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Article

YOUTUBE OR YOULOSE: CAN YOUTUBE SURVIVE A COPYRIGHT INFRINGEMENT LAWSUIT?

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*152 I. Introduction

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

YouTube has predictably found itself at the center of much attention for possible lawsuits. These discussions intensified after Google’s acquisition of the company for stock valued at \$1.65 billion in October of 2006.⁴ The acquisition resolved one of the major issues that confronted content providers: was a company like YouTube worth suing? Without the deep pockets provided by a company like Google, copyright holders may not have had the incentive to sue either the users of YouTube or the hosting service. Damages would have been limited and obtaining injunctions against individual users posting clips would be costly with little benefit.⁵ This is primarily due to the nature of a posting service like YouTube. In the first lawsuit against YouTube, the complaint aptly described the scope of infringements as “a murky moving target.”⁶ The complaint observed that uploaded videos “are not identified by copyright owner or registration number but rather by the uploader’s idiosyncratic choice of descriptive terms to describe the content of *153 the video--tags--making it extremely impractical to identify plaintiff’s copyrighted works.”⁷

The final difficulty for those wishing to sue a video web hosting service like YouTube is the service’s strict adherence to both prevailing case law and a statutory safe harbor that was not available to the likes of Grokster, Napster, and Aimster--companies on the losing-end of infringement litigation. Although it is arguable that YouTube was built on a foundation of posted videos protected by copyright that would be deemed infringing, users also posted a significant amount of legitimate content. In its infancy, legally posted content was predominately comprised of user-created content. This concept of legitimacy has been expanded as many content providers see service providers like YouTube as an avenue for growth. In August 2006, YouTube unveiled a new advertising concept that allows content providers to utilize YouTube as both an advertising platform and a revenue stream.⁸ A portion of the advertising sponsorships associated with pages featuring copyrighted content will be shared with the copyright holder of the video, in addition to YouTube setting up “brand channels” sponsored by companies.⁹ Some of the many companies forging deals with YouTube include CBS, NBC, TMTV, Epic Records, Atlantic Records, E! Entertainment, MTV2, and Fox Searchlight.¹⁰ Music companies, like Sony BMG Entertainment, have even agreed to allow users to include copyrighted songs in their user created uploads.¹¹

These arrangements can be very lucrative for content providers, as CBS discovered about one month after signing a deal with YouTube to create a brand channel. YouTube estimated that CBS content was viewed nearly 30 million times in November of 2006 alone, but this represents only a portion of the total benefit to CBS.¹² Although the causation is questionable, the “Late

Show with David Letterman” and “The Late Late Show with Craig Ferguson” have seen increases in new broadcast viewership by 5% and 7%, respectively, since posting clips of the shows on YouTube.¹³ In fact, three of the top 25 most viewed videos for *154 November 2006 were CBS clips that were uploaded legally, further strengthening the argument for legitimacy.¹⁴

More importantly for video hosting services, an additional defense could insulate them from the fate of a now-defunct service like Grokster if they adhere to the safe harbor’s standards. The Digital Millennium Copyright Act (DMCA) ““was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability” for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider.”¹⁵ With this policy goal in mind, four safe harbors were passed,¹⁶ one of which is applicable to YouTube’s defense against a potential copyright infringement lawsuit. Section 512(c) of the Copyright Act provides insulation from liability for monetary relief for those that store infringing content at the direction of a user.¹⁷ Whether YouTube adheres to the substantive requirements, and the surrounding case law, will be the focus of this paper. I opine that YouTube has established the necessary policies and business practices to avail itself of this safe harbor.

However, certain content providers do not necessarily believe that this affirmative defense is available to video web hosting services, and YouTube has begun to hedge against an adverse court ruling.¹⁸ Rather than rely on 17 U.S.C. § 512(c) exclusively, YouTube deemed it necessary to obtain agreements with content providers that eventually could have been plaintiffs in copyright infringement lawsuits, significantly limiting its exposure. At least six lawsuits have already been filed against video web hosting services, including two against YouTube.¹⁹ The most recent lawsuit against YouTube, filed on March 13, 2007 by *155 Viacom, will likely be very significant, as this is the first clash between two media giants, amounting to a potential \$1 billion damage award.²⁰ Deals with content providers may have been explored for reasons other than legal liability, including YouTube’s desire to be acquired by a company like Google. At the very least, the strategic decision to share advertising revenues and the upcoming court cases call into question whether these business models are legitimate and warrant the investor attention they have received.

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

II. YouTube: How It Works and How It Grew

A. You Post, We Host

YouTube started as a personal video sharing service, but has now become a worldwide entertainment destination. One reason for its meteoric growth is the website’s ease of use. After the user uploads and “tags”²¹ a video, the video hosting service encodes it, supplies a player, and provides bandwidth and server space at no charge to the user. Once the video is posted, a URL is provided which can be passed on to other users, or used to embed the video on another website.²² These users can then browse the hosting service for additional content.²³ New *156 users can also post their own content, and a library is eventually built on the hosting service. At this point, the hosting service is merely “technology and infrastructure.”²⁴

It has been argued that the reason for YouTube’s dominance over Google Video stemmed from Google’s inability to move beyond the technological service, whereas YouTube became a “destination and a brand.”²⁵ This can be accomplished by the browsing experience and an engaging and inviting front page.²⁶ When the brand becomes associated with the content, the aggregator becomes as important as the content and an audience is built, which can also lead to social networking opportunities for users.²⁷ From there, network effects take over: more users lead to more content, which then leads to more users.²⁸ This self-perpetuating loop leads to supremacy and the potential for monopoly-type power. The download, user, and library statistics already show YouTube’s dominance over its more than 100 competitors in the free, web-based video hosting service Internet business.²⁹ Sources vary in their reporting of use statistics, but Nielsen NetRatings has estimated that as of

July 2006, YouTube users streamed 50 million videos per day to more 12.5 million people each month.³⁰

YouTube's content is as varied as its users, which is reflected by the breadth of video that can be found. There are some limits on what content is acceptable for posting. Unlawful, obscene, pornographic, or racist content is impermissible, as well as material that is copyrighted, protected by trade secrets or otherwise subject *157 to third-party proprietary rights without permission of the rightful owner.³¹ In addition, YouTube has implemented a time restriction of ten minutes per video.³² One commentator noted that "YouTube's 10-minute clip limit and tiny video window cater to clip culture, not pirates," as neither television programming nor movies would fall under this limitation.³³ This distinguishes YouTube from services that swap entire television shows and movies.

What can be found on YouTube includes more traditional media content, like TV clips and music videos. However, the website also hosts a large amount of user-created content, including animations, amateur lip-synched songs, Hollywood trailer mash-ups and other remixed material, family videos, and seemingly anything that can be recorded using a camcorder. Importantly, what ends up on YouTube is user-dependant, as YouTube uploads videos from users without screening them prior to posting.³⁴ The homepage includes approximately ten daily "featured videos,"³⁵ as well as one sponsored video.

