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## To Sue or Not to Sue: Video-Sharing Web Sites, Copyright Infringement, and the Inevitability of Corporate Control

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## NOTES

### TO SUE OR NOT TO SUE:

## VIDEO-SHARING WEB SITES, COPYRIGHT INFRINGEMENT, AND THE INEVITABILITY OF CORPORATE CONTROL

### I. INTRODUCTION

Throughout 2006, a remarkable phenomenon invaded the digital world; a phenomenon that could be attributed to the combination of easy access to technology,<sup>1</sup> a new generation full of deteriorating attention spans, and to some commentators, the entertainment industry's "shockingly slow" responses to consumer behavior.<sup>2</sup> This phenomenon was the development and successful proliferation of social networking and video-sharing Web sites. These sites, which include Yahoo! Video,<sup>3</sup> Google Video,<sup>4</sup> Revver,<sup>5</sup> VMIX,<sup>6</sup> YouTube,<sup>7</sup> and MySpace,<sup>8</sup>—to name a few—allow users to sign up, upload videos, store them, rate them, distribute them, or embed them in other Web site pages.<sup>9</sup> While a number of uploaded videos are created by amateurs attempting to attain fame and, perhaps, some fortune, several thousands more are copied from television or stolen from other Web sites and subsequently uploaded by someone other than the actual copyright owner.<sup>10</sup>

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1. See Mark G. Tratos, *Entertainment on the Internet: The Evolution of Entertainment, Production, Distribution, Ownership and Control in the Digital Age*, in ENTERTAINMENT LAW 331, 335 (Howard Siegel ed., 3d ed. 2004) ("[D]igital technology has made copying and high quality reproduction available in every area of entertainment to almost anyone, not just those with once rare and expensive reproduction equipment.").

2. Barrie McKenna, *Entertainment Media Bite Digital Hand that Could Feed Them*, GLOBE AND MAIL, Sept. 26, 2006, at B17.

3. Yahoo! Video, <http://video.search.yahoo.com/> (last visited Nov. 17, 2006).

4. Google Video, <http://video.google.com/> (last visited Nov. 17, 2006).

5. Revver, <http://www.revver.com/> (last visited Nov. 9, 2007). However, unlike most video sharing sites, Revver shares advertising revenue with every user who uploads or shares the video. See Revver, <http://one.revver.com/go/about> (last visited Oct. 17, 2007). Revver also screens all submitted videos to prohibit copyright infringement. See Revver Copyright Policy, <http://one.revver.com/go/copyright> (last visited Oct. 11, 2007).

6. VMIX, <http://www.vmix.com/> (last visited Nov. 17, 2006).

7. YouTube—Broadcast Yourself, <http://www.youtube.com/> (last visited Nov. 17, 2006).

8. MySpace Video, <http://vids.myspace.com/> (last visited Nov. 17, 2006).

9. More technologically savvy users are even able to download the videos.

10. See, e.g., Anthony S. Volpe, *YouTube, Viral Videos and Copyright Infringement on the Internet*, LEGAL INTELLIGENCER, Sept. 6, 2006. ("You make a visit to Youtube [sic] and find copyrightable works, such as newscasts, music videos, sports highlights, movie clips and even entire television shows posted.").

Accordingly, some of these Web sites have actively engaged in policing their sites to make sure copyrighted videos do not appear.<sup>11</sup> Others, however, including two of the most popular sites, YouTube<sup>12</sup> and MySpace,<sup>13</sup> thus far have hidden behind the veil created by the enactment of the Digital Millennium Copyright Act's "safe harbor" provision;<sup>14</sup> arguing that as long as all of the DMCA requirements are met, the service provider is not liable for money damages.<sup>15</sup> Many commentators do agree that the DMCA protects sites like YouTube and MySpace.<sup>16</sup> While this strategy has enabled sites to avoid legal action for the time-being, however, over the past several months, copyright owners, who maintain the exclusive right to reproduce their work, prepare derivative works, distribute, perform and/or display publicly their work,<sup>17</sup> are increasingly, and finally, beginning to take notice; and their discontent has become progressively apparent.<sup>18</sup>

Using YouTube as the model,<sup>19</sup> this note will explore the various ways in which the entertainment industry and independent creators have reacted

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11. Max Kalehoff, *Can Social Video Honor Copyright And Compensate the Artist?*, MEDIAPOST, Sept. 8, 2006, [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art\\_aid=47853](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=47853) (interview with Revver's co-founder and Senior VP who stated that "humans watch over the network" and screen the videos to prevent copyright infringement).

12. While writing this note, on Oct. 9, 2006, Google bought YouTube for \$1.65 billion, leading some to believe that YouTube will now be able to concentrate more on protecting against copyright infringement. See Paul R. La Monica, *Google to Buy YouTube for \$1.65 Billion: Search Engine Leader Looks to Bulk Up in the Burgeoning Online Video Market*, CNNMONEY, Oct. 9, 2006, [http://money.cnn.com/2006/10/09/technology/googleyoutube\\_deal/?postversion=2006100917](http://money.cnn.com/2006/10/09/technology/googleyoutube_deal/?postversion=2006100917).

YouTube will continue operating as an "independent unit of Google," *id.*, but it remains to be seen whether YouTube will take further steps to prevent against infringement or whether more lawsuits will be filed because of Google's "deep pockets." See, e.g., Catherine Holahan, *YouTube's New Deep Pockets: The online video star has found a rich parent, but can it ensure that it won't leave Google vulnerable to copyright lawsuits?*, BUSINESSWEEK ONLINE, Oct. 10, 2006, [http://www.businessweek.com/technology/content/oct2006/tc20061010\\_083340.htm](http://www.businessweek.com/technology/content/oct2006/tc20061010_083340.htm); see also *Does YouTube Make Google a Big Target for Copyright Suits?*, WALL ST. J. ONLINE, Oct. 11, 2006, <http://online.wsj.com/article/SB116049721244288215.html>.

13. According to Alexa Web Information Service, YouTube is ranked 4th and MySpace is ranked 6th among all Web sites tracked, see Alexa, <http://www.alexa.com> (last visited Oct. 11, 2007), compared to Revver, see Revver, *supra* note 5, which is ranked 4,332nd. Alexa Traffic Rankings, [http://www.alexa.com/data/details/traffic\\_details?url=http%3A%2F%2F](http://www.alexa.com/data/details/traffic_details?url=http%3A%2F%2F) (last visited Oct. 11, 2007).

14. Digital Millennium Copyright Act of 1998 § 201, 17 U.S.C. § 512(c) (2006) [hereinafter DMCA]. See discussion *infra* Part II.B.

15. See Copyright Act of 1976, 17 U.S.C. § 512(c)(1) (2006).

16. See, e.g., Heather Svokos, 'You Gotta Check This Out'; *The Passion to Share Video Clips has Made a Web Site an Overnight Sensation*, BERGEN RECORD, Apr. 15, 2006, at F1 ("Wendy Seltzer, a fellow at the Berkman Center for Internet & Society at Harvard Law School . . . [said that] [a]s long as YouTube follows the notice and takedown rules, it's immune from liability.").

17. 17 U.S.C. § 106 (2006).

18. See discussion *infra* Part IV.B.

19. I chose YouTube because each video-sharing site operates in slightly different ways, and YouTube is leading the way in the web television market. It boasts approximately 100 million videos on the site, with 65,000 videos added every day. It has also become a press target, drawing

to this latest phenomenon. It will examine whether video-sharing sites will follow in the path of the peer-to-peer networks such as Napster,<sup>20</sup> and will also attempt to provide a framework leading to a solution to the existing tensions among copyright law, corporate control, and the digital age.

Part II will describe how Congress has dealt with the enormous task of adapting copyright law in a futile attempt to keep up with technological development, describing the legislative enactments, developments, and changes in copyright law, beginning with the U.S. Constitution and ending with the adoption of the DMCA. Part III will examine the most recent cases involving Internet and peer-to-peer file sharing,<sup>21</sup> engaging in an analysis of direct and indirect infringement and how it pertains to video-sharing Web sites and illustrating how copyright owners may have the law on their side. Part IV will discuss the entertainment industry's recent reactions to the explosion of video-sharing and social-networking Web sites. Part V will provide an analysis of the reasons why it is more beneficial for copyright owners to work with, instead of against, video-sharing Web sites. This Part argues that although copyright owners may be successful in court, the stigma that will attach to their efforts, the financial burden it will impose, and the loss of a beneficial promotional tool, are detrimental to the industry. Finally, this Part will also propose a method by which the entertainment industry and the Web sites can work together to appeal to public demand while permitting copyright owners to maintain control over, and reap the benefits from, the content that appears on the sites.

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over 3,000 articles per week. Scott Woolley, *Video Fixation*, FORBES, Oct. 16, 2006, at 100. Although this Forbes article, for example, is complimentary, several others have focused on the site's blatant copyright infringement. See, e.g., Volpe, *supra* note 10. Others have concentrated on the debate pertaining to whether the site is the next Napster and whether it is liable for copyright infringement. See, e.g., Michael Geist, *Why YouTube Won't Become Napster Redux*, TORONTO STAR, Oct. 16, 2006, at C3; Brad Stone, *Is YouTube the Napster of Video?*, NEWSWEEK ONLINE, Mar. 7, 2006, <http://www.msnbc.msn.com/id/11617588/site/newsweek/page/2/>; Reply All, *Does YouTube Make Google a Big Target for Copyright Suits?*, WALL ST. J. ONLINE, Oct. 11, 2006, <http://online.wsj.com/article/SB116069721244288215.html> (containing a conversation between John Palfrey, Harvard Law Professor, and Stan Liebowitz, University of Texas at Dallas Economics Professor).

20. See, e.g., John Boudreau, *How Will YouTube Make Money? Ad Strategy Key to Turning Millions of Clicks into Cash*, MERCURY NEWS, July 12, 2006, at A1, available at 2006 WLNR 11981946 ("YouTube's work-in-progress business plan has raised concerns among some industry observers who believe the Web site could go the way of Napster. The former Redwood City file-sharing company became an Internet star by allowing people to exchange copyrighted music, but became less popular as a legal site.").

21. See Jesse M. Feder, *Is Betamax Obsolete? Sony Corp. of America v. Universal Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859, 862-68 (2004), for background information about peer-to-peer technology; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (explaining how peer-to-peer file sharing works).

