁸³ H.R. REP. NO. 105-551, pt. 2, at 46 (1998).

¹⁸⁴ *See* § 512(c)–(d). Regardless of § 512(d), courts have opined that merely providing hypertext links through a search engine does not create secondary liability for search OSPs. *TicketMaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000) (holding that hyperlinking did not violate copyright law because no copying was involved); *Bernstein v. J.C. Penny, Inc.*, No. 98-2958 R EX, 1998 WL 906644 (C.D. Cal. Sept. 29, 1998) (holding that linking to a site that linked to another site with infringing materials did not amount to contributory infringement).

knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁸⁵

The applicable knowledge standard is critical to retention of safe harbor. As a prerequisite for safe harbor, the OSP must not have actual or constructive knowledge of infringement even before receiving a takedown notice.¹⁸⁶ Once a takedown notice has been received, safe harbor is assured by “expeditious” takedown of the material.¹⁸⁷ Regardless of whether the material is actually infringing, an OSP must comply with a takedown notice or chance the loss of safe harbor.¹⁸⁸ It is important to note that the form of a takedown notice also plays a role in determining an OSP’s level of knowledge.¹⁸⁹ In almost all of the published cases addressing the knowledge component of § 512(c), the copyright holder has offered evidence that it somehow notified the OSP of the allegedly infringing material.¹⁹⁰ However, the DMCA expressly provides that if the copyright holder’s attempted notification fails to “comply substantially” with the elements listed under § 512(c)(3), then notification “shall not be considered” when evaluating whether the service provider had actual or constructive knowledge of the infringing activity.¹⁹¹

Due to the inherent difficulty of establishing actual knowledge in the absence of notice, Congress has recommended a “red flag” test.¹⁹² In explicating this test, the House Report on the DMCA states explicitly that

¹⁸⁵ 17 U.S.C. § 512(c)(1)(A)–(C).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Mere receipt of a notification alleging infringement may not meet the level of “notice of infringement” necessary for secondary liability. In fact, some scholars have argued that receipt of notification under § 512(c)(3)(A) does not equate to “notice” for the purpose of finding secondary liability. See Emily Zarins, *Notice Versus Knowledge Under the DMCA’s Safe Harbors*, 92 CAL. L. REV. 257 (2004); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1872–80 (2000).

¹⁸⁹ The requirements for a statutorily compliant notice by copyright holders are stated in 17 U.S.C. § 512(c)(3). First, rights holders must provide written notification to the service provider’s designated agent. Additionally, notification must “substantially” include the following six elements: (i) a physical or electronic signature of the complainant; (ii) identification of the copyrighted work or a representative list of multiple works at that site; (iii) identification of the infringing material; (iv) information reasonably sufficient to permit the service provider to contact the complaining party; (v) a statement of good faith belief that use of the material is not authorized; and (vi) a statement under penalty of perjury that the information in the notification is accurate.

¹⁹⁰ See, e.g., *Ellison*, 357 F.3d at 1075 (where a DMCA compliant notice was sent to the OSP); *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 620–21 (4th Cir. 2001) (where a presuit letter substantially complying with DMCA was sent to the OSP); *Hendrickson v. Amazon.com*, 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) (where plaintiff attempted to notify the OSP); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084–85 (C.D. Cal. 2001) (where non-DMCA-compliant cease and desist letters were sent); *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 703 (D. Md. 2001) (where plaintiff sent DMCA notification of infringement).

¹⁹¹ 17 U.S.C. § 512(c)(3)(B)(i).

¹⁹² H.R. REP. NO. 105-551, *supra* note 184.

an OSP “need not monitor its service or affirmatively seek facts indicating infringing activity” in order to claim safe harbor.¹⁹³ The “red flag” test is described as having both a subjective and objective element.¹⁹⁴ First, YouTube’s subjective awareness of the facts or circumstances in question must be determined.¹⁹⁵ Second, an objective standard is used to decide whether “infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”¹⁹⁶

Once an OSP becomes aware of “red flags,” through notice or other sufficient means, it ceases to qualify for safe harbor unless it acts “expeditiously” in deleting or preventing further access to the infringing videos.¹⁹⁷ This “notice and takedown” procedure, duplicated in § 512(c)(1)(C), was intended by Congress as a “formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”¹⁹⁸ In spite of the statute’s urgent language, Congress has affirmed the impossibility of defining a uniform time limit for expeditious reaction.¹⁹⁹

The issue of direct financial benefit may be the most crucial element in YouTube’s bid for safe harbor. On one hand, courts are advised to take a common sense, fact-based approach instead of a formalistic one.²⁰⁰ On the other hand, the House Report states that an OSP conducting legitimate business would generally not be classified as receiving financial benefit directly attributable to infringing activity “where the infringer makes the same kind of payment as non-infringing users” of the OSP’s service.²⁰¹ Notwithstanding this apparent conflict, an OSP is generally thought to lose its exemption from liability if the value of its service lies in providing access to infringing material.²⁰² Thus far, courts have interpreted the DMCA’s usage of “direct financial benefit” as consistent with the similarly worded common law standard for vicarious copyright liability.²⁰³

In summary, the DMCA establishes a number of mechanisms through which OSPs participate in copyright enforcement. First, OSPs must terminate the accounts of repeat infringers.²⁰⁴ Second, OSPs are required not to interfere with standard technical measures used by copyright holders to identify or protect copyrighted works.²⁰⁵ Third, OSPs must “expeditiously” remove or disallow access to infringing material once they know of infringing activity or become aware of facts or circumstances from which infringement is apparent.²⁰⁶ Fourth, OSPs must refrain from profiting

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 46–47.