B. Terms of Use and Copyright Info

The User Submissions section of the YouTube "Terms of Use" implicates the copyright issues discussed later in this paper, so a brief description of the pertinent clauses will inform that examination.³⁶ A user is solely responsible for any User Submission posted and affirms that he or she possesses the necessary rights to use and authorize YouTube to use content that may be protected by any proprietary rights.³⁷ All ownership remains with the user submitting the video, but the user grants YouTube a "non-exclusive, royalty-free, sublicenseable and transferable *158 license to use, reproduce, distribute, prepare derivative works of, display, and perform User Submissions in connection with the YouTube website and YouTube's business."³⁸ Additionally, YouTube will remove any content that infringes copyright or does not comply with the Terms of Service, either after proper notification of infringement is provided³⁹ or at their discretion, without prior notice to the user.⁴⁰ If a User Submission is removed from YouTube, the user can elect to send a counter notice which informs YouTube that the material was wrongly taken down.⁴¹ Finally, the company details their repeat infringer policy: "YouTube will also terminate a User's access to its Website, if they are determined to be a repeat infringer."⁴² A previous version of the Terms of Use specified that a repeat infringer is "a User who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice."⁴³

C. The Development of the YouTube Business Model

Studies in April 2006 estimated that YouTube's bandwidth costs alone were approaching \$1 million per month.⁴⁴ Since YouTube is a free service to both its users and uploaders, this is a hefty bill to sustain. Advertising dollars could help YouTube become profitable, if the company is not already.⁴⁵ This business model is similar to that exploited by broadcast television networks: content is "free," but the consumer "pays" by having to watch advertising. Reports indicate that as late as July 2006, YouTube was conservative in its advertising sales, adding ads *159 exclusively to search result pages.⁴⁶ Following the Google acquisition, this approach has been amended. Banner advertising is now included on most clip pages, as are video advertisements on the homepage.

The change in advertising strategy may have also been the result of the deals YouTube negotiated with many of the largest content providers, including sports leagues like the NHL,⁴⁷ music companies like Sony BMG⁴⁸ and Universal Music,⁴⁹ network television stations like CBS,⁵⁰ and production companies like Lucasfilm.⁵¹ For example, YouTube's deal with Warner Music, signed in September 2006, allows Warner Music to use YouTube as a platform for distributing music videos, while sharing in the ad revenue for the pages hosting Warner Music content.⁵² In addition, brand channels have been created pursuant to these deals under the "Channels: Partners" link.⁵³

In September of 2006, YouTube also announced a plan to create technology to combat the appearance of unlicensed content on its service.⁵⁴ The parties in the above-mentioned music deals embrace this technology, which is designed "to automatically spot copyrighted material that users upload without the permission of media companies."⁵⁵ This technology will apparently be able to flag content like music videos, as well as user-created videos making use of copyrighted songs.⁵⁶ The audio identification system is intended to locate unauthorized non-music content as well.⁵⁷ Such technology would help lower

copyright holders' responsibility for tracking down unlicensed content on YouTube.

***160 III. Is YouTube Safe Under Section 512(c)?**

So what does all this mean for YouTube or its competitors? As unlicensed, copyrighted material appears on the website, YouTube is exposed to lawsuits for copyright infringement. Content providers like Viacom and Universal Music seem to believe that, absent a licensing deal, a video hosting service on the Internet would be liable for infringement, as evidenced by their respective lawsuits against YouTube, Bolt, and Grouper Network (which is now owned by Sony Pictures Entertainment). Grouper defended its actions, stating that the lawsuit had no merit and that its service complies with the DMCA.⁵⁸ YouTube has made similar claims.⁵⁹ Whether a video hosting service could survive such a lawsuit is discussed in this section, utilizing YouTube as a case example.

The safe harbor provision in the Copyright Act, 17 U.S.C. § 512(c), does not affect a company's liability under the different theories of infringement, but limits the relief available. Finding safe haven under § 512(c) would shield YouTube from monetary liability or equitable relief for infringing activities on its website (except as detailed in § 512(j)).⁶⁰ Based on the policy to prevent copyright infringement liability for passive, automatic actions by a service provider and the surrounding case law, I believe YouTube would fall under this non-exclusive affirmative defense. The cases discussed below are representative of the different approaches courts have applied to this DMCA provision. The issues that will be at the center of finding YouTube eligible are: (1) whether YouTube has an appropriate repeat infringer policy and complies with standard technological measures as required by § 512(i); (2) whether YouTube is a "service provider" according to § 512(k)(1)(B); (3) whether YouTube has actual knowledge or is aware of facts and circumstances of infringing activities on its website as required by § 512(c)(1)(A); (4) whether YouTube receives a financial benefit directly attributable to the infringing activity and the right and ability to control such activity according to § 512(c)(1)(B); and (5) whether YouTube has an adequate notice and takedown system according to § 512(c)(1)(C).

A. Accommodation of Technology

"Nothing in [§ 512] shall be construed to condition the applicability of [subsection (c)] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a *161 standard technical measure complying with the provisions of subsection (i)."⁶¹ This concept was further explained in House Report No. 105-551, where it states that a service provider need not "investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing."⁶² However, there are certain affirmative requirements that the hosting service must adhere to as a condition for eligibility.⁶³

1. Repeat Infringer Policy

The Ellison court interpreted § 512(i)(1)(A) to create three service provider requirements: "(1) adopt a policy that provides for the termination of service access for repeat copyright infringers in appropriate circumstances; (2) implement that policy in a reasonable manner; and (3) inform its subscribers of the policy."⁶⁴ The third requirement is easily satisfied by YouTube, since a repeat infringer policy is included as a part of its Terms of Service.⁶⁵ All that is required is that users be put on notice that repeated infringements will lead to termination of access from all services.⁶⁶

Evaluating the remaining requirements involves difficult, fact dependant questions, not easily decided as a matter of law.⁶⁷ The case law makes clear that the adopted policy must eliminate the infringer and not merely the infringing content.⁶⁸ As evidenced by the Corbis case, the level of detail needed in such a policy is not great. The Participation Agreement in Corbis was held to be adequate despite its failure to define "repeat infringer," or even, arguably, indicate when appropriate circumstances for termination existed.⁶⁹ It was sufficient that users knew there was a threat of losing access to the service if they infringed intellectual property rights, agreed to the Participation Agreement, and were disciplined under the Participation Agreement for violations.⁷⁰

What are appropriate circumstances for termination is the subject of some debate. The court in Perfect 10, Inc. v. Cybernet Ventures, Inc. appears to take a narrower view of what "appropriate circumstances" and "reasonably implemented" *162 mean,⁷¹ unlike the Corbis and Ellison courts which appear to conflate the issues into one. The Cybernet court implies that a "notice and take-down" provision like that in Corbis, on its own, may not meet the reasonable implementation requirement

when ignorance of infringement would result in the services becoming “safe havens or conduits for known repeat copyright infringers.”⁷² Although the court did not rule on this prong when rejecting the summary judgment motion filed by the defendant, Cybernet, it stated that there was a strong likelihood Cybernet did not meet its obligation.⁷³ A point that appeared important to the court was that the known infringer be terminated from its services completely, not merely from certain services.⁷⁴

Under the less stringent Corbis standard, it appears that YouTube would have met its burden. Its repeat infringer policy even specifies the circumstances under which a user would be terminated. However, under the arguably stricter Cybernet standard, YouTube may still be liable because of its inability to prevent repeat infringers from returning to the service. As one commentator points out, the policy is fairly easy to circumvent due to the anonymity in the posting process.⁷⁵ It can be argued that YouTube could become a “safe haven” for infringers, since users can create a new identity if their accounts are terminated.⁷⁶ This fear, although legitimate, may not create a major issue for YouTube if the court chooses to focus on YouTube’s efforts to curb infringement on its website. The company has clearly taken steps to prevent infringement through deals with content providers and its commitment to technologies that flag copyrighted content.⁷⁷ Therefore, it would be hard to argue that YouTube is turning a blind eye to the problem or creating a pirate-friendly website. This policy argument may not be persuasive due to YouTube’s failure to eliminate infringers, rather than infringing material, which is the purpose behind this requirement.