## II. COPYRIGHT LAW: A BRIEF HISTORICAL ACCOUNT

### A. THE COPYRIGHT ACT AND AMENDMENTS PRIOR TO THE ENACTMENT OF THE DMCA

By recognizing the value of artistic expression and creativity, the U.S. Constitution provided the framework for copyright law. Article I, § 8 gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>22</sup> The first American Copyright Law was adopted in 1790, and gave authors and proprietors the “sole right and liberty of printing, reprinting, publishing and vending” books, charts and maps for a term of fourteen years.<sup>23</sup> It also stipulated the requirements for registering a copyright in the county clerk’s office.<sup>24</sup> In 1831, musical compositions, designs, etchings and engravings were added to the list of protected works;<sup>25</sup> the first U.S. copyright case appeared in the Supreme Court in 1834.<sup>26</sup> In 1865, photographs were added to the list of copyrightable works,<sup>27</sup> conveniently corresponding with the publishing and selling of Matthew Brady’s Civil War photos.<sup>28</sup> Musical compositions were later added in 1909;<sup>29</sup> moving pictures were added in 1911 “[t]hrough the request of industry,” and sound recordings were added in 1971.<sup>30</sup>

While Congress continued to amend copyright laws, extending them to adapt to new technology, businesses in the entertainment industry began requiring that artists and creators convey their copyrights to the company representing them.<sup>31</sup> The 1909 Act:

[F]urthered the industries’ interests by expressly allowing corporations, partnerships and other business entities to be deemed the “authors/owners” of creative works as the concept of works made for hire was added to copyright law. As a result, the majority of all entertainment-related copyrights filed in the United States after . . . 1909 . . . were filed on behalf of business entities, not individuals.<sup>32</sup>

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22. U.S. CONST. art. I, § 8, cl. 8.

23. Copyright Act of 1790 § 1, 1 Stat. 124, 124 (1790) (amended 1831).

24. *Id.* at § 3.

25. Copyright Act of 1831 § 1, 4 Stat. 436, 436 (1831) (amended 1865).

26. *Wheaton v. Peters*, 33 U.S. 591, 658 (1834) (“That every man is entitled to the fruits of his own labour must be admitted.”).

27. Copyright Act of 1865 § 2, 13 Stat. 540 (1865).

28. See Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 592 (2002).

29. Copyright Act of 1909 § 1, 35 Stat. 1075, 1075 (1909).

30. *Tratos*, *supra* note 1, at 340.

31. *Id.* at 342.

32. *Id.*

To combat industry takeover of individual works, however, Congress later adopted § 203 of the 1976 Act,<sup>33</sup> to allow artists to reclaim the works “[b]etween the 35<sup>th</sup> and 40<sup>th</sup> year of the copyright term.”<sup>34</sup> Furthermore, the 1976 Act provided that protection exists “in original works of authorship fixed in any tangible medium of expression, now known or later developed,” and included literary, musical, dramatic, pantomime and choreographic, pictorial, graphic and sculptural, motion pictures and other audiovisual work, sound recordings and architectural works.<sup>35</sup> Finally, “digital forms of artistic works were protected through the Audio Home Recording Act of 1992 and the Digital Millennium Copyright Act in 1998.”<sup>36</sup>

Other amendments included the adoption of § 408 in 1988, which altered the formal nature of copyright laws, and provided that registration of copyright is no longer a condition of protection, meaning that as soon as words hit the page, they are protected.<sup>37</sup> Later, the Sonny Bono Copyright Term Extension Act,<sup>38</sup> adopted in 1998, extended the copyright term to the author’s life plus 70 years for individuals and 95 years from publication, or 120 years from creation for businesses.<sup>39</sup>

#### **B. THE DIGITAL MILLENNIUM COPYRIGHT ACT’S SAFE HARBOR PROVISION: WHY VIDEO-SHARING WEB SITES ARE FAR FROM SAFE**

As technology continued to advance, and copyright owners continued to demand protection, Congress adopted the DMCA in order to cope with the difficulties caused by the digital age.<sup>40</sup> The Online Copyright Infringement Liability Limitation Act, which is Title II of the DMCA, was enacted to “provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online,”<sup>41</sup> and to “protect the property rights of Americans in their work as they move in the global, digital marketplace, and, by doing so, continue to encourage the creation of new works to inspire and delight us and to improve the quality

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33. 17 U.S.C. § 203 (2006) (“In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination.”).

34. Tratos, *supra* note 1, at 342.

35. Copyright Act of 1976, § 101, 17 U.S.C. § 102 (2006).

36. Tratos, *supra* note 1, at 341.

37. 17 U.S.C. § 408(a) (2006). However, “[r]egistration still remains desirable . . . because it provides proof that a valid copyright exists. Further, registration is required to bring an infringement action under the federal statute.” INTELLECTUAL PROPERTY FOR THE INTERNET 10 (Lewis C. Lee & J. Scott Davidson eds., 1997).

38. 17 U.S.C § 302 (2006).

39. See *Eldred v. Ashcroft*, 538 U.S. 916 (2003) (holding that the statute was constitutional).

40. See generally, S. REP. NO. 105-190 (1998) (Conf. Rep.).

41. *Id.* at 1.

of our lives.”<sup>42</sup> This section limits liability for monetary damages when service providers are either passive conduits<sup>43</sup> or merely store or host material at the direction of users.<sup>44</sup> Moreover, this limitation “is an affirmative defense, as to which the defendant bears the burden of proof,”<sup>45</sup> and is employed only after a court finds the service provider liable for copyright infringement.

Video-sharing sites began to appear on the Internet only within the last few years;<sup>46</sup> and thus far, the safe harbor protection, as it pertains to these sites, has not been tested in court. Most video-sharing Web site providers argue that they are protected by this “safe harbor” provision, and that as long as they comply with all of the DMCA requirements, they are not liable for monetary damages.<sup>47</sup> However, in similar cases involving Web sites or peer-to-peer networks, some courts have essentially ignored the provisions once contributory liability has been found.<sup>48</sup> Furthermore, when copyright owners alleged direct infringement, courts have interpreted the DMCA’s protection “to be a floor, not a ceiling, of protection,”<sup>49</sup> meaning that DMCA analysis is just one step in the process of determining liability.<sup>50</sup> Therefore, in addition to designating an agent to receive complaints<sup>51</sup> and adopting, implementing, and informing users of a policy to terminate repeat infringers,<sup>52</sup> the service provider must also meet several requirements before finding refuge under the DMCA. Three of these requirements are described below.

### 1. The “Service Provider” Requirement

First, to be protected, the sites need to qualify under the DMCA’s definition of “service provider.”<sup>53</sup> Thus far, courts have not been asked to

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42. S. REP. NO. 105-144, at 11889 (1998) (Conf. Rep.) (statement of Sen. Orrin G. Hatch).

43. See 17 U.S.C. § 512(a) (2006).

44. See 17 U.S.C. § 512(c).

45. JAY DRATLER, JR., CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM 6-41 (2006).

46. For example, YouTube was founded on February 14, 2005. See YouTube Founders, <http://www.youtube.com/t/founders> (last visited Dec. 16, 2006). “MySpace . . . launched in 2003.” Alex L. Goldfayn, *Time Flies When You’re Having Fun with Technology*, CHICAGO TRIBUNE, Sept. 18, 2006, at 7.

47. See, e.g., Leslie Simmons, *YouTube: News Service Infringement Claim ‘Without Merit’*, THE HOLLYWOOD REPORTER, ESQ., July 19, 2006, [http://www.hollywoodreporteresq.com/thresq/litigation/article\\_display.jsp?vnu\\_content\\_id=1002841475](http://www.hollywoodreporteresq.com/thresq/litigation/article_display.jsp?vnu_content_id=1002841475).

48. See, e.g., In re: Aimster Copyright Litigation, 334 F.3d 643, 655 (7th Cir. 2003).

49. CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 555 (4th Cir. 2004).

50. *Id.*

51. 17 U.S.C. § 512(c)(2) (2006).

52. 17 U.S.C. § 512(i)(1)(A).

53. The Copyright Act broadly defines the term “service provider” to include:

[A]n entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the

determine whether video-sharing Web sites fall under the DMCA's definition,<sup>54</sup> and if courts decide that such sites are not "service providers," the sites will then be precluded from claiming DMCA protection. However, since the language contained in § 512(k)(1)(B) is broad, "[a] *fortiori* it covers such Web presences as . . . online file sharing services."<sup>55</sup> Furthermore, district courts have interpreted the DMCA definition to include similar types of Web sites.<sup>56</sup> Therefore, because courts will likely find that the sites are service providers, the sites qualify for DMCA protection as long as they satisfy the other numerous requirements. Moreover, since they store material at their users' direction, they fall under § 512(c).<sup>57</sup>

## 2. The "Knowledge" Requirement

Section 512(c) limits service providers' liability if infringing material is posted by users and stored on the server as long as the service provider does not have "actual knowledge that the material . . . is infringing."<sup>58</sup> In addition, if the service provider does not have actual knowledge, it must also be unaware "of facts or circumstances from which infringing activity is apparent."<sup>59</sup> If the service provider subsequently becomes aware of facts or circumstances, or obtains actual knowledge, it must "act expeditiously to remove, or disable access to, the material."<sup>60</sup> Once a copyright owner

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user's choosing, without modification to the content of the material as sent or received.  
 . . . The term "service provider" means a provider of online services or network access,  
 or the operator of facilities therefor . . . .

17 U.S.C. § 512(k)(1).

54. Robert Tur, *see infra* note 168 and accompanying text, alleges that the video-sharing sites are not "service providers." See Steve Bryant, *Examining Google's Inheritance: Robert Tur v. YouTube*, GOOGLEWATCH: EWEEK, Oct. 23, 2006, [http://googlewatch.eweek.com/content/archive/examining\\_google's\\_inheritance\\_robert\\_tur\\_v\\_youtube.html#comments](http://googlewatch.eweek.com/content/archive/examining_google's_inheritance_robert_tur_v_youtube.html#comments), for Robert Tur's response to Bryant's article, in which he states, "[c]learly [YouTube is] not [an OSP]. Youtube [sic] is first and foremost, a commercial website engaged in willful distribution of millions of infringing copyrighted works for a profit."

55. See DRATLER, *supra* note 45, at 6-44.4.

56. See *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001). After quoting part of § 512(k)(1)(B), the court did not engage in an analysis of whether the eBay auction Web site fell under the DMCA's definition of "service provider." The court stated that eBay's site, on which "sellers . . . post 'listings'" that describe and display photographs of items for sale, which allows buyers to find items to bid on or buy, qualifies as a "service provider" within the meaning of Section 512." *Id.* at 1084, 1088. See also *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) (stating that a Web site, which allows users or subscribers to upload and post commercial real estate listings, is an ISP that, if protected by the DMCA, would fall under § 512(c)(1)).

57. Section 512(c) "applies where a plaintiff seeks to hold an Internet service provider responsible for . . . (1) infringing 'material' stored and displayed on the service provider's website." *Hendrickson*, 165 F. Supp. 2d at 1088.

58. 17 U.S.C. § 512(c)(1)(A)(i).

59. 17 U.S.C. § 512(c)(1)(A)(ii).