¹⁹⁷ *See id.* at 46.

¹⁹⁸ *Id.* at 47.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See, e.g., Perfect 10, Inc. v. CCBill, LLC*, 2007 U.S. App. LEXIS 12508 (9th Cir. 2007); *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004).

²⁰⁴ 17 U.S.C. § 512(i)(1)(A) (2007).

²⁰⁵ *Id.* § 512(i)(1)(B).

²⁰⁶ *Id.* § 512(c)(1)(A)(iii).

directly from infringing activity.²⁰⁷ Fifth, a notice and takedown procedure compels OSPs, upon formal notice from the copyright owner, to remove or block access to infringing material.²⁰⁸ Moreover, OSPs must disclose the identities of infringers upon subpoena.²⁰⁹ If an OSP does not act promptly in regard to these mechanisms, it will lose its safe harbor.

C. WILL YOUTUBE BE HELD LIABLE FOR COPYRIGHT INFRINGEMENT?

This Section will evaluate the claims made within Viacom's complaint in relation to the DMCA safe harbor provisions. Viacom's inducement claim will be addressed last and in the most detail due to the uncertainty of its coverage by the DMCA.

1. *Direct Infringement Claim*

In its complaint, Viacom alleges that YouTube has directly infringed its copyrights in three ways: reproduction, public display and public performance.²¹⁰ With regard to reproduction, Viacom argues that YouTube takes infringing videos uploaded by users and copies them into its preferred software format without proper authorization.²¹¹ YouTube is also accused of publicly displaying copyrighted works, without proper authorization, by showing thumbnail images of individual frames from infringing video clips in response to searches for videos on YouTube.²¹² Lastly, the complaint states that YouTube publicly performs copyrighted works, without proper authorization, by streaming video content from its servers to users' computers, sometimes via host websites in which videos have been embedded.²¹³ For each of these claims, Viacom characterizes YouTube's alleged infringement as "willful, intentional, and purposeful," which appears to be irrelevant because direct infringement is generally considered a strict liability offense.

Although YouTube may choose to make arguments rebutting the premises on which Viacom has based its claims of direct infringement, for the sake of brevity this Note will not conjecture on the matter. If a DMCA safe harbor applies, then the issue of direct infringement is moot. If YouTube does not qualify for DMCA protection, then ordinary copyright law will apply.

2. *Contributory Infringement Claim*

Viacom also charges YouTube with contributory infringement. First, Viacom argues that YouTube users have infringed its exclusive rights of reproduction, public display, and performance by uploading infringing copies of its copyrighted works onto YouTube's website.²¹⁴ The complaint

²⁰⁷ *Id.* § 512(c)(1)(B).

²⁰⁸ *Id.* § 512(c)(1)(C).

²⁰⁹ *Id.* § 512(h).

²¹⁰ Complaint, *supra* note 52, at 18–20.

²¹¹ *Id.* at 10.

²¹² *Id.*

²¹³ *Id.* at 11.

²¹⁴ *Id.* at 23.

then asserts that YouTube has actual and constructive knowledge of its users committing copyright infringement against Viacom because a casual inspection of the website reveals numerous infringing videos of the entertainment behemoth's well-known television shows and films.²¹⁵ Viacom further contends that in spite of its knowledge, YouTube enables, facilitates, and materially contributes to "each act of infringement" by its users, "which could not occur without [YouTube's] enablement."²¹⁶

Interestingly, § 512(c) may not provide as much protection here as YouTube might hope, because this safe harbor does little to limit claims that an OSP is liable for contributory infringement.²¹⁷ Under this safe harbor provision, YouTube remains subject to liability if it actually knows that a user's material or activity is infringing or is aware of facts or circumstances from which the infringing activity is apparent.²¹⁸ This standard basically mirrors the fundamental test for contributory infringement, which creates liability where a party knows or has reason to know of infringement and materially contributes to the infringing activity.²¹⁹ Of course, the Court may decide that the standard of knowledge that an OSP must have to lose safe harbor may be incrementally higher than the test for contributory infringement, so § 512(c) may provide some degree of protection against liability for contributory infringement. However, due to the parallel nature of these standards, the question of YouTube's liability for contributory infringement will more or less be determined by evaluating whether DMCA safe harbor applies.

3. *Vicarious Infringement Claim*

Viacom also accuses YouTube of vicarious infringement. First, Viacom argues that YouTube users have infringed its exclusive rights of reproduction, public display, and performance by uploading infringing copies of its copyrighted works onto YouTube's website.²²⁰ It then contends that YouTube has both the right and the ability to supervise YouTube users' infringing conduct and that YouTube "significantly and directly benefits from the widespread infringement of its users."²²¹

As in the case of contributory infringement, § 512(c) offers sparse cover against allegations that YouTube is liable for vicarious infringement.²²² This safe harbor does not protect an OSP that receives "a financial benefit directly attributable to the infringing activity" where the OSP "has the right and ability to control such activity."²²³ This standard

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See Lemley & Reese, *supra* note 119 at 1371 (stating that "[s]ection 512(d) provides little protection to innovators against secondary liability claims, because this safe harbor primarily shields defendants against liability for acts of *direct* copyright infringement while placing essentially no limitation on claims that a service provider is secondarily liable for the direct infringement of its users." (emphasis added)).