2. Standard Technical Measures

The second inquiry under § 512(i)(1) requires that the service provider “accommodates and does not interfere with standard technical measures.”⁷⁸ The *163 term “standard technical measures” is defined as those measures used by copyright owners to identify and protect their works, and which “(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.”⁷⁹ It would be difficult to argue that YouTube violates this requirement, since at this time technical measures do not exist that allow copyright owners to identify and protect copyrighted works in videos. YouTube could require watermarking by the copyright holder for videos to be uploaded, but this would prevent user-created content from appearing on the website. YouTube is also taking affirmative steps, as discussed previously, to combat this problem. Until there is a broad consensus of copyright owners who agree on such a standard, video hosting services are likely accommodating standard technical measures.

B. Service Provider

The § 512(c) safe harbor only applies to service providers, defined in § 512(k)(1)(B) as “a provider of online services or network access, or the operator of facilities therefor.”⁸⁰ Under the standard definition, many websites may not be considered service providers,⁸¹ but under the judicially-interpreted statutory definition, courts “have trouble imagining the existence of an online service that would not fall under the definitions.”⁸²

In *Hendrickson v. eBay Inc.*, this definition was interpreted very broadly, but the court failed to qualify why eBay fell under the statute’s definition.⁸³ The Corbis court provided more insight, holding that Amazon.com was a service provider, as it “operates web sites, provides retail and third party selling services to Internet users, and maintains computers to govern access to its web sites.”⁸⁴ Further clarity into the breadth of the term “service provider” was offered by the Cybernet court.⁸⁵ In rejecting Perfect 10’s more limited definition, which would exclude services that had an interest in the content or participated in screening or *164 selecting the data, the court made it abundantly clear that almost all websites would fall under this expansive definition, likely including YouTube.⁸⁶

C. Actual or Apparent Knowledge

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

1. Actual Knowledge

There are two primary methods a content provider can use to establish a service provider's actual awareness under § 512(c)(1)(A)(i). The first and more practical method is to supply evidence that notification of the infringing material was given. By substantially complying with the DMCA's notice requirement,⁸⁷ actual infringement would be established.⁸⁸ Failure by the content holder to provide notice of infringement requires that there be knowledge beyond "a general awareness that a particular type of item may be easily infringed."⁸⁹ Very little guidance is provided by the courts as to the extent of the evidence needed,⁹⁰ but an extreme onus can be inferred by the high threshold required for apparent knowledge. As there is no affirmative duty to search for infringing content, however,⁹¹ it appears that absent notification, establishing an instance of actual knowledge of infringement would be almost impossible.

2. Apparent Knowledge

If actual knowledge is not established, the copyright holder has to demonstrate that the service provider is "aware of facts or circumstances from which infringing activity is apparent."⁹² Awareness does not hinge on whether a reasonable person would have inferred that infringement was occurring,⁹³ but whether a service provider "turned a blind eye to 'red flags' of obvious *165 infringement."⁹⁴ As interpreted by the Corbis court, in order to demonstrate apparent knowledge, the copyright holder must show that his or her material was hosted on a website that was "clearly a pirate site."⁹⁵ A site is clearly a pirate site if the URL and header information uses terms that show the purpose is illegal, like pirate or bootleg, even when the viewing is "brief and casual."⁹⁶

In Corbis, the court held that Corbis did not adequately establish that the defendant, Amazon.com, had anything more than general knowledge of infringement or ignored red flags that would have led to awareness.⁹⁷ Third party notices were not held to constitute red flags, absent other evidence.⁹⁸ Moreover, no evidence on the actual websites was found to be an indicator of obvious infringement.⁹⁹ Finally, the court held that general familiarity of Corbis's business was not enough to put Amazon.com on notice of infringement.¹⁰⁰ Other courts looking at the issue of apparent knowledge have held that defective notices do not act as red flags,¹⁰¹ nor do disclaimers on a website stating that any copyrighted images found were either in the public domain or posted for a newsworthy purpose.¹⁰²

Whether YouTube ignores red flags is unclear, based on some cursory searches of its content performed in early December, 2006. Typing "pirate" into the search engine yields results ranging from videos discussing the legal ramifications of pirating music to videos that, oddly enough, are based on a pirate theme. "Illegal" generates information regarding illegal activities, or live performances of Shakira performing her song, "Illegal" (ironic, I know). "Bootleg" is probably the most damaging to YouTube, as the search results provide videos of soccer, concerts or television interviews, all of which likely appear illegally. The service provider may not be required to perform these searches because there is no duty to discover infringing material. How a court would interpret the apparent conflict between the absence of an affirmative obligation to investigate and the requirement that the service provider not ignore red flags is unclear. However, the strictness of the courts' interpretation of this prong leads me to believe that YouTube would not have apparent knowledge.

*166 Viacom makes many arguments that seem adverse to the case law discussed above. In its complaint, Viacom argues that YouTube ignores red flags "from which infringing activity is apparent, such as description terms and search tags using Plaintiffs' well-known trademarks and other terms identifying their popular copyrighted works."¹⁰³ This does not appear to be the conception of red flag as interpreted by the Corbis court. Additionally, Viacom's argument that the infringement "on YouTube is open and notorious and has been the subject of numerous news reports"¹⁰⁴ appears to be analogous to the argument made in Corbis regarding general familiarity with a business. Viacom could distinguish this case factually by maintaining that YouTube runs the websites housing the videos, rather than a third party vendor. However, this interpretation appears to counter the general policy that the service provider is not responsible for the identification of infringing material. In effect, Viacom is arguing to shift this burden to YouTube. A court may find this persuasive on policy grounds, but ultimately the contention should fail under the DMCA.

3. Expeditious Removal

The final condition under § 512(c)(1)(A) requires the service provider "upon obtaining such knowledge or awareness" to act "expeditiously to remove, or disable access to, the material."¹⁰⁵ YouTube claims to promptly remove infringing material once it is properly notified, and also unilaterally removes infringing material of which it is aware.¹⁰⁶ Because YouTube removes infringing material, it presumably meets this requirement.