60. 17 U.S.C. § 512(c)(1)(A)(iii).



provides notice of infringement that substantially meets § 512(c)(3) requirements,<sup>61</sup> the service provider is then considered to have the requisite knowledge and is, therefore, compelled to act.<sup>62</sup>

Aside from receiving proper notice, however, the statute does not clarify when or in what other ways service providers may acquire the requisite knowledge.<sup>63</sup> Most commentators claim that actual knowledge is acquired only after the service provider receives notice of infringement, and therefore, as long as they remove the infringing material upon receiving notice, they are covered.<sup>64</sup> However, once courts have found service providers liable for contributory infringement,<sup>65</sup> which includes a requirement of actual or constructive knowledge,<sup>66</sup> they have, in effect, disregarded any further protection that may or may not have been intended by the statute's enactment.<sup>67</sup>

To find actual or constructive knowledge, courts have a copious amount of evidence available, especially where the more popular sites are

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61. See 17 U.S.C. § 512(c)(3)(A)–(B), for notification requirements. See 17 U.S.C. § 512(g)(1)–(4), for removal requirements and effects, as well as counter-notification requirements. Courts have broadly interpreted notice requirements in order to lessen the burden to copyright holders when multiple infringements are alleged. See *ALS Scan, Inc. v. Remarq Cmty., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (“[N]otification requirements are relaxed to the extent that, with respect to multiple works, not all must be identified—only a “representative list. . . . [W]ith respect to location information, the copyright holder must provide information that is ‘reasonably sufficient’ to permit the service provider to ‘locate’ this material.”).

62. See 17 U.S.C. § 512(c)(1)(C); see also *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1089 (C.D. Cal. 2001) (“Under the third prong of the test, the service provider’s duty to act is triggered . . . upon receipt of proper notice.”).

63. However, the Copyright Act does indicate that if a copyright owner does not substantially comply with the notification set forth in § 512(c)(3)(A), then the court shall not consider the notification as providing the actual knowledge or awareness of the facts or circumstances of infringing activity. See 17 U.S.C. § 512(c)(3)(B)(i). But see 17 U.S.C. § 512(c)(3)(B)(ii).

In a case in which the notification . . . fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) . . . , clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

*Id.*

64. See Fred von Lohmann, *YouTube’s Balancing Act: Making Money, Not Enemies*, HOLLYWOOD REPORTER, ESQ., July 10, 2006, [http://www.hollywoodreporteresq.com/thresq/spotlight/article\\_display.jsp?vnu\\_content\\_id=1002802746](http://www.hollywoodreporteresq.com/thresq/spotlight/article_display.jsp?vnu_content_id=1002802746) (explaining why YouTube may be shielded by the DMCA).

65. See discussion *infra* Part III.B.1.

66. See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (defining contributory infringement); see also discussion *infra* Part III.B.1.

67. See *A & M Records, Inc v. Napster, Inc.*, 114 F. Supp. 2d 896, 919 n.24 (N.D. Cal. 2000) (after finding that Napster was liable for contributory infringement, the court refused to engage in an analysis of the DMCA provisions, stating that just because the DMCA “explicitly excludes” service providers that have actual knowledge from protection, it does not “[shelter] contributory infringers”).

concerned. The mainstream media and various internet bloggers<sup>68</sup> have devoted much energy to drawing the public's attention to several infringing videos, making it almost impossible for service providers to avoid the commentary.<sup>69</sup> Furthermore, YouTube consistently acknowledges its awareness of the fact that infringement occurs on the site, and has made futile attempts to limit the infringement.<sup>70</sup> Although YouTube will claim that it was unaware of *specific* infringing videos before being notified of the infringement, and therefore, did not have the requisite knowledge under the DMCA,<sup>71</sup> since it is obviously aware of several infringing videos and activities, it is not a stretch for courts to determine that YouTube was aware of the rampant infringement. Moreover, other internet sites, such as Australia's Peekvid.com,<sup>72</sup>—while it does not host any copyrighted videos directly—create indexes of several copyrighted videos already posted on YouTube and Google, and subsequently sort the infringing videos into categories from which users can choose to view. Its affiliated site, KeepVid.com,<sup>73</sup> then provides a tool that enables users to download the videos they were able to locate on Peekvid.<sup>74</sup> The availability of these sites draws further attention to the blatant and vast copyright infringement

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68. See Patrick Goldstein, *The People's Republic of YouTube*, L.A. TIMES ONLINE, Oct. 17, 2006, <http://www.latimes.com/entertainment/news/cl-et-goldstein17oct17,0,171750,print.story?coll=la-home-entertainment>; see also Mark Cuban, *GooTube—The End of DRM?*, BLOG MAVERICK, THE MARK CUBAN WEBLOG, <http://www.blogmaverick.com/2006/10/11/gootube-the-end-of-drm/>; Svokos, *supra* note 16.

69. See Woolley, *supra* note 19, at 100 (“YouTube began showing up in quick mentions in the media, luring still more visitors. . . . Months later that would explode to 3,000 articles per week and hundreds of stories on television.”).

70. See *Your 15 Minutes of Fame..ummm...Make that 10 Minutes or Less*, YOUTUBE BLOG, Mar. 26, 2006, [http://www.youtube.com/blog?entry=oorjVv\\_HDVs](http://www.youtube.com/blog?entry=oorjVv_HDVs) (“We poked around the system a bit and found that these longer videos were more likely to be copyrighted videos from tv [sic] shows and movies than shorter videos posted.”). While this is a nice gesture, it also provides evidence of knowledge, and even may permit courts to infer that YouTube, while not specifically *encouraging* copyright infringement, is not exactly discouraging it either. It is simply limiting the duration of the copyrighted clip. Therefore, if users wanted to post numerous ten-minute clips, they could potentially post entire episodes.

71. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (“[A]bsent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement.”).

72. Peekvid: Watch Videos Online, <http://peekvid.com/> (last visited Nov. 22, 2006). In fact, this site allows you to watch entire movies. See *The Notebook on Peekvid*, <http://movies.peekvid.com/s3253/> (last visited Nov. 22, 2006) (splitting the movie into 12 different parts all gathered from YouTube).

73. KeepVid: Download videos from Google, YouTube, iFilm, Putfile, Metacafe, DailyMotion!, <http://keepvid.com/> (last visited Nov. 26, 2006).

74. See Louisa Hearn, *Video Piracy's New Battleground*, SYDNEY MORNING HERALD, June 26, 2006, <http://www.smh.com.au/news/web/video-piracys-new-battleground/2006/06/23/1150845364940.html> (“And now that indexes such as Peekvid are building businesses around the cataloguing [sic] of content appearing on video sites—including music, sporting clips and even entire television programs—pirated content is expected to become even more accessible to the casual browser.”).

occurring on YouTube and likely provides enough awareness of the infringing activity.

Even if a service provider, upon acquiring knowledge, expeditiously removes infringing material, there are other ways for courts to conclude that the DMCA does not protect the service provider. For example, if the service provider has not implemented technological devices designed to recognize and delete copyrighted material, or does not monitor or provide an easy way to detect copyrighted material on its Web site, there are no guarantees that the infringing material will not be posted by another user at a later date.<sup>75</sup> As a result, known infringement is perpetuated and the service provider is hardly able to claim that it did not have actual knowledge of the infringement.<sup>76</sup>

Because of the extensive media coverage, the inability or reluctance to control new videos containing the same content from popping up after they have been taken down,<sup>77</sup> and the service providers' own acknowledgment of blatant copyright infringement, courts should infer that most of the service providers have the requisite knowledge of infringement. At the very least, they can conclude that service providers are "aware of facts or circumstances from which infringing activity is apparent," and, therefore, ineligible for safe harbor protection.<sup>78</sup>

### 3. The "Financial Benefit" and the "Right and Ability to Control" Requirements

If a court finds that the service provider lacks the requisite knowledge, yet finds that it receives "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,"<sup>79</sup> the service provider loses DMCA

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75. In fact, as of Oct. 20, 2006, the SNL video, *see infra* note 150 and accompanying text, can still be found on YouTube at [http://www.youtube.com/watch?v=A\\_jcEsJz9rY](http://www.youtube.com/watch?v=A_jcEsJz9rY). Although this situation should diminish when YouTube rolls out its new technology, *see Delaney & Smith, infra* note 182, at B1 and accompanying text, without such technology, this situation is bound to occur repeatedly.

76. Furthermore, when multiple copyrights are claimed to have been infringed, § 512(c)(3)(A)(ii) states that notification of infringement only requires the copyright owner to present a "a representative list" of the infringing material. Section 512(c)(3)(A)(iii) requires that the copyright owner only provide "information reasonably sufficient to permit the service provider to locate the material." Therefore, presumably, if the service provider fails to locate all files containing the copyright owner's material, the service provider can be held liable.

77. MySpace has announced that its new tool to combat copyright infringement does include a mechanism that prevents other users from uploading the infringing video after it has been taken down. *See Yuki Noguchi, MySpace Sued Over Music Copyright Claims*, WASH. POST, Nov. 18, 2006, at D1. After several entertainment companies filed suit against YouTube, YouTube claimed that it was also set to launch its own "video recognition technology" in September 2007. The Associated Press, *For YouTube, a System to Halt Copyright-Infringing Videos*, N.Y. TIMES, July 28, 2007, at C6.

78. 17 U.S.C. § 512(c)(1)(A)(ii).

79. 17 U.S.C. § 512(c)(1)(B).

protection. Past courts have “embraced a very broad notion of ‘financial benefit.’”<sup>80</sup> When infringing activity serves as a “draw,” or “enhance[s] the attractiveness of the venue,” courts have determined that the service provider receives a direct financial benefit.<sup>81</sup> Moreover, when a service provider derives advertising revenue from the infringing activity or material,<sup>82</sup> or when “future revenue is directly dependent upon ‘increases in userbase [sic],’”<sup>83</sup> service providers have been found to have received a direct financial benefit.<sup>84</sup> Most video-sharing sites contain advertisements on pages displaying copyrighted material.<sup>85</sup> Therefore, since these video-sharing sites gain in popularity primarily because of the infringing activity that occurs, which consequently, increases advertising revenue,<sup>86</sup> courts should find direct financial benefit from the infringing activity.

Section 512(c)(1)(B) also mandates that the service provider have “the right and ability to control such activity.”<sup>87</sup> Although the DMCA does not require service providers to monitor its service or Web sites in order to locate and remove infringing material without receiving notice,<sup>88</sup> and courts have refused to penalize service providers who engage in voluntary, but limited monitoring,<sup>89</sup> YouTube and other providers can easily observe the “infringing activity” occurring directly on its Web site.<sup>90</sup> Given that other sites *do* filter out infringing material,<sup>91</sup> and since it is possible to develop

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80. FRED VON LOHMAN, IAAL: WHAT PEER-TO-PEER DEVELOPERS NEED TO KNOW ABOUT COPYRIGHT LAW 16 (2006), [http://www.eff.org/IP/P2P/p2p\\_copyright\\_wp\\_v5.pdf](http://www.eff.org/IP/P2P/p2p_copyright_wp_v5.pdf).

81. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263–64 (9th Cir. 1996); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 857 (C.D. Cal. 2006); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (internal citations and quotations omitted).

82. *See Perfect 10*, 416 F. Supp. at 857 (C.D. Cal. 2006).