²¹⁸ 17 U.S.C. § 512(c)(1)(A)(i)–(ii) (2007).

²¹⁹ See Lemley & Reese, *supra* note 119, at 1371–72.

²²⁰ Complaint, *supra* note 52, at 24–25.

²²¹ *Id.* at 25.

²²² See Lemley & Reese, *supra* note 119, at 1371.

²²³ 17 U.S.C. § 512(c)(1)(B).

reflects the central test for finding vicarious infringement,²²⁴ although the directness of financial benefit necessary for loss of safe harbor may be somewhat greater than the “obvious and direct financial interest”²²⁵ required for liability in run-of-the-mill claims of vicarious infringement. Therefore, the issue of YouTube’s vicarious liability will be largely decided by analyzing whether safe harbor applies.

4. *Inducement Claim*

Most intriguingly, Viacom is basing an infringement claim on the newly minted inducement theory from *Grokster*, which is not expressly addressed by the DMCA.²²⁶ The Court may choose to determine, as a threshold issue, whether the DMCA safe harbors apply to inducement-based liability. If inducement is interpreted as a subspecies of contributory infringement, then YouTube may be safeguarded from liability based on an inducement theory. On the other hand, if inducement is treated as a distinct species of secondary copyright infringement, then YouTube will find it much tougher to retain safe harbor. In order to reconcile preservation of safe harbor, the Court may choose to read the inclusion of inducement into the legislative history behind the DMCA. Alternatively, if the Court decides that inducement is not covered by the DMCA, then it will most likely run through a version of the *Grokster* analysis.

5. *DMCA Safe Harbor Analysis*

In all likelihood, YouTube will meet the preliminary eligibility requirements for the DMCA safe harbor. First, it easily fits the broad definition of an OSP under the DMCA. As an online video service, it also falls well within the activity descriptions laid out under § 512(c)—information residing on systems or networks at direction of users—and § 512(d)—information location tools. It also appears to meet the DMCA’s harbor-specific conditions of eligibility. With respect to the first statutory condition, Viacom does not strictly claim that YouTube fails to terminate repeat infringers. Although it grumbles that YouTube does not block these same infringers from signing up for new accounts,²²⁷ an exhaustive background check of every new user would most likely prove expensive and unmanageable. Moreover, due to the haziness of case law in this area, YouTube would likely not be penalized even if its deterrence of infringement is found to be somewhat lacking. Thus, YouTube has probably not failed to reasonably employ a policy for the termination of repeat infringers.

However, Viacom may be claiming that YouTube fails in regard to the second condition for eligibility—that is, the accommodation of copyright owners’ standard technical measures. Viacom alleges that YouTube deliberately interferes with copyright holders’ ability to locate infringing

²²⁴ See Lemley & Reese, *supra* note 119, at 1372.

²²⁵ *Gordon v. Nextel Commc’ns*, 345 F.3d 922, 925 (6th Cir. 2003).

²²⁶ Complaint, *supra* note 52, at 21.

²²⁷ *Id.* at 15.

videos even after they are uploaded.²²⁸ For example, one of YouTube's features enables users to designate "friends" who alone are able to view uploaded videos, thereby impeding copyright owners' searches for infringing videos.²²⁹ Also, YouTube has recently limited its search function so that it identifies only one thousand clips at a time.²³⁰ Notwithstanding these criticisms, YouTube does not appear to have interfered with standard technical measures as identified by the statute. These measures are defined as benchmark tools developed out of a multi-industry standards process, which might encompass simple devices like watermarks but would not include the complex filtering technology that has been licensed from Audible Magic. In fact, YouTube goes above and beyond the standard of non-obstruction by fingerprinting any infringing video that is taken down so that it can automatically reject these videos from being uploaded at a later time.

The next step is to evaluate whether YouTube has fulfilled the criteria specific to the applicable safe harbor provisions. Because § 512(c) and § 512(d) list virtually the same criteria, they will be addressed concurrently.

a. Knowledge of Infringing Activity and Takedown

Viacom alleges in its complaint that YouTube has "actual knowledge and clear notice" of users' massive infringement of Viacom's copyrights.²³¹ This allegation is buttressed by the obviousness to the casual observer of YouTube users' infringement of Viacom's copyrights, the subject of which has been covered in numerous news publications.²³² Moreover, Viacom states that YouTube's website is filled with "red flags" from which infringing activity is apparent, such as "description terms and search tags" using the media conglomerate's easily recognizable trademarks and other identifying terms.²³³ The complaint even goes so far as to suggest that YouTube fully intends the presence of pirated content on its website as a critical part of its business plan.²³⁴ Finally, it characterizes YouTube's response to takedown notices as "ineffectual" because it removes only the specific infringing clips rather than "all infringing works that can be reasonably located" as well as slightly altered clips that have been reposted.²³⁵

Viacom will find it tricky to meet the relevant knowledge standard. The blatant infringement of its copyrights and subsequent news coverage by no means assures actual knowledge because neither amounts to formal notification by Viacom of specific acts of infringement.²³⁶ Furthermore, as

²²⁸ *Id.* at 16.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 12.