D. Financial Benefit, and Right and Ability to Control

YouTube's financial benefit from copyright infringement, and its right and ability to control users' infringement, is likely to be the heart of a lawsuit against YouTube, but also the key to its ability to utilize the § 512(c) safe harbor. Based on the prevailing precedent, YouTube may be found to benefit in a way "directly attributable to the infringing activity" and have the "right and ability to control such activity."¹⁰⁷ I argue below that this is primarily the result of courts conflating precedent from contributory and vicarious liability cases, which has led to inconsistent rulings. The court in at least one case, *CoStar Group Inc. v. LoopNet, Inc. (CoStar I)*, has explicitly rejected the importation of contributory liability theories for the financial benefit prong.¹⁰⁸ As this issue would be integral to any *167 ruling regarding YouTube, I will distinguish cases where other theories of liability influence the decision of the courts. Ultimately, I believe the court will follow the *CoStar I* line of cases, rather than those that rely on *Fonovisa*¹⁰⁹ and its progeny.

I. Direct Financial Benefit Attributable to the Infringing Activity

There are two primary precedents for this section of the safe harbor provision. The first, set by *CoStar I*, was erroneously ruled consistent, in my opinion, with the second in *Cybernet*, the vicarious infringement line of cases. *CoStar I* involved the posting of potentially infringing photographs on LoopNet's website by users who wanted to advertise property listings.¹¹⁰ No posting fee was required for any listing, regardless of the use of a photograph.¹¹¹ The court held that there is no direct financial benefit attributable to the infringing activity "where the infringer makes the same kind of payment as non-infringing users of the provider's service."¹¹² Neither the infringers nor the non-infringers paid anything for the service, so there was no direct financial benefit.¹¹³

The court also rejected the plaintiff's argument that there is a direct financial benefit attributable to the infringing activity for the purposes of § 512(c) when "infringing performances enhance the attractiveness of the venue to potential customers."¹¹⁴ The court found that the application of this "indirect" benefit test, although applicable in a contributory infringement cause of action, was not warranted by the plain language or purpose of the statute.¹¹⁵ Since the financial benefit was required to be directly attributable, an indirect benefit test was deemed inapplicable.¹¹⁶ However, this indirect benefit test was applied in *Fonovisa* as a method of showing direct financial benefit from the customers in a vicarious infringement suit.¹¹⁷ This seems to imply that the *CoStar I* court rejected the use of vicarious liability precedent for this requirement of the safe harbor. Whether this was the court's intent is unclear,¹¹⁸ but a question arises as to what case law relating to direct financial benefit should be applicable to the DMCA safe harbors.

*168 The *Cybernet* court held that "the direct flow of income to Cybernet based on the number of new Adult Check users that sign up to Adult Check from infringing sites establishes [a] direct relationship."¹¹⁹ In this case, websites using the Adult Check¹²⁰ service included infringing pictures. The webmasters who run and promote the websites under the Adult Check brand are not charged a fee for the service; rather, the customer pays a monthly fee to Cybernet, which then distributes revenue to the webmasters based on which website was responsible for the enrollment.¹²¹ *Perfect 10* found that approximately 900 Adult Check-affiliated websites¹²² housed more than 10,000 copies of *Perfect 10* images.¹²³

The court looked at legislative history to derive the outcome.¹²⁴ Courts should use a "common-sense, fact based approach, not a formalistic one."¹²⁵ Where the value of the service originates from the infringing content, rather than a "legitimate business," the service provider receives a direct financial benefit.¹²⁶ Since membership growth, and thus *Cybernet's* revenue, was dependent on the quantity and quality of images available on Adult Check member websites (some of which were using infringing images to attract new members), a direct benefit was found to exist.¹²⁷

In coming to this conclusion, the *Cybernet* court attempts to distinguish this case from *CoStar I*: "[t]his is quite different from the situation in *CoStar* where the site made money on other services it offered, which were not directly tied to the infringing activity."¹²⁸ Implicit in this argument is that the infringement is enhancing the desirability of these sites, which leads to a disproportionate amount of funds from infringing sites. Otherwise, using the reasoning of *CoStar I*, since the webmasters are indirectly paying the same percentage fee per new customer regardless of their status as infringers, they would not be directly benefiting from the infringement. The *Cybernet* court appears to be adopting a vicarious infringement standard for direct financial interest, like that used in *Fonovisa*. Similarly, the *Aimster* court held that the direct financial benefit element of *169§ 512(c)(1)(B) was met, and refers the reader to the section discussing vicarious liability.¹²⁹ In *Aimster*, the court stated that the "financial benefit element is . . . satisfied where . . . the existence of infringing activities act[s] as a draw for potential customers."¹³⁰ The tests adopted in *Fonovisa*, *Aimster* and *Cybernet* appear to be the same test, and it is unclear that any of them is consistent with the precedent set in *CoStar I*. Whether all vicarious infringement precedents for this prong are

applicable is ambiguous to say the least.

One precedent of particular importance to YouTube is the recently decided Google¹³¹ case, where, under a vicarious infringement theory of liability, the defendant, Google, was found to have received a direct financial benefit. Applying the precedent of Fonovisa as applied broadly by the Napster¹³² court, the Google court determined that Google received a direct financial benefit because its revenue was directly dependent on an increase in its user base: “Google certainly derives a direct financial benefit if users visit AdSense partners’ websites that contain such infringing photos” since they will share in the advertising revenue appearing on those sites.¹³³

This murky background creates many questions as to YouTube’s ability to rely on § 512(c). “Some have argued that this may restrict the kinds of advertising business models that YouTube (and other video hosting services) might want to pursue, as ads tied too closely to an infringing video could be viewed as creating a ‘financial benefit directly attributable to the infringing activity.’”¹³⁴ This may explain YouTube’s initial hesitance to place advertisements on content pages, as well as their rush to make deals with copyright holders. Following the CoStar I precedent, it is unlikely that YouTube will be found to have received a direct financial benefit from displaying a banner ad on an infringing video’s website. As posters of video, including infringers, are not charged to do so, they appear to follow that precedent. The less formalistic approach of the Cybernet court may not find this argument persuasive. Moreover, if other vicarious liability doctrines are imported to § 512(c), like that of Google, it appears that YouTube’s banner ads on infringing video pages would clearly confer a direct financial benefit.

***170 2. Right and Ability to Control Activity**

The case law is slightly more consistent for the section of the statutory safe harbor regarding the right and ability to control activity. Almost all of the courts recognize that the right and ability to control the infringing activity, “as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored on its system.”¹³⁵ Two cases explicitly import concepts from contributory and vicarious infringement jurisprudence,¹³⁶ again generating doubt as to which precedents are applicable to this statutory condition.