83. *Napster*, 239 F.3d at 1023.

84. *See id.*

85. *See, e.g.,* Grey’s Anatomy on YouTube, <http://www.youtube.com/watch?v=AejvULMQrJE> (last visited Nov. 22, 2006).

86. For example, YouTube divides videos into categories such as “Top Rated and “Most Views.” *See* Recently Featured, <http://www.youtube.com/browse?s=rf> (last visited Nov. 26, 2006). A day after Kelly Ripa, co-host of ABC’s “Live with Regis and Kelly” blasted American Idol’s Clay Aiken during the show, several clips of the discussion appeared on YouTube at the direction of users. These videos were included in the YouTube’s “most views” section. When viewing the video, advertisements appeared above the video. Therefore, every time the videos are viewed on YouTube and shared with others who are directed to the YouTube page, the number of users, and therefore, advertising revenue increases. Furthermore, the availability of the video serves as a draw to the site. *See* <http://www.youtube.com/watch?v=WmQPv4L8VdM> (last visited Nov. 22, 2006).

87. 17 U.S.C. § 512(c)(1)(B).

88. 17 U.S.C. § 512(m).

89. *See* *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001). (“Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA.”).

90. *See id.* (distinguishing between infringing activities that occurred ‘offline’ from those that occurred on the actual Web site).

91. *See supra* notes 5, 11 and accompanying text.

tools to filter out infringing material,<sup>92</sup> courts should conclude that YouTube and other video-sharing sites have the “right and ability to control such activity.”<sup>93</sup> Furthermore, in relying upon the safe harbor provisions for protection and ignoring obvious infringing activities occurring on the site, they have, in effect, engaged in willful blindness.<sup>94</sup> While the smaller Web sites may not have the means necessary to implement technological devices that can be used to locate and filter out infringing material, presumably Google’s YouTube<sup>95</sup> and News Corp.’s MySpace<sup>96</sup> do have the financial means and ability to implement such devices. As of November 2006, both YouTube and MySpace were apparently testing out devices and MySpace has unveiled an initiative to protect against infringement of audio content.<sup>97</sup> However, several copyrighted videos have appeared, and continue to appear, on both sites, and it remains to be seen whether these devices will pacify copyright owners.

#### 4. Conclusion

Since service providers need to satisfy all three prongs of § 512(c)(1) in order to find refuge under the DMCA, YouTube and other video-sharing sites should be precluded from finding safety under the DMCA because they fail to satisfy at least one of the prongs included within the safe harbor provision. Furthermore, because the DMCA codifies much of the common law elements of direct,<sup>98</sup> contributory,<sup>99</sup> and vicarious liability,<sup>100</sup> the safe harbor offers little protection to service providers already found liable for infringement. As one commentator stated, not only did “Congress deliberately [leave] the law—with all of its ambiguities—unchanged,”<sup>101</sup> but the “assurance of nonliability applies largely in situations where ISPs

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92. See Ethan Smith, *MySpace Deploys System to Guard Copyright Works*, WALL ST. J., Oct. 31, 2006, at B2.

93. 17 U.S.C. § 512(c)(1)(B).

94. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001). (“Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.”).

95. See Holahan, *supra* note 12.

96. News Corporation acquired MySpace for \$580 million. See Chris Gaither & Sallie Hofmeister, *News Corp. to Acquire MySpace; Seeking Web Ad Dollars, the Media Giant Agrees to Buy the Parent of the Social-Networking Site*, L.A. TIMES, July 19, 2005, at A1.

97. See Smith, *supra* note 92. See also Press Release, CBS and YouTube Strike Strategic Content and Advertising Partnership (Oct. 9, 2006), available at [http://www.youtube.com/press\\_room\\_entry?entry=iXG7e1g-BWl](http://www.youtube.com/press_room_entry?entry=iXG7e1g-BWl). Finally, in May 2007, MySpace announced the launch of its video-recognition tool. See Alex Woodson, *MySpace ‘Down’ with Copyright Tool*, HOLLYWOOD REPORTER.COM, May 14, 2007, [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=1003584525](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1003584525).

98. See discussion *infra* Part III.A.

99. See discussion *infra* Part III.B.1.

100. See discussion *infra* Part III.B.2.

101. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1837 (2000).

face no liability in the first place.”<sup>102</sup> Unless courts develop one standard for indirect liability and another for DMCA protection, as another commentator argues must be done,<sup>103</sup> once the service provider is found liable for copyright infringement, the DMCA will not provide any further protection for that infringer. Therefore, unless Congress changes the law to adapt to the latest trend in technological development, courts must look to the common law elements of copyright liability to determine whether such sites are liable for copyright infringement.

### III. CASE LAW PRECEDENT: ARE VIDEO-SHARING WEB SITES THE NEXT TO FALL?

If the service provider fails to find refuge under the DMCA’s safe harbor provisions, this does not necessarily mean that it is automatically liable for copyright infringement.<sup>104</sup> Copyright owners have three claims under which they may choose to find video-sharing sites liable: direct, vicarious, and contributory liability. On the other hand, all defenses, including copyright estoppel,<sup>105</sup> fair use,<sup>106</sup> and the “Sony-Betamax” defense,<sup>107</sup> are still available to the service provider.<sup>108</sup>

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102. *Id.* at 1883 (stating that “risk aversion” is the reason why ISPs would even “undergo the expense of complying with the DMCA’s statutory requirements” to protect against liability that does not exist in the first place).

103. See Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1007–08 (2000) (“[Arguing] that actual control must be read into 17 U.S.C. 512(c)(1)(B) in order to reconcile Title II [of the DMCA] with common law vicarious liability and to preserve the structural integrity of Title II.”).

104. See 17 U.S.C. § 512(l) (2006) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.”); see also *CoStar Group v. Loopnet*, 373 F.3d 544, 552 (4th Cir. 2004) (“[A]n ISP is still entitled to all other arguments under the law—whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the Copyright Act.”).

105. Copyright estoppel contains four elements:

- (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury.

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

106. Fair use is an affirmative defense that is available to defendants that have been found liable for infringement. The use of copyrighted material “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research,” is not copyright infringement. Courts determine fair use depending upon the facts of each case, and consider four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2006). See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), for the Supreme Court’s analysis of the Fair Use defense.

In March 2006, in an attempt to ease the tension between copyright liability and copyright protection, YouTube implemented a ten-minute time limit for uploaded videos. See *supra* note 70

### A. DIRECT LIABILITY AND HOW IT PERTAINS TO VIDEO-SHARING WEB SITES

The Copyright Act states that “[a]nyone who violates any of the exclusive rights of the copyright owner” is liable for copyright infringement.<sup>109</sup> To establish direct copyright infringement, the plaintiff must prove that he or she is the owner of “a valid copyright” and that the service provider has violated “one of the exclusive rights granted under copyright.”<sup>110</sup> Furthermore, “[t]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the [service provider] himself trespassed on the exclusive domain of the copyright owner.”<sup>111</sup> Most service providers and peer-to-peer networks have not been held liable for direct infringement. This is because they were not themselves uploading, “swapping,” or making copies of material that was shared, and were acting merely as passive conduits, facilitating infringement or transmitting infringing materials.<sup>112</sup> Although video-sharing sites only host the videos and may not actively participate in posting the videos, copyrighted content is publicly displayed throughout the sites.<sup>113</sup> Undeniably, displaying videos containing both copyrighted and non-copyrighted material for the purpose of viewing, commenting on, and

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and accompanying text. The point of limiting the time for uploaded videos is arguably an attempt to find refuge within the fair use defense. However, since entire episodes may be uploaded by one individual user as long as each clip satisfies the 10-minute limit, YouTube’s actions are not likely to ease any such tensions.

107. See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 442 (1984) (announcing that if the product is capable of “substantial noninfringing uses,” the owner of such product may not be held contributorily liable). However, courts have declined to apply the *Sony* “staple article of commerce doctrine,” to those who “exercise ongoing control over” their service. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 916 (N.D. Cal. 2000) (“In *Sony*, the defendant’s participation did not extend past manufacturing and selling the VCRs.”).

108. See 17 U.S.C. § 512(l).

109. 17 U.S.C. § 501(a). See *supra* note 17 and accompanying text, for a list of the exclusive rights.

110. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 838 (C.D. Cal. 2006).

111. *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). See also *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

112. See *In re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (holding the peer-to-peer network liable only for the indirect infringement due to the direct infringement of its users); *Costar*, 373 F.3d at 550 (“If the Copyright Act does not hold the owner of the copying machine liable as a direct infringer . . . , the ISP should not be found liable as a direct infringer when its facility is used by a subscriber to violate a copyright without intervening conduct of the ISP.”); *Religious Tech. Center*, 907 F. Supp. at 1372 (“It would be especially inappropriate to hold liable a service that acts more like a conduit, in other words, one that does not itself keep an archive of files for more than a short duration.”).

113. For example, on Nov. 17, 2006, a search for ABC’s “Grey’s Anatomy” on YouTube.com produced 2,195 results. Many were various clips from the television program, while others were clips spliced together in music videos, which also contained copyrighted songs. See YouTube, [http://www.youtube.com/results?search\\_query=Grey%27s+Anatomy&search=Search](http://www.youtube.com/results?search_query=Grey%27s+Anatomy&search=Search) (last visited Nov. 17, 2006). Astonishingly, the same search conducted approximately one year later resulted in almost 28,000 clips. See YouTube, [http://www.youtube.com/results?search\\_query=Grey%27s+Anatomy&search=Search](http://www.youtube.com/results?search_query=Grey%27s+Anatomy&search=Search) (last visited Nov. 6, 2007).

distributing or sharing, is the Web sites' purpose; and without the ability to display the videos, the sites would be entirely worthless. The problem is that publicly displaying copyrighted works is a violation of a copyright owner's exclusive right under § 106(5) of the Copyright Act.<sup>114</sup>

Although service providers need only violate one exclusive right to be found liable for direct infringement, another exclusive right is also violated when sites create indexes using thumbnail versions of the videos. Likewise, in a case pending litigation, which involves a similar, but lesser-known video-sharing site,<sup>115</sup> the copyright owners have alleged that the site is liable for direct infringement "because the Web site changed the formats of the submitted videos."<sup>116</sup> In addition to changing the formats on MySpace, YouTube, and various other sites when indexes are implemented, the service providers also create categories for the videos, including "Top Rated" and "Most Viewed," and divide up the videos according to whether they are considered entertainment, sports, comedy, etc.<sup>117</sup> Several copyrighted videos then appear within each of these categories.<sup>118</sup> Courts could easily determine that this is active participation or intervening conduct on behalf of the service provider, and because of this, the sites do not act merely as passive conduits.<sup>119</sup> Accordingly, service providers may be deemed to be reproducing the copyrighted work in a copy,<sup>120</sup> violating another exclusive right under § 106(1) of the Copyright Act.<sup>121</sup> Consequently, as similar copyright owners have already demonstrated,<sup>122</sup> as

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114. The Copyright Act states that the copyright owner has the exclusive right "to display the copyrighted work publicly." 17 U.S.C. § 106(5).