²³² *Id.* at 12–13.

²³³ *Id.* at 13.

²³⁴ *Id.*

²³⁵ *Id.* at 15–16.

²³⁶ In evaluating DMCA safe harbor in relation to contributory infringement, courts have considered whether an OSP had "actual knowledge that specific infringing material is available using its system." *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 733 (9th Cir. 2007); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (emphasis in original).

the House Report on the DMCA notes, YouTube has no duty to seek out “red flags” such as the ones that Viacom has described in its complaint. Even if YouTube is able to screen user uploads on a granular level by keying on video descriptors and tags—as is strongly suggested by its filtering of pornographic and obscene content—it is not obligated to do so with regard to Viacom’s copyrighted works. Moreover, when YouTube was made to actually know and be subjectively “aware” of infringement by Viacom’s takedown notice in February 2007, it obliged the media company by removing the offending videos almost immediately. Although YouTube appears to meet the vague standard of expeditious reaction to notice, Viacom may still argue the overall ineffectiveness of its takedowns. If it can establish that the likes of DeluTube had access to Viacom properties that were already taken down, YouTube may fall short of meeting safe harbor requirements. However, it would seem unfair for the DMCA to demand that an OSP be impervious to underhanded access by third parties.

b. Financial Benefit

Viacom argues that YouTube derives advertising revenue directly attributable to users’ infringing activity because advertisers pay YouTube to display banner advertising to users when they log on to YouTube, search for infringing videos, and view infringing videos.²³⁷ Viacom further claims that YouTube accumulates additional advertising revenue by attracting traffic to its website via infringing videos embedded on other websites.²³⁸ In this way, Viacom’s complaint draws a direct causal connection between the presence of infringing videos on YouTube’s website and the financial benefit to YouTube from user traffic.²³⁹ Lastly, Viacom claims that YouTube has the ability to control users’ infringement because it proactively removes pornographic clips from its system.²⁴⁰

With regard to the financial benefit test, YouTube’s fate may rest on the Court’s choice between a common-sense approach and a formalistic one. Since users do not pay fees to YouTube at all—meaning that there is no differential in revenue from infringing and noninfringing users—a straightforward analysis under the paradigm described in the legislative history would outright reject any claim of direct financial benefit. This formalistic judgment would be based on YouTube’s supposed impartiality toward infringement in relation to deriving revenue. However, since Congress has urged a more commonsense approach, the Court will likely delve into the facts surrounding YouTube’s revenue stream from advertising, starting with how much infringing activity actually occurs on YouTube. In doing so, the Court will have to make a choice between considering infringing activity vis-à-vis Viacom or infringing activity as a whole.

In either case, YouTube will need to cast doubt on the assertion that the amount of pirated content on its website directly affects its advertising

²³⁷ Complaint, *supra* note 52, at 13.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 14.

revenue. One statistic strongly favoring YouTube is that traffic to its website did not dip, but climbed by fourteen percent, after it complied with Viacom's takedown notice.²⁴¹ Moreover, due to the recent string of deals concluded with other media companies, the value of YouTube's service depends increasingly less on pirated content. As such, YouTube may succeed in distinguishing the presence of Viacom's works on YouTube as a tangential byproduct of its business model. Conversely, if the Court finds a strong correlation between infringement and revenue, then YouTube must convincingly explain how its alleged ability to contain pornographic content does not guarantee its ability to limit infringing content. For example, it could point to concerns about the effectiveness of its fingerprinting technology and the worrisome incidence of false positives while taking down what it thought was Viacom's copyrighted works. By downplaying its ability to maintain control over its website, YouTube may be able to sidestep proof of direct financial benefit from copyright infringement.

Because the balance of factors appears to tip in favor of YouTube, it will probably meet the requirements for DMCA safe harbor. However, if the Court finds that DMCA safe harbor is inapplicable to liability based on inducement, it will have to interpret the *Grokster* decision's effect on YouTube.

6. *Grokster Analysis*

Viacom asserts that YouTube is liable for inducement of its users' copyright infringement. First, Viacom argues that YouTube users have infringed its exclusive rights of reproduction, public display, and performance by uploading infringing copies of its copyrighted works onto YouTube's website.²⁴² YouTube is then accused of operating its website with the object of promoting its use to infringe copyrights and, by clear expression and other affirmative steps, fostering copyright infringement by YouTube users.²⁴³ Viacom also characterizes YouTube's alleged infringement as "willful, intentional, and purposeful."²⁴⁴

Viacom appears to support its inducement claim with examples modeled after the three types of evidence that collectively demonstrated intent to cause third-party infringement in *Grokster*. First, Viacom essentially argues that YouTube's embed function, which allegedly facilitates infringement, performs a promoting function that has contributed significantly to the website's popularity.²⁴⁵ This embed function is likened to a solicitation for others to commit copyright infringement as seen in *Grokster*. Second, Viacom's complaint draws a direct causal connection between the presence of infringing videos on YouTube's website and the financial benefit to YouTube from user traffic.²⁴⁶ Third, Viacom argues that

²⁴¹ Prescott, *supra* note 14.