In *Hendrickson v. eBay*, the court stated that the DMCA could not be interpreted to say that a service provider loses its immunity simply because it has the ability to block access to materials stored on its system.¹³⁷ The DMCA requires that infringing materials be removed from the website; it would be internally inconsistent to require service providers to engage in behavior that would thereby forfeit their insulation under § 512(c).¹³⁸ Additionally, the court held that the “voluntary practice of engaging in limited monitoring of [a service provider’s] website for ‘apparent’ infringements . . . cannot, in and of itself, lead the Court to conclude that [the service provider] has the right and ability to control infringing activity within the meaning of the DMCA.”¹³⁹ eBay’s practice of searching its website daily, using terms like “bootleg” or “pirated,” to find and remove users that are selling infringing products was found to be consistent with the legislative intent that a service provider’s ability to use § 512(c) should not be limited solely because of its use of a monitoring program.¹⁴⁰ This rule also makes the statute internally consistent with what is required under the “red flag” standard for apparent knowledge.¹⁴¹

***171** The Cybernet court held that Cybernet had the right and ability to control the infringing activity. The court provided a list of activities in which Cybernet participated that established this conclusion, including prescreening sites,¹⁴² giving “extensive advice,” and prohibiting “proliferation of identical sites,” among other things.¹⁴³ These procedures meant they did “something more,” a concept borrowed from contributory liability of trademark licensors.¹⁴⁴ It appears the court was concerned that Cybernet was too involved with the content, rather than merely operating a service for hosting the content. The Corbis court, applying Cybernet, held that Amazon.com did not have the right and ability to control: “Amazon does not preview the products prior to their listing, does not edit the product descriptions, does not suggest prices, or otherwise involve itself in the sale.”¹⁴⁵

Aimster refers the reader to the vicarious liability section in its application of the DMCA.¹⁴⁶ In doing so, the precedent set by this court is the one outlier where termination of individual users is found to be instructive in holding that a right and ability to control existed. In addition, the *Aimster* service required members to log on, which allowed them to supervise the activities of the users. *Aimster*’s argument that the system’s encryption prevented them from blocking a user’s access without shutting down the entire service was rejected.¹⁴⁷ The court again relied on *Fonovisa* as controlling precedent, where an ability to control was found for vicarious infringement when the company promoted, policed, and controlled access of customers through its rules and regulations.¹⁴⁸

It is fairly clear that Aimster is inconsistent with the cases analyzing the § 512(c) safe harbor. A court could choose to follow the absolute importation of vicarious liability precedent, although I doubt it would follow the precedent so far as to make § 512(c) internally inconsistent. Furthermore, YouTube is unlikely to lose the benefits of the safe harbor for prescreening and removal of material obviously infringing copyright, consistent with its duty to not ignore red flags of infringement. The harder question is whether YouTube is found to control the content found on its website, so as to amount to an issue like that in *Cybernet*. One commentator has expressed concern that exerting editorial control, like creating a “top 10” list or “editor’s picks,” could create an issue under this DMCA safe harbor.¹⁴⁹ YouTube may have already crossed the line as it posts “featured videos” on the home page.¹⁵⁰ They have also setup “channels” for certain content providers. If YouTube provides advice to users who administer channels, a court could find that it had the right and ability to control. Lastly, since YouTube’s Terms of Service state that it retains a license in the material, YouTube could be said to have a certain level of control over the material, including the ability to reproduce, distribute, and prepare derivative works of the submitted video. Whether having a license to control is synonymous with control is uncertain. These fact-dependent questions could be integral to a court’s determination.

E. Notification and Replacement of Disabled Material

The elements of a proper notification of claimed infringement are laid out in § 512(c)(3).¹⁵¹ YouTube’s Terms of Use strictly adhere to the statute, which requires the service provider to expeditiously remove or disable access to the infringing material following a proper notification.¹⁵² “The purpose behind the notice requirement under the DMCA is to provide the internet service provider with adequate information to find and examine the allegedly infringing material expeditiously.”¹⁵³ A notification must adhere “substantially” to the requirements. A written communication provided to the designated agent is necessary, and not part of the substantial adherence requirement.¹⁵⁴ The two notification obligations that are most implicated with regard to substantial compliance are those dealing with identification of the infringing material.¹⁵⁵ This question is extremely fact-dependent and, thus, will rely on the specifics of a copyright-holder’s notice.¹⁵⁶

*173 If the original poster chooses to file a substantially-compliant counter-notification, pursuant to § 512(g)(3), the service provider must supply notice to the provider of the initial notification that the removed material will be replaced.¹⁵⁷ Unless the provider of the notification informs the service provider that it is seeking a court order to restrain the material’s restoration, the service provider must replace the material.¹⁵⁸ If the service provider adheres to these requirements, it “shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.”¹⁵⁹ Unsubstantiated claims of infringement could lead to liability for the filer of the notice.¹⁶⁰

IV. Is YouTube An Infringer?

The safe harbor discussed above does not shield YouTube from being found guilty of infringement, under the theories of direct, vicarious, and contributory liability. The DMCA statute is an affirmative defense that merely limits the relief available. If a court finds that YouTube is not liable for any of the above forms of copyright infringement, then the safe harbor under § 512(c) is not necessary. YouTube is currently being sued by Viacom and Robert Tur under each of these theories of liability, as well as the *Grokster*¹⁶¹ theory of inducement.¹⁶² A sampling *174 of relevant precedents indicates that YouTube could be found liable of copyright infringement. Thus, the question of whether § 512(c) is satisfied is crucial to YouTube’s ability to operate.

A. Direct Infringement

To establish a prima facie claim for direct infringement, the copyright holder must demonstrate that he or she owns the material and that one of the exclusive rights provided under 17 U.S.C. § 106 has been violated.¹⁶³ YouTube’s users potentially violate all of these exclusive rights of copyrighted material when using the web service, but it is not clear that they could be found to infringe the rights of reproduction, performance, and distribution, as were the users of *Napster*.¹⁶⁴ YouTube’s liability for direct infringement is improbable, however, based on the precedent set by *CoStar II*.

The *CoStar II* court held that “there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to use a copy by a third party,” although copyright is a strict liability statute.¹⁶⁵ The court

went on to state that “an ISP who owns an electronic facility that responds automatically to users’ input is not a direct infringer.”¹⁶⁶ They are then acting more as conduits than copiers, as they have “no interest in the copy itself.”¹⁶⁷ The question then becomes whether YouTube is truly passive.

***175** The passivity of YouTube, at first glance, seems clear as YouTube does not pre-screen videos before they are posted. A pre-screening process does not in itself equate to non-passivity, as LoopNet’s process of briefly examining photographs that clearly infringed copyright did not create liability for LoopNet as a direct infringer in *CoStar II*.¹⁶⁸ The current lawsuits challenge whether services like YouTube are in fact passive, as “they are greatly involved in editing their content.”¹⁶⁹ The creation of the featured video section, for example, could be considered “copying,” similar to that found in *Hardenburgh*.¹⁷⁰ After encouraging users to upload files onto the system, *Hardenburgh*’s employees would transfer the files into folders available to subscribers.¹⁷¹ This conduct was considered distribution by the court.¹⁷² YouTube could suffer a similar fate if its employees are involved in the selection process of featured videos. This is a factual issue, and one that calls into question whether YouTube would be deemed a direct infringer.¹⁷³

B. Vicarious Infringement

As discussed in Part III.D, *infra*, YouTube is most in danger of being found liable for vicarious infringement of copyright. The vicarious liability conditions for users’ infringement are very similar (if not identical) to those in § 512(c)(1)(B). The party claiming infringement must establish that the service provider “derived a direct financial benefit from the infringement and had the right and ability to supervise the infringing activity.”¹⁷⁴

1. Direct Financial Benefit

The *Ellison* court further narrowed the *Fonovisa* precedent for the direct financial benefit prong as applied to the digital world in *Napster*: “The essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant’s ***176** overall profits.”¹⁷⁵ In this case, AOL was not found liable for hosting USENET groups where users transferred an author’s copyrighted novels.¹⁷⁶ Insufficient evidence was presented that AOL’s “customers either subscribed because of the available infringing material or canceled subscriptions because it was no longer available.”¹⁷⁷ The USENET groups were not found to be a draw that increased AOL’s user base, but rather were an added benefit of the service.¹⁷⁸