115. *Io Group Inc. v. Veoh Networks Inc.*, No. 5:06-CV-03926 (N.D. Cal. filed June 23, 2006). See also Delaney, *infra* note 179.

116. Amanda Bronstad, *Video Web Sites Download a Defense*, NAT'L. L.J., Nov. 2, 2006, <http://www.law.com/jsp/article.jsp?id=1162375515690>. See also *Perfect 10*, 416 F. Supp. 2d 828 (granting a preliminary injunction because the court found that Google's creation and display of thumbnail versions of Perfect 10's photos would likely be determined a direct infringement).

117. See <http://www.youtube.com/browse?s=rf> for a list of the categories.

118. For example, see <http://www.youtube.com/watch?v=GC14VKUI4lg>, for a clip of "The Oprah Winfrey Show," which is included in the "comedy" category. Oprah is owned by Harpo Productions. See Terms and Conditions—Harpo, [http://www2.oprah.com/about/aboutharpo/about\\_harpo\\_terms.jhtml#terms](http://www2.oprah.com/about/aboutharpo/about_harpo_terms.jhtml#terms) (last visited Nov. 25, 2006), for Harpo's copyright policy.

119. See *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (holding that a Web site that is only involved in storing and transmitting "data in the establishment and maintenance of an Internet facility" and is "indifferent to the content" it transmits, functions more like a copy machine, and is therefore not directly liable for the infringing activity of its users (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003)).

120. See *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 828 (C.D. Cal 2006).

121. The Copyright Act states that the copyright owner has the exclusive right "to reproduce the copyrighted work in copies . . ." 17 U.S.C. § 106(1).

122. See *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997) (holding Web site operator directly liable for distributing and displaying copyrighted photographs); see also *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 552 (N.D. Tex. 1997) (holding a Web site directly liable for posting copyrighted photographs because the Web site "did not function as a mere provider of access" to the Internet).



long as the court does not determine that such uses are fair,<sup>123</sup> proving that the video-sharing Web sites are directly liable for copyright infringement is not a difficult task.

### B. INDIRECT LIABILITY AND HOW IT PERTAINS TO VIDEO-SHARING WEB SITES

Indirect liability comes in two forms:<sup>124</sup> contributory and vicarious infringement. In 2005, the Supreme Court stated:

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.<sup>125</sup>

Although YouTube and others may likely be held liable for their own direct infringement, their users are also directly liable for the infringement they cause by copying, uploading, and distributing copyrighted video to other users or Web sites.<sup>126</sup> Although copyright owners have sought user information from service providers in the past,<sup>127</sup> and in fact, YouTube recently “promptly handed over” user information to Paramount Pictures,<sup>128</sup> attacking the service providers and claiming indirect infringement is more practicable and time- and cost-effective.<sup>129</sup>

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123. See *supra* note 106, for a description of the fair use defense.

124. It may come in three forms, depending upon one’s interpretation of the Court’s use of the “inducement theory.” See FRED VON LOHMANN, IAAL: WHAT PEER-TO-PEER DEVELOPERS NEED TO KNOW ABOUT COPYRIGHT LAW 4 n. 1 (Jan. 2006), [https://www.eff.org/IP/P2P/p2p\\_copyright\\_wp\\_v5.pdf](https://www.eff.org/IP/P2P/p2p_copyright_wp_v5.pdf) (explaining that until courts clarify whether traditional contributory infringement has been replaced or whether it has just been supplemented, service providers should “avoid any conduct that would give rise to liability under *either*” theory).

125. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005) (holding a peer-to-peer network liable for infringement because it distributed the device “with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement”).

126. See 17 U.S.C. § 106(1) & (3).

127. See *Recording Industry Ass’n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (holding that, under the DMCA provision 512(h), a subpoena to obtain user information cannot be issued to a service provider acting merely as a passive conduit).

128. Ben Charny, *YouTube Shared User Data with Studio Lawyers: Video Site Helped Paramount Pictures Track Down and Sue Filmmaker*, MARKETWATCH, Oct. 20, 2006, <http://www.marketwatch.com/news/story/youtube-turned-over-user-data/story.aspx?guid=%7B52DAE3DD%2D70D2%2D4206%2D80A7%2DA809363944E9%7D>.

129. See *In re: Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) (“[C]hasing individual consumers is time consuming and is a teaspoon solution to an ocean problem.”) (quoting Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002)); see also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 STAN. L. REV. 1345, 1376–78 (2004).

### 1. Contributory Copyright Infringement

The traditional definition of contributory infringement provides that when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another,” she is liable for copyright infringement.<sup>130</sup> In the most recent Supreme Court case involving copyright infringement on a peer-to-peer network, however, the Court stated that one is a contributory infringer when she “intentionally induce[s] or encourage[s] direct infringement.”<sup>131</sup> Therefore, before a court will find a service provider liable for contributory infringement, there are two elements that must be satisfied: (a) knowledge, which includes both actual and constructive knowledge,<sup>132</sup> and (b) acts of inducement of, encouragement of, or a material contribution to, the direct infringement of others. Since this note has already argued that YouTube and other video-sharing services should be found to have the requisite knowledge of user infringement,<sup>133</sup> the only question remaining is whether the sites have induced, encouraged or materially contributed to the direct infringement of others.

In the *Grokster* opinion, in which the Court held a peer-to-peer network liable for indirect infringement, the Court found that the network had developed kits and advertisements specifically designed to attract Napster users looking for an alternative after record companies filed suit against Napster.<sup>134</sup> The Court also found an “internal email from a company executive” stating that once Napster shut down or started charging fees, he wanted Grokster to be the place to which users would flock next.<sup>135</sup> For these reasons, the Court found that, regardless of whether the device was capable of substantial non-infringing uses, because the network’s intent and “principal object was use of their software to download copyrighted

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

131. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). In so defining contributory liability, the Court cited *Gershwin Publ’g*, 443 F.2d at 1162. Therefore, whether the traditional definition has been replaced or just supplemented is an issue that will need to be addressed by the Court in subsequent cases. For purposes of this note, I am combining the two within a single analysis of contributory infringement. However, in its complaint against YouTube, see Helft and Fabrikant, *infra* note 177 and accompanying text, Viacom chose to treat inducement and contributory liability as distinct claims. See Complaint for Declaratory and Injunctive Relief and Damages at 21, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 1:07-CV-02103 (S.D.N.Y. 2007). UMG did the same in its complaint against MySpace. See Complaint for Direct, Contributory, and Vicarious Copyright Infringement, for Inducement of Copyright Infringement, and for Violations of California Business and Professions Code § 17200, *UMG Recordings, Inc. v. MySpace, Inc.*, No. CV 06-07361 (C.D. Cal. 2007).

132. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

133. See discussion *supra* Part II.B.2.

134. *Grokster*, 545 U.S. at 924–25.

135. *Id.*

works,”<sup>136</sup> the evidence presented was enough to conclude that the network was liable for contributory or inducement liability.<sup>137</sup>

Video-sharing sites would contend that, by responding to infringement notices and expeditiously removing infringing content, they are effectively cooperating with copyright owners and actually discouraging infringement. However, because *Grokster* had never developed tools to filter out infringing material and also made money by selling advertising space to accompany the infringing activity, these actions—or lack thereof—added fuel to the Court’s conclusion that *Grokster*’s objectives were unlawful.<sup>138</sup> Accordingly, in a case against YouTube or MySpace, these same or similar arguments may be used against them to prove an unlawful intent. Nevertheless, because YouTube and other service providers have satisfied the DMCA requirements for taking down the infringing material once they receive notice of infringement, courts may not find YouTube liable based on the inducement theory.

Other courts, however, have given broad meaning to the term “material contribution” and have found that if a service provider stores infringing copies of works on a server, and provides access to those copies to other users, it may indicate that the service provider materially contributed to the infringement.<sup>139</sup> Therefore, if courts analyze contributory liability based on traditional notions, instead of focusing on the *Grokster* theory, YouTube and other sites may be prime targets for contributory liability.

## 2. Vicarious Copyright Infringement

A service provider may also be held liable for vicarious infringement when there is direct profit from the infringement and the service provider “has a right and ability to supervise the direct infringer, even if the [service provider] initially lacks knowledge of the infringement.”<sup>140</sup> These elements have been codified by the DMCA,<sup>141</sup> and therefore, for purposes of this argument, since the analysis is nearly identical, it is not necessary to analyze vicarious liability further.

## 3. Conclusion

Copyright holders have enough evidence to support allegations of direct or indirect copyright infringement against most video-sharing sites; and

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136. *Id.* at 926.

137. *Id.* at 941. The court emphasized the network’s “purposeful, culpable expression and conduct” in reaching its conclusion. *Id.* at 937.

138. *Id.* at 939–40.

139. See *Ellison*, 357 F.3d at 1078 (finding that a service provider materially contributed to infringement when it stored infringing copies of the copyright owner’s work on a server and then provided user access to the copies).

140. *Grokster*, 545 U.S. at 931 n.9.

141. See discussion *supra* Part II.B.3.

contrary to what most commentators have been saying,<sup>142</sup> the DMCA provides only a thin veil of protection. Threatening such sites with suit in order to apply pressure on them to cooperate further with copyright owners is essential to maintaining control over content. Furthermore, it is crucial for obtaining the benefit of copyright protection.<sup>143</sup> Likewise, suing smaller sites that are engaging in rampant copyright infringement, in order to establish precedent, is also essential and necessary to “promote the Progress of Science and useful Arts.”<sup>144</sup> Arguably, however, forcing sites like YouTube or MySpace to shut down or become a fee-based service à la Napster—a service that has been struggling to stay afloat<sup>145</sup>—will only anger consumers, decrease viewership, and stifle digital innovation. Consequently, although the entertainment industry’s response to the new digital phenomenon may be frenzied and “shockingly slow,”<sup>146</sup> there are indications that the industry is finally catching on. And this time, it may not be too late.<sup>147</sup>

#### **IV. FRIEND OR FOE: THE ENTERTAINMENT INDUSTRY’S SCHIZOPHRENIC RESPONSE TO THE DIGITAL PHENOMENON**

##### **A. THE FRENZIED NETWORK RESPONSES**

Over the latter part of 2006, the entertainment industry’s reaction to the recent explosion and popularity of video-sharing sites has been increasingly frenzied.<sup>148</sup> As this section demonstrates, there have been some positive reactions, yet most indicate that the industry is both ambivalent and inconsistent in its decision-making pertaining to whether to take action

142. *See, e.g.*, Stone, *supra* note 19 (“[YouTube’s] ‘beg for forgiveness’ approach—taking copyrighted content off its site only when faced with a complaint—probably places them comfortably within the safe harbor provisions of 1998’s Digital Millennium Copyright Act.”).