²⁴² *Id.* at 21.

²⁴³ *Id.*

²⁴⁴ *Id.* at 22.

²⁴⁵ *Id.* at 12–13.

²⁴⁶ *Id.* at 13.

YouTube has not only adopted a hands-off policy toward copyright infringement, but has also intentionally interfered with content owners' ability to locate infringing videos.²⁴⁷ YouTube's "friends" feature and recently limited search function, both of which may hinder a search for infringing material, could be characterized as affirmative steps taken by YouTube to foster infringement.

YouTube should be able to refute an inducement claim because it is unclear whether it actually intends to promote and foster infringing use. The three types of evidence that unmistakably implicated the defendants in *Grokster* are not represented as unambiguously in the immediate case. First, YouTube will argue that the video embedding function is intended solely as a tool for sharing. Unlike in *Grokster*, where the defendants clearly sought to avail themselves to former Napster users through overt solicitation, YouTube's video embeds clearly perform a function other than promotion. In addition, YouTube actively requests users to refrain from committing infringement, as evidenced by the manifold notices on its website. Second, as discussed under the DMCA safe harbor analysis, evidence of YouTube's growth after removing copyright-infringing content suggests that its advertising revenue may not be directly tied to a larger quantity of pirated material. Third, YouTube will argue that the ability to designate "friends" is meant to build communities on the website; it will also find an innocent motivation for limiting the website's search capability. Moreover, YouTube has proactively introduced a number of techniques to prevent infringement with reported success.

Although YouTube reserves advanced fingerprinting technology for companies with whom it has content deals, it appears not to have taken affirmative steps to foster infringement. In fact, it appears to be doing the opposite. As a result, its overall business model can be likened more closely to legitimate product distribution than to intentional, culpable behavior. However, if the Court chooses to emulate the *Grokster* opinion and contemplate the balance between supporting creativity and protecting innovation, its determination of who is favored may depend on the number of infringing copies in YouTube's library. Thus, using a policy-driven approach, the Court may find liability for inducement if investigation reveals an overwhelming number of infringing copies on YouTube's website.

In sum, it is likely that YouTube will be cleared of liability on all counts of copyright infringement, although inducement-based liability is not entirely out of the question. If DMCA safe harbor proves to be as efficacious as illustrated above, reasonable content owners will seek alternatives to suing OSPs. Conversely, even if Viacom and others were to succeed in bringing claims against YouTube and analogous services, the cumulative effect of these judgments is questionable due to an array of harmful externalities.

²⁴⁷ *Id.* at 16.

III. NEGATIVE EXTERNALITIES ARISING FROM LIABILITY

One of the clearest problems with claims against services like YouTube is that they inevitably affect legal conduct in the same way that they impact infringing conduct. Unlike lawsuits against individual users, a successful lawsuit against a content-hosting company—with the potential of shutting it down—ultimately affects both infringers and innocent users. Furthermore, although the lawsuits against YouTube may not aim to completely shut the video service down—as compared to recent P2P cases—they do seek to compel substantial modification in the way it operates. Currently, YouTube is unable to easily modify its operations in order to conform to the demands of copyright owners, as evidenced by its accidental sweeping up of non-infringing videos while taking down Viacom's works.²⁴⁸ We can extrapolate from these mistakes the probability of YouTube facing difficulty in operating within the bounds of a permanent injunction.

If YouTube were forced to completely enjoin the dissemination of infringing material on its website, then it would suffer from transaction costs that might prove insurmountable. Disputes would certainly arise as to which content is infringing, due in part to the vagueness of the fair use doctrine.²⁴⁹ In the context of videos using copyrighted materials like popular music without authorization from songwriters and performers, content owners may lack opportunities for redress simply because YouTube cannot handle the burden of sifting through them. As such, possibly the most important mistake copyright owners can make is presupposing that YouTube actually possesses full control over the material that is uploaded to its library. As indicated by news reports, the fingerprinting technology that YouTube has licensed is not fully operational yet and may turn out to be less successful than content owners might hope.

If YouTube were to collapse because immense liability and enforcement costs make its business model untenable, the online landscape would lose a useful and economical means of disseminating user-generated content. Online video sharing is innately responsive to demands for content. The fact that consumers are also producers means that if lots of people want to watch videos of animal tricks, lots of people are likely to upload such videos in order to generate hits and positive comments. Moreover, services like YouTube may affect the creation as well as the dissemination of user-generated content by facilitating a new paradigm of consumer collaboration, described as “peer production.”²⁵⁰ Relevant examples include YouTube clips of users leading other users through the steps of technical support or software configuration. Also, due to

²⁴⁸ [Sandoval](#), *supra* note 50.

²⁴⁹ See Lemley & Reese, *supra* note 119, at 1384 (citing *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2d Cir. 1939) (Hand, J.) (lamenting the indeterminacy of the fair use doctrine)).

²⁵⁰ Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 *YALE L.J.* 369, 381 (2002) (discussing “production by peers who interact and collaborate without being organized on either a market-based or a managerial/hierarchical model,” as in the cases of the Wikipedia online encyclopedia and the Linux operating system).