The *Cybernet* court found that there was a strong likelihood of success in showing that there was a direct financial benefit.¹⁷⁹ Unlike the content of the web pages in *Ellison*, the content of the websites found in *Cybernet*’s network was the primary attraction for customers: “The more consumers appreciate the content of a page, the more money *Cybernet* receives.”¹⁸⁰ After all, the users will only sign up through their *AdultCheck* system if they are pleased by the pictures appearing on the member website.¹⁸¹ Unlike the *Ellison* court, which found that the copyright holder presented insufficient evidence to support a finding that the USENET groups acted as a draw, the *Cybernet* court placed this burden on the defendant: “*Cybernet* has given no reason to believe that these pages do not attract consumers, thereby creating a financial benefit to *Cybernet*.”¹⁸²

Most recently, and potentially most damaging to YouTube, the court in *Perfect 10 v. Google* found that a website that posts advertisements on websites exhibiting infringing images provides a direct benefit under the theory of vicarious infringement.¹⁸³ Google received a percentage of the advertising revenue derived from users of the infringing websites.¹⁸⁴ Moreover, the infringing photographs found on the internet acted as at least a limited draw for Google Image Search, and the court found it “indisputable that Google does stand to benefit the more users visit and use Google Image Search.”¹⁸⁵ Neither of these theories of direct financial benefit was bolstered with firm evidence,¹⁸⁶ demonstrating the broadness by which the court has interpreted this prong.

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

advertisement is found alongside an infringing video, the necessary nexus of benefit would appear to be demonstrated.

2. Right and Ability to Supervise

Fonovisa provides the controlling precedent for this prong of the vicarious liability test.¹⁸⁷ A third party has a right and ability to supervise the infringing activity when its rules and regulations provide for the power to promote and police the service, as well as control the access of customers.¹⁸⁸ The Napster court applied this precedent to the digital realm and determined that Napster retained the right to control access to its system.¹⁸⁹ The terms of service provided that Napster reserved the right to refuse access and terminate users at its discretion: “To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent.”¹⁹⁰ Methods of policing included monitoring the file name indices for copyrighted material.¹⁹¹ The court held that Napster failed to police its system, and thus held to satisfy this condition.¹⁹² YouTube’s liability will likely depend on this “closed system” standard.¹⁹³ YouTube’s internal policy of searching tags *178 would appear integral to a court holding, as their terms of service provide for controls similar to those endorsed by Napster.¹⁹⁴

C. Contributory Infringement

“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer.’”¹⁹⁵ There is no contributory infringement for providing the means to infringe where the means to infringe is a staple article of commerce that is capable of substantial non-infringing use.¹⁹⁶ This test requires that a balance be struck between providing effective copyright protection and preserving the “rights of others freely to engage in substantially unrelated areas of commerce.”¹⁹⁷ YouTube’s function as a distribution channel for user-created and licensed works, otherwise lacking avenues for dissemination, will likely lead a court to rule that YouTube is not liable for contributory infringement under the staple of commerce doctrine.

1. Knowledge

There is some disagreement in the courts as to the scope of the knowledge requirement. Generally, “[c]ontributory liability requires that the secondary infringer ‘know or have reason to know of direct infringement.’”¹⁹⁸ The Napster court limited this precedent to actual knowledge in the online context: “Absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.”¹⁹⁹ Napster was found to possess the specific information which identified the infringing activity, including a notification by the RIAA of more than 12,000 infringing files and a document written by the service’s founder about “the need to remain ignorant of users’ real names and IP addresses.”²⁰⁰ While the users were eliminated from the *179 servers, the songs were still available for download.²⁰¹ In contrast, the Netcom court found that there was a disputed issue of fact as to knowledge where an online bulletin board was merely capable of infringing uses.²⁰²

The Aimster court rejected the Ninth Circuit’s test, and provided that constructive knowledge is sufficient in cases where the secondary infringer exhibits willful blindness.²⁰³ The operator of a service cannot use “encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service--maybe all the users of his service--are copyright infringers.”²⁰⁴ The court also held that it was insufficient for the service to merely be physically capable of non-infringing uses.²⁰⁵ Absent evidence of actual non-infringing uses by the users of the service, a service can be found contributorily liable for infringement.²⁰⁶ The court stated that even when noninfringing uses exist, “if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.”²⁰⁷

Under either of these standards, YouTube may be found to have knowledge of infringing uses. Content users have made multiple requests for videos to be removed from the service,²⁰⁸ akin to the notice that the Napster court found sufficient to find Napster had actual knowledge. Additional evidence of knowledge could be established through the discovery process. Unlike Napster, YouTube appears to eradicate the files completely from their system, although it may be impossible to have a full-proof system of total abolition. YouTube may have *180 difficulties claiming that it is merely aware of the possibility of infringement, but it is hard to imagine a court ruling that YouTube has been willfully blind to the issue of copyright infringement. As previously discussed, YouTube is attempting to license content that would otherwise appear illegally, as well as researching copyright identification technology.²⁰⁹ Finally, YouTube has many well established, non-infringing uses as have been discussed throughout this paper. The unavailability of other means of distribution would endanger these non-infringing purposes from occurring, especially in the context of user-created content. The combination of these factors

will likely lead a court to rule that YouTube is not contributing to its users' infringements.

2. Material Contribution

“[P]roviding the site and facilities for known infringing activity is sufficient to establish contributory liability.”²¹⁰ To create a triable issue of fact for material contribution, it is only necessary that the service allow users to access copyrighted works.²¹¹ Napster was found to materially contribute to infringement by providing the site and facilities for direct infringement that enabled users to easily find and download music that would otherwise be difficult absent the service.²¹² This “but for” causation is likely to be damaging to YouTube, as it provides the servers and website that store and display videos posted by users. Absent YouTube (or similar services), users would not be able to share videos with the ease for which they are now accustomed. Therefore, a content holder will almost undeniably be able to present a prima facie case for material contribution.

D. Grokster Inducement

The Grokster theory of inducement is an additional theory of secondary liability. “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”²¹³ As a secondary infringer, meeting this test would not “compromise legitimate commerce or discourage innovation having a lawful promise,” the Sony substantial non-infringing use standard is not applicable in such cases.²¹⁴ The court found three notable factors that proved Grokster had the unlawful intent to promote infringement: (1) the service was aimed to satisfy a known demand for infringement; (2) the service did not develop tools to lessen infringement on the *181 service; and (3) the commercial viability of the service hinged on high volume use, which is infringing.²¹⁵ The court stated that in the absence of corroborating evidence, factors (2) or (3) would not alone establish a finding of unlawful intent.²¹⁶

Robert Tur’s lawsuit addresses each of these factors specifically. He first claims that YouTube “aimed to satisfy in part a known source of demand for copyright infringement, e.g., the market comprised of former Grokster video ‘sharers.’”²¹⁷ Whether YouTube has internal documents suggesting an unlawful intent will be critical, but publicity for the service never claimed to be a replacement for a file sharing service previously shut-down.²¹⁸ Next, Tur claims that YouTube “failed to develop any substantial filtering tools or other mechanisms to diminish the infringing activity.”²¹⁹ It is at least arguable that YouTube has created mechanisms to diminish infringing activity, by signing deals with content providers and creating a notice/takedown system that would remove copyrighted material from its website. YouTube is also creating software to help curb infringement.²²⁰ Finally, Tur claims that YouTube is pursuing a “model which rewards high-volume use, including that of infringing uses, with greater advertising revenue, as revenue is correlated with usage.”²²¹ This factual question of infringing uses would require discovery. However, as it is probable that Tur will fail to verify YouTube’s intent to satisfy a known demand for illegally sharing copyrighted videos, I am skeptical that YouTube will be found liable for inducement.