143. Arguably, without the threat of suit or the ability to hold the sites responsible for blatant and on-going copyright infringement, there will be no incentive for the sites to make deals and share revenue. Furthermore, without a finding of liability, content owners will likely no longer be able to maintain control over their content in the digital realm. While users may find excitement in this outcome, the incentive to creators, which is provided by copyright law, would essentially be destroyed. Presumably, this is an outcome most copyright owners would clearly like to avoid.

144. U.S. CONST. art. I, § 8, cl. 8.

145. *See* Geist, *supra* note 19, at C3.

146. McKenna, *supra* note 2.

147. *See infra* note 192 and accompanying text.

148. *Compare, e.g.*, Steve Johnson, *YouTube’s Dream Could Get Clipped*, CHI. TRIB., Sept. 22, 2006, at C1 (“When you take into account . . . Comedy Central’s wink-and-a-nod at the proliferation of ‘Daily Show’ and ‘Colbert Report’ clips that users upload, . . . copyright holders seem to be deciding that the promotional value of YouTube . . . is valuable.”), *with* Noam Cohen, *YouTube is Purging Copyrighted Clips*, N.Y. TIMES, Oct. 30, 2006, at C8 (“The site late last week began purging copyrighted material from Comedy Central, including clips from YouTube stalwarts like ‘The Daily Show with Jon Stewart,’ ‘The Colbert Report’ and ‘South Park’ . . . [which] was a ‘result of third-party notification by Comedy Central.’”).

against, or to work with, such sites. Some entertainment conglomerates perceive the sites' blatant and severe copyright infringement as a beneficial promotional tool, embracing and/or partnering up with the sites, while others argue that the service providers are reaping benefits they do not deserve to reap.<sup>149</sup>

In February 2006, after NBC discovered that a user uploaded its now infamous *Saturday Night Live* skit entitled "Chronicles of Narnia,"<sup>150</sup> onto YouTube's site, which users then viewed approximately five million times, the network sent YouTube a notice, allegedly asking the site to "remove about 500 clips of NBC material from its site or face legal action."<sup>151</sup> NBC waited until after the video had hit its "peak download period" before asking that the video be taken off the site,<sup>152</sup> evidently recognizing the promotional value in allowing the clip to be seen by millions of viewers. Consequently, while NBC continues to monitor YouTube's site in search of user-uploaded copyrighted videos,<sup>153</sup> in June 2006, the network decided to partner up with YouTube.<sup>154</sup> Six months later, NBC posted a different *Saturday Night Live* skit after presumably realizing that, by allowing viewers to watch a skit from a program that had seemingly lost its spark, new interest in the program could be generated and, consequently, a new spark ignited.<sup>155</sup> However, it remains to be seen how long this partnership will last since NBC Universal recently created National Broadband Company (NBBC), which will distribute programming to internet sites

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149. Compare, e.g., Greg Johnson & Lance Pugmire, *NHL, YouTube Reach Video Agreement*, L.A. TIMES, Nov. 15, 2006, at D3 ("The NHL clearly understands the value of the community factor on YouTube. This is designed to help ... connect with their fans.") (internal quotation omitted), with Ken Fisher, *YouTube and the Copyright Cops: Safe... for now?*, ARSTECHNICA, July 16, 2006, <http://arstechnica.com/news.ars/post/20060716-7273.html> ("[W]hy does the BBC get hit with letters, licensing demands, and potential lawsuits when they use unauthorized material, yet YouTube is packed to the gills with it?").

150. The skit features Andy Samberg and Chris Parnell rapping and is now available for free viewing at NBC 24/7 Video, [http://www.nbc.com/Video/videos/snl\\_1432\\_narnia.shtml](http://www.nbc.com/Video/videos/snl_1432_narnia.shtml) (last visited Sept. 21, 2006) and can also be downloaded from Apple iTunes. See *Live, from iTunes, it's 'Saturday Night'*, CNNMONEY, Jan. 10, 2006, [http://money.cnn.com/2006/01/10/technology/apple\\_snl/index.htm](http://money.cnn.com/2006/01/10/technology/apple_snl/index.htm).

151. John Biggs, *Media Talk; A Video Clip Goes Viral, and a TV Network Wants to Control It*, N.Y. TIMES, Feb. 20, 2006, at C5. "Chronicles of Narnia" is also known as "Lazy Sunday."

152. Peter Pollack, *NBC Orders Removal of Video from Download Site*, ARSTECHNICA, Feb. 17, 2006, <http://arstechnica.com/news.ars/post/20060217-6213.html>.

153. See Stone, *supra* note 19 (describing how NBC would probably have to ask YouTube to again remove the SNL clip from the site when a user uploaded the video after YouTube had removed it).

154. See Press Release, YouTube, NBC and YouTube Announce Strategic Partnership (June 27, 2006), available at [http://www.youtube.com/press\\_room\\_entry?entry=c0g5-NsDdJQ](http://www.youtube.com/press_room_entry?entry=c0g5-NsDdJQ) ("[A] . . . partnership . . . will combine NBC's . . . programming with YouTube's vast audience . . . to promote NBC's Fall program lineup and other preferred shows over the next year.").

155. See Pete Cashmore, *YouTube Gives NBC a Hit in a Box*, MASHABLE!, Dec. 19, 2006, <http://mashable.com/2006/12/19/youtube-gives-nbc-a-hit-in-a-box/> ("Not only have the SNL clips dominated YouTube's Most Viewed and Top Rated clips this week, but they've also been the most linked-to videos . . .").

“including CNET, Forbes, and the About.com unit of The New York Times Company.”<sup>156</sup>

Like NBC, CBS has also demonstrated its apparent uncertainty pertaining to the video-sharing site’s value. Early in 2006, CBS asked YouTube to remove a video of an autistic teen who, in four minutes, scored twenty points during his high school basketball team’s last game of the year.<sup>157</sup> This video, which appeared on CBSNews.com, was also uploaded onto YouTube, and CBS soon realized that bloggers were directing more viewers to the video on YouTube than to its actual source. As a result, the video soon “became the most viewed video of the week” on YouTube.<sup>158</sup> Eventually, CBS also learned its lesson, and in October 2006, the network and YouTube struck a deal.<sup>159</sup> Consequently, a month later, YouTube announced that CBS’s content was among the “most viewed videos on YouTube,” much to the delight of YouTube and CBS executives.<sup>160</sup>

ABC, however, has chosen a different route. Upon learning that a racy scene from an unaired clip of ABC’s hit show “Desperate Housewives” had found its way onto YouTube without permission, ABC demanded that YouTube remove the clip.<sup>161</sup> Consequently, although ABC recognized the site’s value in terms of attracting viewers, instead of partnering up with YouTube, the network dedicated its resources to creating its own site upon which viewers can watch recently aired episodes of some of the most popular ABC programs.<sup>162</sup> Although this is certainly a viable option, ABC may have disregarded YouTube’s value a little too quickly.<sup>163</sup>

156. Saul Hansell, *NBC and Its Stations Venture Into Online Video Market*, N.Y. TIMES, Sept. 13, 2006, at C2. Interestingly, over a year later, “NBC pulled its channel off of YouTube” in anticipation of the launch of a new online video service called Hulu, which is set to offer approximately “90 TV shows” and “10 feature films” from NBC, Sony, MGM, and News Corp. Kenneth Li, *Hulu adds Sony, MGM, launches test*, REUTERS, Oct. 29, 2007, <http://www.reuters.com/article/email/idUSN2854415820071029>.

157. See Brian Montopoli, *The Jason McElwain Story Comes to CBS News—And YouTube*, CBS NEWS, Feb. 27, 2006, <http://www.cbsnews.com/blogs/2006/02/27/publiceye/entry1350516.shtml>.

158. *Id.* (“CBS News, after all, would love to see that million people head to its site, not least because increased traffic means increased advertising revenue.”).

159. See Press Release, YouTube, CBS and YouTube Strike Strategic Content and Advertising Partnership (Oct. 9, 2006), *available at* [http://www.youtube.com/press\\_room\\_entry?entry=iXG7e1g-BWI](http://www.youtube.com/press_room_entry?entry=iXG7e1g-BWI).

160. Press Release, YouTube, After One Month, CBS Content Among Most Viewed Videos on YouTube (Nov. 21, 2006), *available at* [http://www.youtube.com/press\\_room\\_entry?entry=oJpEXVevcKg](http://www.youtube.com/press_room_entry?entry=oJpEXVevcKg) (“Above all the other good news, what’s most exciting here is the extent to which CBS is learning about its audience as never before,” said Quincy Smith, President, CBS Interactive.”).

161. See Mike Shields, *YouTube Streams Desperate Sex Scene*, MEDIAWEEK, Sept. 4, 2006, [http://www.mediaweek.com/mw/search/article\\_display.jsp?vnu\\_content\\_id=1003086573](http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1003086573).

162. See Nate Anderson, *Disney-ABC: “We understand piracy now as a business model”*, ARSTECHNICA, Oct. 10, 2006, <http://arstechnica.com/news.ars/post/20061010-7946.html> (“[T]he goal becomes offering a more compelling product than file-swapping networks can provide, rather than [sic] attempting (for instance) to sue the users who like your content.”).

163. See discussion *infra* Part V.A.

Finally, Comedy Central sent YouTube a notice to remove “Colbert Report” and “The Daily Show with John Stewart” clips, after months of Comedy Central’s seemingly implicit consent to the widespread dissemination of such clips via YouTube and other video-sharing sites.<sup>164</sup> A week later, however, the clips found their way back onto the site, which made commentators suspect that a potential deal was on the horizon between Viacom—under whose corporate umbrella Comedy Central exists—and YouTube.<sup>165</sup> Besides Viacom’s subsequent filing of a lawsuit, however, which is discussed in the next section, the networks have yet to take further action against YouTube. This is arguably due to their uncertainty pertaining to whether YouTube’s promotional value exceeds the networks’ potential revenue loss, or from their reluctance to take action until the law is more firmly developed.

### B. INTRODUCING: THE LAWSUITS

For the majority of 2006, YouTube had been running smoothly, allowing users to upload copyrighted video, while maintaining that the DMCA “safe harbor” protected the site from liability.<sup>166</sup> On July 14, 2006, however, YouTube received its first blow when Robert Tur filed suit in the United States District Court, Central District of California.<sup>167</sup> Tur, owner and operator of Los Angeles News Service and copyright owner of the famous Reginald Denny beating video and several others,<sup>168</sup> claimed that he was entitled to “\$150,000 for each work infringed upon and a court order enjoining YouTube from allowing his work [to] be posted on the Web site.”<sup>169</sup> While YouTube believes Tur’s claim is “without merit,” given the

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164. See *YouTube Takes Down Comedy Central Clips Based on DMCA Claims*, NEWSLOUD, Oct. 27, 2006, <http://www.newsclooud.com/read/75528>, for an example of the notice that YouTube sends to users who upload allegedly infringing material after it receives a takedown notice from the copyright owner, which is a requirement of the DMCA.