YouTube's nascent rise in usage and popularity, some positive implications resulting from its continuing existence have likely not come to light.

Lastly, lawsuits against the likes of YouTube will dampen technological innovation that might enable valuable legal uses instead of just copyright infringement. When programmers were prosecuted for writing code that violated anti-circumvention measures in the DMCA, their compatriots were consequently deterred from working on encryption and other areas perceived to be similarly sensitive.²⁵¹ Likewise, if courts were to weigh in by dictating the designs of products and services, developers of new technologies would feel hampered by the prospect of future interference. As a result, innovation would suffer.²⁵²

Due to these harmful externalities, content owners should look to remedies other than the pursuit of legal claims against content-hosting services like YouTube.

IV. ALTERNATIVE REMEDIES

Currently, copyright infringers may be held liable for either actual damages or statutory damages,²⁵³ the latter of which may be raised to \$150,000 per infringed work at the discretion of a court.²⁵⁴ In order to maximize the deterrent effect of these monetary sanctions, content owners should consider the pursuit of infringement claims against individual uploaders of pirated material. This tactic may produce promising results because uploaders of infringing videos have little incentive for continuing their activities. They are not compensated financially and therefore volunteer their time and effort out of less self-serving interests. By following the model of the Recording Industry Association of America,²⁵⁵ the content industry may achieve startling results by filing just a few hundred lawsuits. One downside to pursuing this strategy is the dissimilarity in user behavior behind P2P file sharing and the uploading of infringing videos. While high-volume uploaders pervaded the P2P landscape,²⁵⁶ the possible dearth of such uploaders in online video makes the imposition of liability on a casual uploader appear draconian. On the other hand, casual uploaders who have been singled out for infringement

²⁵¹ Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501, 514-16 (2003).

²⁵² See Lemley & Reese, *supra* note 119, at 1387 ("Innovation works best when it is as unfettered by governmental requirements as possible, particularly the kind of detailed oversight that the *Napster* case ultimately entailed.")

²⁵³ 17 U.S.C. § 504(c) (2007).

²⁵⁴ *Id.* § 504(c)(1)-(2).

²⁵⁵ The Pew Internet & American Life Project survey estimates that illegal "music downloading" plunged by nearly 50% in the months after the RIAA announced its intent to sue P2P users and filed its first round of lawsuits. Lee Rainie & Mary Madden, *The Impact of Recording Industry Suits Against Music File Swappers*, PEW INTERNET & AMERICAN LIFE PROJECT, Jan. 2004, http://www.pewinternet.org/pdfs/PIP_File_Swapping_Memo_0104.pdf. *But cf.* Thomas Mennecke, *P2P Population Nears Record High*, SLYCK, Dec. 2005, available at <http://www.slyck.com/news.php?story=1031> ("The RIAA may be winning over the courts and legislators, yet these victories are proving hollow. Their courtroom and legislative successes are yielding little in the way of tangible benefits as the P2P population continues to grow.")

²⁵⁶ Matt Bai, *Hating Hilary*, WIRED, Feb. 2003 (quoting Hillary Rosen of the RIAA), available at <http://www.wired.com/wired/archive/11.02/hating.html>.

will not be subject to massive liability that seems disproportionate to their wrongdoing.

Since suing direct infringers can quickly turn into an expensive proposition, another alternative would be to lower the cost of enforcement by blanket licensing based on an automated system of levies as proposed independently by Neil Netanel and Terry Fisher.²⁵⁷ A levy is “a form of blanket compulsory license, authorizing copying in exchange for a set fee.”²⁵⁸ Instead of requiring everyone who wants a license to apply for one or burdening copyright holders with the responsibility of suing those who owe license fees, a levy would be collected on any sale of software, hardware, or services that are deemed likely to be used for the infringement of audiovisual works.²⁵⁹ Mark Lemley and R. Anthony Reese have suggested that statutory language could be modeled on the Audio Home Recording Act of 1992 (AHRA), which provides for a levy to be charged on all digital audio recorders and blank digital audio media, the proceeds of which are to be distributed among music copyright owners.²⁶⁰ Because this type of levy system runs automatically and forces virtually all copyright infringers to pay the equivalent of an inexpensive licensing fee, it requires little maintenance and avoids the hassle of litigation.

Nevertheless, blanket licensing does have a significant shortcoming in that its economic effect is comparable to that of suing OSPs.²⁶¹ Lemley and Reese have theorized that a levy must be tied to a wide range of products or else its cost will be prohibitively high.²⁶² However, such a levy will predictably adhere to devices with both infringing and non-infringing uses, meaning that the burden is eventually shared with users who are innocent of infringement.²⁶³ Thus, according to Lemley and Reese, a levy system merely substitutes a liability rule and a collection mechanism for the existing property rule seen in copyright law.²⁶⁴ Ultimately, a levy system still seems preferable because its diminishing effect on technological innovation pales in comparison to the outright ban on innovation that may result under a property rule.²⁶⁵

Lemley and Reese have suggested another possible alternative for lowering the cost of copyright enforcement—an alternative dispute resolution system that allows content owners to quickly and inexpensively bring complaints against the most prolific uploaders of infringing videos.²⁶⁶ Although Lemley and Reese speak mainly to P2P networks, Congress could amend the Copyright Act to provide that in the case of egregious copyright infringement related to OSPs, a copyright owner would have the

²⁵⁷ See WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* ch. 6 (Stanford University Press 2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

²⁵⁸ Lemley & Reese, *supra* note 119, at 1406.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1407 (citing 17 U.S.C. §§ 1004–07 (2007)).