V. Conclusion

The outcomes of the legal and factual disputes discussed above will be integral to the future development of a service like YouTube. Video web hosting services have already proven to be exceptionally popular, and the potential for growth seems immense. If the courts find YouTube guilty of copyright infringement, either directly or under a theory of secondary liability, the availability *182 of the DMCA safe harbor will be integral in allowing the service to develop on its current trajectory. Otherwise, an alteration of policies may be necessary to conform to the court’s interpretation of the statute’s qualifications. The implications of such potential changes, and whether they will allow YouTube to flourish and become a significant media channel, are yet to be seen. Remember, YouTube is still a fledgling company that has been in operation for less than two years. Google obviously believes the future for video web hosting servers is bright, but the ever evolving digital world, with its demanding and erratic customer base, may not agree.

Some users have voiced concerns about how YouTube may change after Google purchased the company. One YouTube poster commented that “[t]he Wild West feel of YouTube is already slipping away, and within a few weeks it likely will be gone altogether.”²²² The service’s popular creators may become annoyed by YouTube’s ability to profit from their content without any retribution, while more powerful content aggregators are sharing in advertising revenue. YouTube’s once loyal user base, which helped build the service, could flock to another video hosting service perceived to be less restrictive of their

use.²²³ Will YouTube's interest lie with these users or their new partners, the major movie studio, networks and record labels? Ironically, the deals that added legitimacy to YouTube's business model may result in losing the user base that made YouTube the target of a \$1.65 billion acquisition. The legal consequences, therefore, go beyond the possibility of copyright infringement liability. They may ultimately influence YouTube's ability to become the "sixth network."

Footnotes

^{a1} J.D., UCLA School of Law, 2007; B.A. Harvard University, 2002.

¹ YouTube, About YouTube, <http://www.youtube.com/t/about> (last visited Sept. 15, 2007).

² Gary Arlen, 'GooTube' Impact on TV Unclear, TV Tech. News, Nov. 1, 2006, <http://www.tvtechnology.com/pages/s.0082/t.451.html>.

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

⁴ Andrew Ross Sorkin & Jeremy W. Peters, Google to Acquire YouTube for \$1.65 Billion, N.Y. Times, Oct. 9, 2006, available at <http://www.nytimes.com/2006/10/09/business/09cnd-deal.html>.

⁵ The predicted legal fees in the Viacom lawsuit against YouTube are \$350 million or more, due to the lengthy discovery process and need for multiple experts. Lisa Lerer, Viacom's Expensive Suit, Forbes.com, Mar. 28, 2007, http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html.

⁶ Complaint, Tur v. YouTube, No. CV 06-4436-GAF(FMOx), 2006 WL 3043777, at ¶ 19 (C.D. Cal July 14, 2006) (quoted in Mack Reed, Publishers vs. YouTube: Does Either Side Win?, USC Annenberg Online Journalism Rev., July 20, 2006, <http://www.ojr.org/ojr/stories/060720reed/>).

⁷ Id.

⁸ Press Release, YouTube, YouTube Unveils New Advertising Concepts (Aug. 22, 2006), http://www.youtube.com/press_room_entry?entry=RZs9p25QDCY.

⁹ Id.

¹⁰ Fred von Lohmann, YouTube's Balancing Act: Making Money, Not Enemies, Hollywood Rep., July 10, 2006, available at http://www.hollywoodreporteresq.com/thresq/spotlight/article_display.jsp?vnu_content_id=1002802746.

¹¹ Press Release, YouTube, Sony BMG Music Entertainment Signs Content License Agreement with YouTube (Oct. 9, 2006), http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA [hereinafter Sony BMG Agreement].

¹² Press Release, YouTube, After One Month, CBS Content Among Most Viewed Videos on YouTube, (Nov. 21, 2006), http://www.youtube.com/press_room_entry?entry=oJpEXVevcKg.

¹³ Id.

- 14 Id.
- 15 Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1086 (C.D. Cal. 2004) aff'd in part, rev'd in part, 481 F.3d 751 (9th Cir. 2007), modified, 488 F.3d 1102 (9th Cir. 2007) (quoting H.R. Rep. No. 105-796, at 72 (1998) (Conf. Rep.)).
- 16 17 U.S.C. §512 (2006). Provisions (a) - (d) establish the four safe harbors, while provisions (e) - (n) are applicable to each of the safe harbors.
- 17 17 U.S.C. §512(e)(1).
- 18 For an interesting discussion of Mark Cuban's heated opinion on YouTube's viability over the long term, see YouTube is 'Toast,' Sydney Morning Herald, Sept. 29, 2006, available at <http://www.smh.com.au/news/biztech/youtube-is-toast/2006/09/30/1159337344017.html>.
- 19 Two complaints have been filed against YouTube: Tur Complaint, supra note 6; and Complaint, Viacom Int'l Inc. v. YouTube, Inc., No. 1:07CV02103, 2007 WL 775611 (S.D.N.Y. Mar. 13, 2007). YouTube's answer has also been filed in both cases: Answer, Tur v. YouTube, Inc., No. CV 06-4436-GAF, 2006 WL 3043780 (C.D. Cal. Oct. 11, 2006); and Answer, Viacom Int'l, Inc. v. YouTube, Inc., No. 1:07-CV-02103, 2007 WL 1724620 (S.D.N.Y. Apr. 30, 2007). Universal Music has sued three companies for infringement, including Myspace, Grouper Network, and Bolt. See Complaint, UMG Recordings, Inc. v. Myspace, Inc., No. CV 06-07361, 2006 WL 3466446 (C.D. Cal. Nov. 17, 2006); Steve Poland, Universal Music Files Suit Against Grouper, Bolt.com, Oct. 17, 2006, <http://www.techcrunch.com/2006/10/17/universal-music-files-suit-against-grouper-boltcom/>; Amanda Bronstad, Video Web Sites Download a Defense, Nat. L. J., Nov. 2, 2006, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1162375515690>. Universal has since settled their case with Bolt for an undisclosed damage award for past infringements. Anup Roy, Universal Music, Bolt Settle Copyright Infringement Lawsuit, Reuters, Mar. 9, 2007, <http://www.reuters.com/article/businessNews/idUSWNAS362420070309>. Finally, Veoh Networks is being sued by the IO Group. Complaint, IO Group, Inc. v. Veoh Networks, Inc., No. C-06-3926, 2006 WL 2180442 (N.D. Cal. June 23, 2006).
- 20 Kenneth Li & Michele Gershberg, Viacom in \$1 Billion Copyright Suit Versus Google, YouTube, Reuters, Mar. 13, 2007, <http://www.reuters.com/article/internetNews/idUSWEN535120070313>.
- 21 A user provides "tags" that become associated with the uploaded video. See YouTube, <http://www.youtube.com> (select any video and notice the Tags field) (last visited Sept. 15, 2007). They can describe the genre of the video, the person appearing in the video, or any other term that would easily identify the video. These terms are not standardized, as they are left to the idiosyncrasies of the user. Therefore, duplicate videos may have different tag associations. Tags are useful when users are browsing the site or when searching for videos.
- 22 Niko Flores, How YouTube Works (Oct. 11, 2006), http://ondemandmedia.typepad.com/odm/2006/10/how_youtube_wor.html.
- 23 Id.
- 24 Id.
- 25 Id.
- 26 Id.
- 27 Id.