165. See Nate Anderson, *Comedy Central Clips Back on YouTube*, ARSTECHNICA, Nov. 1, 2006, <http://arstechnica.com/news.ars/post/20061101-8126.html>.

166. See Simmons, *supra* note 47.

167. See Bryant, *supra* note 54. As of August 2007, Tur’s lawsuit is being dropped and combined in a potential class action suit against YouTube, which is pending in the United States District Court for the Southern District of New York. See *YouTube Class Action*, <http://www.youtubeaction.com/> (last visited Aug. 14, 2007). The growing list of plaintiffs include the National Music Publisher’s Association, The Football Association Premier League, and independent music publisher, Bourne Co. See Ethan Smith & Kevin J. Delaney, *Music Publishers Join YouTube Copyright Suit*, WALL ST. J., Aug. 7, 2007, at A2.

168. During the 1992 L.A. riots, Reginald Denny, a white man, was pulled out of his truck and almost beaten to death by black rioters after the police officers who attacked Rodney King were acquitted. See Timothy Egan, *AFTER THE RIOTS; Scorned, Los Angeles Police Find Less Pride in the Badge*, N.Y. TIMES, May 11, 1992, at A1. Tur also filmed the O.J. Simpson’s slow-speed police chase in 1994. See Simmons, *supra* note 47.

169. Simmons, *supra* note 47. See also Bryant, *supra* note 54, for an analysis of Tur’s claims, a response from Robert Tur, and a copy of Tur’s original complaint.

recent decisions that have gone against similar types of services, the court may not agree.<sup>170</sup>

In addition to Tur's lawsuit, Universal Music Group's Chief Executive received much attention after he threatened suit against both MySpace and YouTube, allegedly stating that the sites owe Universal "tens of millions of dollars" for allowing copyrighted material to appear on the site.<sup>171</sup> However, soon after these remarks were made, Universal decided to partner up with YouTube,<sup>172</sup> and about a week later, filed suit against Bolt.com<sup>173</sup> and Grouper.com,<sup>174</sup> two smaller, lesser-known video-sharing sites.<sup>175</sup> Thereafter, the threats against MySpace became a reality when, on November 17, 2006, Universal filed suit against the social-networking site.<sup>176</sup>

170. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In Re: Amster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

171. Charles Duhigg, *California and the West; Music Chief Rails at Websites; Head of Universal Says Social Spots Such as YouTube and MySpace help Violate Copyrights*, L.A. TIMES, Sept. 14, 2006, at C2 (internal quotation omitted).

172. See Sorkin & Peters, *infra* note 184.

173. Bolt.com has since been bought by GoFish.com. Joshua Chaffin, *Rights Success for Universal as Bolt Settles*, FIN. TIMES, Mar. 9, 2007, <http://www.ft.com/cms/s/2/8575f190-cdc-d-11db-839d-000b5df10621.html>. In March 2007, a settlement agreement allegedly required Bolt to pay Universal a "multimillion-dollar share of the proceeds of Bolt's recent sale to . . . GoFish, as damages for past copyright infringement." *Id.*

174. In August 2006, Sony Pictures Entertainment purchased Grouper for \$65 million. Jim Benson, *Grouper Drops User-Generated Video; Rebranded Sony company to become streaming Web network*, BROADCASTING & CABLE, July 16, 2007, at 3. A year later, the site dropped its user-generated content and relaunched as Crackle.com. Crackle, <http://crackle.com/play/Flash8.aspx> (last visited Nov. 9, 2007).

175. See Dawn C. Chmielewski, *Universal Sues Video Sharing Websites; The record label's move against Grouper and Bolt opens a new front in copyright litigation*, L.A. TIMES, Oct. 18, 2006, at C1. These suits could set the precedent regarding whether such sites are, in fact, protected under the DMCA's safe harbor provision. See Patrick Goldstein, *The People's Republic of YouTube*, L.A. TIMES ONLINE, Oct. 17, 2006, <http://www.latimes.com/entertainment/news/cl-et-goldstein17oct17,0,171750.print.story?coll=la-home-entertainment>. Interestingly, a few days after Google acquired YouTube, see La Monica, *supra* note 12, and a few days before Universal filed suit, Mark Cuban, see Mark Cuban - Biography, [http://www.nba.com/mavericks/news/cuban\\_bio000329.html](http://www.nba.com/mavericks/news/cuban_bio000329.html), predicted that the big entertainment companies would implement this exact strategy, see Mark Cuban, *I Was Wrong*, BLOG MAVERICK, THE MARK CUBAN WEBLOG, Oct. 11, 2006, <http://www.blogmaverick.com/2006/10/11/i-was-wrong/> ("Rather than suing Gootube, the media companies will first sue several of the imitators and competitors that have no money whatsoever. They wont [sic] sue those companies to get money, they will sue a bunch of those companies to build precedent."). Cuban is also considering buying Tur's Los Angeles News Service. See Greg Sandoval, *Mark Cuban Courts YouTube Foe*, N.Y. TIMES ONLINE, Nov. 15, 2006, [http://www.nytimes.com/cnet/CNET\\_2100-1030\\_3-6135703.html?ex=1164258000&en=1e0ba4d988c315cc&ei=5070&emc=etal](http://www.nytimes.com/cnet/CNET_2100-1030_3-6135703.html?ex=1164258000&en=1e0ba4d988c315cc&ei=5070&emc=etal).

176. See, e.g., Dawn C. Chmielewski, *MySpace is Sued by Universal Music; The Record Label Accuses the Social Networking Site of Widespread Piracy of Songs and Videos. The News Corp. Unit Calls the Lawsuit Unnecessary*, L.A. TIMES, Nov. 18, 2006, at C1 ("[L]awyers say Universal has no choice: It can't afford to have some sites distributing for free videos that others pay to license. But the issue also complicates business for Universal executives who have sought to



Finally, after several months of negotiations failed and after much media speculation about an impending deal, in early 2007 Viacom filed suit against YouTube for copyright violations.<sup>177</sup> In this suit, Viacom is “seeking more than \$1 billion in damages and an injunction prohibiting Google and YouTube from committing further infringement.”<sup>178</sup>

Unfortunately, if these video-sharing sites continue to allow copyrighted work to appear without taking further action to prevent such proliferation, these claims are bound to continue until the video sharing sites develop more intelligent business plans.<sup>179</sup> Fortunately, however, there are other options that could prove to be mutually beneficial, and both the sites and some industry giants are finally figuring this out.

### C. ISSUES IN THE INTERIM

Aside from the network deals, many entertainment conglomerates have chosen to take advantage of YouTube’s popularity, while others have engaged various file sharing sites to display and/or distribute their videos.<sup>180</sup> In September, Warner Music Group (WGM), for example, negotiated a partnership deal with YouTube, making WGM “the first music company to harness YouTube’s leading video entertainment service to commercially distribute its music video catalog.”<sup>181</sup> However, this partnership was formed after YouTube developed plans to “[roll] out technology designed to automatically spot copyrighted material that users upload without the permission of media companies.”<sup>182</sup> This system “is an ambitious effort to

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embrace social networking as a marketing tool.”); Jeff Leeds, *Universal Music Sues MySpace for Copyright Infringement*, N.Y. TIMES, Nov. 18, 2006, at C3. Interestingly, this move comes after MySpace implemented a system to identify and filter out copyrighted material. See Smith, *supra* note 92 (“This system is supposed to filter out unauthorized content and identify licensed content in order to compensate copyright owners for its use. MySpace is initially testing its service only on Universal content.”).

177. Miguel Helft and Geraldine Fabrikant, *Viacom Sues Google Over Video Clips on Its Sharing Web Site*, N.Y. TIMES, Mar. 14, 2007, at C1.

178. *Id.*

179. In fact, in June, 2006 “[a]dult entertainment company Io Group Inc. . . . filed a lawsuit against Veoh Networks Inc., an online video-sharing service, in a potential important legal test of Web video companies’ liability for copyright infringement claims.” Kevin Delaney, *Veoh Faces Copyright Suit, a test of Web Video*, WALL ST. J. ONLINE, June 29, 2006, <http://online.wsj.com/article/SB115154757274993889.html>.

180. See Andrew Wallenstein, *Biz Not Sure How to Treat Upstart YouTube*, THE HOLLYWOOD REPORTER, Mar. 21, 2006, available at [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=1002199881](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1002199881) (“News Corp. isn’t the only media giant that recognizes the advertising potential of viral video. Not long after the acquisition of MySpace.com, Viacom grabbed a similar site, iFilm.com. Last week, NBC Universal acquired the female-targeted Web site iVillage, which it plans to seed with video programming as well.”).

181. See Press Release, YouTube, Warner Music Group and YouTube Announce Landmark Video Distribution and Revenue Partnership (Sept. 18, 2006), available at [http://www.youtube.com/press\\_room\\_entry?entry=vCfGHo5\\_Fb4](http://www.youtube.com/press_room_entry?entry=vCfGHo5_Fb4) (last visited Nov. 17, 2006).

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

give media companies more control over the video on the site and to address their fears that others will profit from consumers' piracy of their content."<sup>183</sup> WMG may have been the first to embrace this new technology; however, others are slowly beginning to follow suit.<sup>184</sup>

While YouTube is, ostensibly, more than willing to work with industry giants in order to develop solutions that might combat copyright infringement for the major corporations while simultaneously and strategically benefiting economically, these solutions do not remedy the entire problem. The development of filtering tools may, in the short-term, quiet some of the industry giants. However, Robert Tur and other smaller companies and creators, who make their living off of licensing and royalty payments, will not be able to participate.<sup>185</sup> This means that they will still have the extremely arduous and tedious task of policing the site and complying with the "notice" provisions under the DMCA<sup>186</sup> to make sure their work is not uploaded, viewed, and then shared with several millions of Internet users without permission or payment. Unless the sites are willing to take a firmer stance against the proliferation of copyright infringement, these tools will only solve part of the problem. Because the digital age has spawned developments in all areas, chances are, technologically savvy users will find ways to circumvent YouTube's new technology (notwithstanding the fact that this is, of course, illegal)<sup>187</sup> and find new, perhaps lesser-known, sites on which to post copyrighted material.<sup>188</sup>

The recent lawsuits filed by Universal, Viacom, and the pending class action,<sup>189</sup> as well as the rest of the industry's conflicting responses upon finding its copyrighted content spread throughout the Internet, demonstrate

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183. *Id.*

184. As of Oct. 9, "YouTube reached agreements with the Universal Music Group and Sony BMG Music Entertainment. . . ." Andrew Ross Sorkin & Jeremy W. Peters, *Google to Acquire YouTube for \$1.65 Billion*, N.Y. TIMES ONLINE, Oct. 9, 2006, <http://www.nytimes.com/2006/10/09/business/09cnd-deal.html?ref=business>. Universal, Sony and Warner Music could receive approximately \$50 million from the deals. See Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, N.Y. TIMES, Oct. 19, 2006, at C1. As of Nov. 15, the NHL reached an agreement with YouTube, making it the first agreement to be made between the site and the major sports leagues. See Johnson & Pugmire, *supra* note 149. However, other sports entities are not as willing to work with YouTube and are contemplating suit. See Rhys Blakely, *German Football Latest to Threaten YouTube*, TIMES ONLINE, Nov. 3, 2006, <http://business.timesonline.co.uk/article/0,,9071-2436255,00.html>.