²⁶¹ *See id.* at 1408.

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *Id.*

²⁶⁵ *See id.* at 1408–09.

²⁶⁶ *Id.* at 1410–11.

choice of either pursuing a copyright infringement claim in federal court or pursuing a claim in an alternative dispute resolution proceeding before an arbitrator properly appointed by the Copyright Office.²⁶⁷ If instituted, the system could be designed to resolve only straightforward cases of bad-faith infringement, and to reserve more difficult factual and legal disputes for the courts.²⁶⁸ As such, an arbitrator given the basic facts, without face-to-face argument or discovery,²⁶⁹ would be able to make a decision swiftly and with minimum cost to copyright holders.²⁷⁰ The success of such a system would depend heavily on the ability of OSPs to easily identify the worst offenders, such as those who repeatedly repost slightly modified videos in response to takedowns. Creating an effective arbitration system will entail a great deal of forethought and cooperation on the part of OSPs, content owners, and lawmakers.

In combination with any of the remedies touched upon above, the content industry must redouble its efforts to legitimize online video. Major media companies have the financial resources and the wherewithal to develop attractive online video services. Reducing infringement on websites like YouTube through enforcement efforts against infringing uploaders will be more successful if end users become acclimated to reliably and affordably accessing a wide variety of professional-grade digital videos online. GE and Vivendi's NBC Universal, News Corporation's Fox, and Viacom have all started to offer online video experiences targeting specific consumers.²⁷¹ Accruing the favor of built-in audiences will pay dividends to content owners fearful of copyright infringement. Moreover, major studios and networks can utilize the grassroots element of online video that has worked so well for YouTube. For example, CBS has begun to encourage college basketball fans to upload homemade videos supporting their favorite teams.²⁷²

Partnering with existing online video services is another alternative. While YouTube may appear to pose an insidious threat to traditional entertainment, statistics suggest that it also represents a legitimate economic opportunity for content owners and advertisers alike. According to a recent Harris interactive poll of a representative sample of 2300 adults in the United States, forty percent of adults have watched a video on YouTube.²⁷³ Of these viewers, fourteen percent described themselves as visiting the website frequently.²⁷⁴ Also, YouTube is more popular among young males, a segment of the population that advertisers already have trouble reaching through television.²⁷⁵ An astounding forty percent of eighteen to twenty-four-year-old U.S. men described themselves as visiting

²⁶⁷ See *id.* at 1413.

²⁶⁸ See *id.* at 1411.

²⁶⁹ See *id.* at 1417–18.

²⁷⁰ See *id.* at 1411.

²⁷¹ See Cassimir Medford, *CBS: Is YouTube Fan Enough?*, RED HERRING, Feb. 28, 2007, <http://www.redherring.com/Home/21472>.

²⁷² *Id.*

²⁷³ YouTube viewers watch less television as a result, INFORMITV, Feb. 4, 2007, <http://informatv.com/articles/2007/02/04/youtubviewerswatch/>.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

the website frequently.²⁷⁶ Advertisers and content owners should take heed of these attractive numbers and utilize online video services to build their respective brands.

Over one thousand content owners of all sizes have already begun to capitalize on the positive opportunities presented by YouTube.²⁷⁷ YouTube has brokered a multi-year, non-exclusive partnership deal with the British Broadcasting Corporation (“BBC”), which encompasses a rich mix of promotional content, short-form entertainment, and news clips.²⁷⁸ The companies will split advertising revenue and begin testing video advertisements—a first for YouTube—but BBC executives are more intent on expanding awareness of their brand in the U.S. market.²⁷⁹ This year, online video advertising is expected to be worth a mere \$775 million, a fraction of the overall online advertisement market.²⁸⁰ However, the market potential is enormous, as seen in the estimated seventy billion to eighty billion dollars spent annually in television advertising.²⁸¹ In any event, the BBC deal represents a major coup for YouTube due to its scope, length, and prominence of the partner, and illustrates the promise of its platform in legitimizing online video content.

YouTube also boasts revenue-sharing deals with smaller entities, such as the Sundance Channel, the YES Network (a regional sports television network), AskTheBuilder.com (a home improvement website), and small independent video producers.²⁸² Results have proved attainable thus far, as seen in the Sundance Channel receiving more than two million hits on YouTube and experiencing a significant uptick in traffic to its own website.²⁸³ YouTube’s success with smaller media companies validates its platform as an effective and safe means for promotion, distribution, and monetization of media content. Undersized companies especially benefit from YouTube’s platform because they are generally willing to risk some copyright infringement for the potential payoff of mass distribution.²⁸⁴ Major content providers that recognize the profit potential from advertising revenue are even expressing interest in creating original programming exclusively for online video platforms like YouTube.²⁸⁵ In all likelihood, the growing presence of legitimate, professional content will dampen the demand for infringing material, which will in turn reduce the uploading of pirated content.