185. See Delaney & Smith, *supra* note 182, at B1 (quoting YouTube's Chief Executive and stating that YouTube is only "building tools for record labels, TV networks and movie studios").

186. 17 U.S.C. 512(c)(3) (2006).

187. See DMCA § 103, 17 U.S.C. § 1201.

188. "The end of Napster didn't mean the end of file sharing. The end of Grokster didn't mean the end of file sharing. New technologies such as BitTorrent and sites like ThePirateBay.org have sidestepped around any new controls, and others will move to take their place once countermeasures are found for these." Sean Carton, *YouTube: Another Casualty in the Copyright Wars?*, EXTREME DRM, July 24, 2006, [http://www.extremedrm.com/article/YouTube+Another+Casualty+in+the+Copyright+Wars/184179\\_1.aspx](http://www.extremedrm.com/article/YouTube+Another+Casualty+in+the+Copyright+Wars/184179_1.aspx).

189. See *supra* notes 167, 171, 175, 177 and accompanying text.

the industry's lack of certainty and fruitless attempt to figure out what the law actually means and what kind of protection it actually provides. Therefore, we will undoubtedly continue to see these video-sharing Web sites going by way of the peer-to-peer networks unless they figure out how to play ball with the corporate giants.<sup>190</sup> Ultimately however, service providers and entertainment conglomerates need to realize that they must work together with, not against, one another if they want to continue to exist and prosper in the digital realm.

## V. ENTERTAINMENT INDUSTRY, MEET CONSUMER DEMAND

### A. THE BOTTOM LINE

Peer-to-peer networks such as Napster, Grokster, and Aimster were innovative ideas that failed primarily because the providers instituted faulty business models. They also failed because they built systems that were designed to induce or encourage users to infringe upon copyright owners' valid and exclusive rights while refusing to cooperate with the corporate entities that controlled their fate. Regardless of what small businesses or independent creators may think of the entertainment giants, they cannot build successful business models that are designed to break copyright law, a law that has enjoyed tremendous support for over 200 years.<sup>191</sup> As history indicates, companies that derive revenue or gain in popularity by selling a product that is not theirs to sell will fall prey to those with the power to control and/or destroy them. As long as copyrighted material continues to appear on the sites, unless video-sharing Web sites succumb to industry pressure and combine forces with the corporate powers against whom they had previously fought, these sites will likely become the next Napster, Grokster, or Aimster.

The entertainment industry, moreover, must also learn from past mistakes. As one commentator has already pointed out, once the major entertainment companies successfully shut down Napster, entities other than the record companies ended up reaping the benefits.<sup>192</sup> While the record companies won the legal battle, they lost the opportunity to profit substantially from the achievement. Therefore, instead of shutting down the sites, the entertainment industry must recognize that “[c]ompanies such as

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190. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In Re: Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

191. See discussion *supra* Part II.A.

192. “[Major media companies] battled Napster and other file sharing services into submission. . . [and] left the door wide open for the Apple iPod and iTunes service to dominate the legitimate market. It’s a business that should have belonged to the music industry, not Apple. . . . It’s as if providing music and videos to consumers is an afterthought for these guys. They don’t seem to really care how consumers buy their music, so long as they don’t steal it. Talk about a failed business model.” McKenna, *supra* note 2.

YouTube, MySpace and others have created entirely new markets where the major content providers apparently saw no value;<sup>193</sup> and the digital age has spawned technological developments and innovation over which the industry can no longer maintain complete control. Even if the industry figures out how to create Web sites using technology comparable to the video-sharing sites,<sup>194</sup> the ease and convenience of one-stop shopping is presumably more appealing than having to search each individual site for content.<sup>195</sup> For example, although ABC's actions<sup>196</sup> may prove to be a qualified success for the network, there are a few reasons why it would presumably be even more lucrative to partner up with sites such as YouTube.

First, the ABC favorites will inevitably appear on YouTube regardless of whether ABC or a user uploads the clips unless and until YouTube implements video-recognition technology. If ABC is already allowing users to view entire episodes, and YouTube implements tools to recognize copyrighted content, the network can then reap the monetary rewards every time a user views an ABC clip. Next, if users view clips that capture their interest, the ten minute time-limit that YouTube imposes on certain videos may leave them thirsty for more. Therefore, the higher quality video that ABC can provide may encourage users to visit ABC's site to view the entire episode. ABC then profits from displaying their videos on YouTube as well as their own Web site and increases their viewership and popularity among video-sharing Web site users.<sup>197</sup>

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193. McKenna, *supra* note 2. "If we had licensed Napster we could have saved ourselves billions and got a real head start in digital music," one music executive said. "But as usual the lawyers had the loudest voices." Dominic Rushe & Paul Durman, *Google helps media giants see things YouTube's way*, U.K. TIMES ONLINE, Oct. 15, 2006, <http://technology.timesonline.co.uk/article/0,,20411-2404038.html>.

194. "Even today, the media conglomerates are doing a pitiful job of getting their content into the hands of consumers. Universal Music's website, . . . , is slow and clunky." McKenna, *supra* note 2.

195. While writing this note, media giants including NBC Universal, News Corp., Viacom and possibly CBS, were preparing to announce that they were trying to put together a "new Web site that will feature some of their best-known television programming and other clips in an attempt to build a business for distributing video on the Internet to rival YouTube." Richard Siklos & Bill Carter, *Old Model Versus A Speedster*, N.Y. TIMES, Dec. 18, 2006, at C1. Commentators immediately began expressing doubts about whether the networks would get along well enough to make it work, and also about its effectiveness. *See id.*; *see also* Pete Cashmore, "Anti-YouTube" May Be Announced Next Week: Really Bad Idea, MASHABLE!, Dec. 17, 2006, <http://mashable.com/2006/12/17/anti-youtube/> ("YouTube is the media darling right now—the little startup whose founders took on the big guys and won. . . . [B]uilding a whole new site seems about as likely to succeed as trying to build your own iTunes clone."). By March 2007, News Corp. and NBC announced they had concluded a deal "to showcase their own programming across the Internet's biggest Web sites, as well as a new jointly owned Web destination." *See* Richard Siklos, *News Corp. and NBC in Web Deal*, N.Y. TIMES, Mar. 23, 2007, at C1.

196. *See supra* note 162 and accompanying text.

197. One commentator adds that "you can't expect YouTube users to be driven to your content if you're not promoting it in any way. It seems likely that while the number of viewers to CBS shows has risen, those US networks that don't promote their content have seen no difference."

As the law continues to adapt to new developments, those who wish to exercise control over their work must also adapt. Once a precedent is set and copyright owners prove one more time that working within the law is the better and more profitable idea,<sup>198</sup> those who are finding these new markets need to join forces with the entertainment industry, and the entertainment giants must refrain from blindly shutting these innovators down.

Finally, copyright laws were developed to inspire and compensate artists for their creations. Video-sharing sites that respond to these desires, such as Revver,<sup>199</sup> which pays users who upload and share videos each time another user clicks on an advertisement accompanying the video and monitors all videos uploaded, have responded to copyright law's purpose and should be commended.<sup>200</sup> However, even when a service provider claims that every video is inspected to prevent a user from uploading copyrighted content, there are bound to be those that slip through the cracks. Therefore, in order to survive, service providers must show copyright owners that they are eager and prepared to do everything in their power to combat the copyright infringement that occurs on their Web sites.

## B. THE SOLUTION

To ease the tension among copyright owners' concerns, user desires, and digital innovation, as well as to avoid potential lawsuits, there needs to be a compromise. Presumably, service providers cannot control every one of their subscribers' actions. They can, however, show copyright owners that they are taking all practicable steps to prevent against copyright infringement occurring on their sites. To do so, there are a few simple steps that should be followed. First, home pages of every video-sharing Web site should indicate in bold letters that the forum must not be used for uploading and displaying copyrighted video. Because the average consumer may not know exactly what copyright infringement laws entail, the service provider should provide some examples of infringing activity. If the service provider does not want this material listed directly on the home page, the provider should explicitly and boldly direct users to a page containing copyright information. Second, once subscribers sign up and an e-mail is sent to his or her address to confirm registration, the e-mail should clearly state the service provider's policy against copyright infringement and repeat

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Pete Cashmore, *YouTube vs.[.] TV*, MASHABLE!, Nov. 27, 2006, <http://mashable.com/2006/11/27/youtube-vs-tv/> (noting that YouTube may be stealing viewers away from television, at least in the U.K). ABC News, however, does have a deal with Yahoo! News. See *Yahoo, ABC News Extend Pact*, MEDIAWEEK, Dec. 13, 2006, [http://www.mediaweek.com/mw/search/article\\_display.jsp?vnu\\_content\\_id=1003520964](http://www.mediaweek.com/mw/search/article_display.jsp?vnu_content_id=1003520964).

198. See discussion *supra* Part III.B.3.

199. See Revver, *supra* note 5.

200. See What is Revver?, <http://one.revver.com/about/> (last visited Nov. 9, 2007); Copyright Information, <http://one.revver.com/go/copyright/> (last visited Nov. 9, 2007).

infringers. Third, before a subscriber may upload his or her video on to the site, there should be a tool for verifying ownership that also informs subscribers of the consequences of their misrepresentation. Fourth, the service provider must implement tools to identify and protect against infringing material—whether by monitoring the site or through technological devices.

Although these tools may not be able to identify every unauthorized copyrighted video or song, it would at least ease most copyright owners' concerns. If the copyright owners later discovered their video displayed on the site, they can then initiate the DMCA's notice-and-takedown procedures.<sup>201</sup> At that point, if a user should attempt to upload the video again, the filtering tool should identify the video, and prevent it from being uploaded again. Without these actions or tools, the incentive for copyright owners to cooperate with the video-sharing sites is compromised.

Finally, depending upon how much control the copyright owner wants to exert over the distributed content, each copyright owner can craft a deal that makes sense for them and meets their individualized needs. As evidenced by the CBS-YouTube deal,<sup>202</sup> the Universal-YouTube deal,<sup>203</sup> and the WMG-YouTube deal,<sup>204</sup> there are ways to satisfy consumers, video-sharing sites, and the entertainment conglomerates without resorting to a legal battle. Through partnership, cooperation, and good faith efforts, the Robert Turs, the Universals, the music publishers, the video-sharing Web sites, and the consumers may all enjoy this piece of the digital pie.

*Andrea Frey\**

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201. See 17 U.S.C. § 512(c)(3).

202. See Press Release, *supra* note 97.

203. See Sorkin & Peters, *supra* note 184.

204. See Press Release, *supra* note 181.

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