The most innovative forays into revenue-sharing involve hitching the copyrighted works of media companies to the user-generated engine that

²⁷⁶ *Id.*

²⁷⁷ Miguel Helft, *Google Courts Small YouTube Deals, and Very Soon, A Larger One*, N.Y. TIMES, Mar. 2, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=950DE4D81631F931A35750C0A9619C8B63>.

²⁷⁸ Ben Fritz & Steve Clarke, *YouTube Ties to BBC*, VARIETY, Mar. 2, 2007, available at <http://www.variety.com/article/VR1117960423.html?categoryid=1009&cs=1>.

²⁷⁹ *Id.*

²⁸⁰ Delaney & Karnitschnig, *supra* note 28.

²⁸¹ See Lee, *supra* note 32.

²⁸² Helft, *supra* note 277.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Anne Becker et al., *How the Google-YouTube Deal Shakes Up TV*, BROADCASTING & CABLE, Oct. 16, 2006, available at <http://www.broadcastingcable.com/article/CA6381202.html>.

has contributed to YouTube's growth. YouTube has reached an arrangement with Wind-up Records that allows the use of certain pre-selected music tracks in amateur videos created by YouTube users.²⁸⁶ Users can add musical backdrops to their video exploits without fear of liability for infringement, and copyright owners are compensated for the use of their works. If film studios and television networks were also willing to selectively license the marriage of their copyrighted material to the activities of end users, this type of copyright infringement would resultantly disappear. In essence, content owners could legalize certain types of copyright infringement and get paid for it.

To take the concept one step further, copyright holders could even license to YouTube the rights to wholesale use of their works. For example, a television network could agree to discard any future claims of copyright infringement against YouTube in exchange for 100% of the advertising revenue generated from any of its works that have been used. However, these types of deals would simply replace the negative externalities produced by lawsuits against YouTube with equivalent costs. YouTube would be forced to constantly monitor its website for use of copyrighted material with no real compensation for its efforts. Like an automated levy system, a compulsory license for the use of others simply trades a property rule for a liability rule and a collection mechanism.

In sum, viable alternatives to lawsuits against YouTube and comparable services are available to the content industry. However, such devices may turn out to be less imperative in treating infringement because the demographics of end users are rapidly changing. In late 2006, older viewers already appeared to make up a large proportion of YouTube's audience, as estimated U.S. proportions of YouTube visitors between the ages of thirty-five and sixty-four reached as high as sixty-five percent.²⁸⁷ A concurrent study indicated that YouTube visitors were also more likely to be relatively well-heeled, as income data showed that 61.6% earned above \$60,000 annually.²⁸⁸ Since then, the percentage of eighteen-to-twenty-four-year-olds that visit YouTube has dropped,²⁸⁹ signaling the evolution of its audience into a broader and more mainstream blend of people who have little incentive to commit copyright infringement. This trend may already be reflected by YouTube's creation of a discrete channel allowing 2008 Presidential candidates to showcase their own videos with the intent to facilitate dialogue with viewers.²⁹⁰ Assuming that uploader demographics morph along with visitor demographics, which is not at all unlikely, copyright infringement may very well drop to an acceptable level without substantial pressure brought to bear on it.

²⁸⁶ Fred O'Connor, *YouTube Reaches Deals for Music Video, Sports Content*, PC WORLD, Feb. 27, 2007, available at <http://www.pcworld.com/article/id,129443/article.html>.

²⁸⁷ Jeremy Reimer, *YouTube Makes the Move on TV's "Old Rich People,"* ARS TECHNICA, Nov. 27, 2006, <http://arstechnica.com/news.ars/post/20061127-8290.html>.

²⁸⁸ *Id.*

²⁸⁹ Lee, *supra* note 32.

²⁹⁰ Associated Press, *YouTube Sets Aside 'Channel' for Presidential Candidates*, FOXNEWS.COM, Mar. 2, 2007, <http://www.foxnews.com/story/0,2933,256178,00.html?sPage=fnc.politics/youdecide2008>.

V. CONCLUSION

YouTube represents a new breed of viral online service that places the content industry in a quandary. While the online video service seems to provide a haven for copyright infringement, it also offers content owners opportunities to expand awareness of their brands and share in the stream of online advertising revenue. Thus far, traditional media companies have taken different approaches to dealing with YouTube, one of which is to pursue copyright infringement claims against the company due to the relative ease of targeting OSPs. Although digital copyright law appears to shelter YouTube from liability for infringement, it is impossible to reach a definitive conclusion as of yet. It is clear, however, that the vigorous imposition of liability on YouTube and others like it will eventually lead to the surfacing of externalities that negatively impact society as a whole. Keeping in mind the balance between protection of artistic pursuits and progress of innovation, the content industry should seek alternative remedies that lessen or altogether eliminate these harmful effects.

There are a number of feasible alternatives to lawsuits against OSPs, such as lawsuits against individual infringers, blanket licensing based on automated levies, alternative dispute resolution, and beneficial content relationships. Of these options, content partnerships have already shown signs of early success. Content owners of all sizes are starting to show that they can effectively leverage their copyrighted material in order to share in online advertising revenue while simultaneously promoting their brands. Late adopters who have not taken advantage of these opportunities would do well to consider the future of their businesses in the context of online video.