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

29 von Lohmann, supra note 10.

30 von Lohmann, supra note 10. YouTube claimed more than 70 million videos were watched daily as of October 2006. About YouTube, supra note 1. According to other reports, this could be up to 100 million videos daily. Long, supra note 28. From December 2005 to November 2006, YouTube has estimated the number of unique users has grown from 3 to 6 million. Jonathan A. Hyman, How I Learned To Stop Worrying and Love YouTube: Video-Hosting Services and the Death of Copyrights on the Internet (August 2006), http://www.kmob.com/pdf/videohosting_youtube.htm. In July of 2006, according to Hitwise, it was estimated that YouTube held 29% of the U.S. multimedia entertainment market. Long, supra note 28. Myspace was the only company close to YouTube (19%), while Yahoo, MSN, Google and AOL (3-5% each) trailed behind. Long, supra note 28. Again, according to Hitwise, YouTube was estimated to have a 43% market share of video search sites in May of 2006, which MySpace Video (24%), Yahoo! Video Search (10%), MSN Video Search (9%), and Google Video Search (6%) could not match. Press Release, Hitwise, YouTube Dominating Video Search Category (May 24, 2006), <http://www.hitwise.com/press-center/hitwiseHS2004/videosearch.php>.

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

32 YouTube, How Long/Large Can My Video Be?, <http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527> (last visited Oct. 2, 2007).

33 von Lohmann, supra note 10.

34 Hyman, supra note 30.

35 The selection process is not described by YouTube, nor is the information behind the selection process available as far as I can tell. When asked to describe their metric, I received an e-mail response stating "Thank you for your interest in YouTube, but unfortunately we are unable to help you with the information you need. The YouTube Team." E-mail from YouTube to Jason Breen (Dec. 12, 2006, 04:29:00 PST) (on file with author).

36 See Terms of Use, supra note 31; YouTube, Copyright Infringement Notification, http://www.youtube.com/t/dmca_policy (last visited May 30, 2007).

37 Terms of Use, supra note 31, §6(B).

38 Terms of Use, supra note 31, §6(C).

39 Terms of Use, supra note 31, §8(A), provides the elements of proper notification (also found at Copyright Infringement Notification, supra note 36). The elements of proper notification follow the requirements set forth in 17 U.S.C. §512(c)(3), including a designated Copyright Agent. Terms of Use, supra note 31, §8(A). Content holders have used this policy to remove their copyrighted materials from YouTube. For example, NBC-owned "Saturday Night Live" skits and an American Airlines in-house training video have both been removed after proper notification was received by YouTube. Hyman, supra note 30.

40 “YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another’s intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice. YouTube also reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User’s access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.” Terms of Use, supra note 31, §6(F).

41 Copyright Infringement Notification, supra note 36.

42 Terms of Use, supra note 21, §7(A).

43 Terms of Use, supra note 21, §5(C).

44 Dan Frommer, Your Tube, Whose Dime?, Forbes.com, Apr. 8, 2006, http://www.forbes.com/intelligentinfrastructure/2006/04/27/video-youtube-myspace_cx_df_0428video.html.

45 For an interesting discussion on YouTube’s profitability, see Mitch Ratcliffe, YouTube Wildly Profitable? (Oct. 4, 2006), <http://blogs.zdnet.com/Ratcliffe/?p=186>.

46 von Lohmann, supra note 10.

47 See Press Release, YouTube, YouTube and National Hockey League Team Up for Strategic Content and Advertising Partnership (Nov. 15, 2006), http://www.youtube.com/press_room_entry?entry=2oJxBs3sq3k.

48 See Sony BMG Agreement, supra note 11.

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

50 See Press Release, YouTube, CBS and YouTube Strike Strategic Content and Advertising Partnership (Oct. 9, 2006), http://www.youtube.com/press_room_entry?entry=iXG7e1g-BWI.

51 See Hyman, supra note 30.

52 Kevin J. Delaney & Ethan Smith, YouTube Model is Compromise Over Copyrights, Wall St. J., Sept. 19, 2006, available at http://online.wsj.com/public/article/SB115862128600366836-75c3bUMscxrCANO6O7hKTgLNttc_20070919.html.

53 See YouTube Channels: Partners, <http://www.youtube.com/members?s=ms&t=w&g=5> (last visited Sept. 15, 2007).

54 Delaney & Smith, supra note 52.

55 Delaney & Smith, supra note 52.

56 “The system relies partly on what’s known as ‘fingerprinting’-- comparing audio uploaded to the site to unique attributes of copyrighted content it already knows.” Delaney & Smith, supra note 52. YouTube hopes to eventually use similar video-identification technology. Id.

57 Delaney & Smith, supra note 52.

58 Bronstad, supra note 19.

59 Li & Gershberg, supra note 20.

60 17 U.S.C. §512(c)(1) (2006). If an injunction is permissible under §512, it is only for the limited context described under §512(j)(1). When deciding to grant injunctive relief, the court must consider, among other factors, whether the injunction would “significantly burden either the provider or the operation of the provider’s system or network,” and “whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations.” 17 U.S.C. §512(j)(2)(A), (C). An injunction that shuts down YouTube completely would obviously violate these provisions.

61 17 U.S.C. §512(m)(1).

62 H.R. Rep. No. 105-551, pt. 2, at 61 (1998).

63 See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1176 (C.D. Cal. 2002) (“[T]he Court reads section 512(i) to imply some substantive responsibilities for service providers”).

64 Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004) (emphasis added).

65 See supra Part II.B.

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

67 Ellison, 357 F.3d at 1078.

68 Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1093 (C.D. Cal. 2004), aff’d in part, rev’d in part, 481 F.3d 751 (9th Cir. 2007), modified, 488 F.3d 1102 (9th Cir. 2007).

69 Corbis, 351 F. Supp. 2d at 1100-01.

70 Id. at 1101.

71 Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1175-79 (C.D. Cal. 2002).

72 Cybernet, 213 F. Supp. 2d at 1177-78 (“These circumstances would appear to cover, at a minimum, instances where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly

infringement of a willful and commercial nature.”).

73 Id. at 1179.

74 Id. at 1177-79.

75 Hyman, *supra* note 30.

76 Viacom made this argument in its complaint against YouTube. See Viacom Complaint, *supra* note 19, ¶ 41.

77 See *supra* notes 52-56 and accompanying text.

78 17 U.S.C. §512(i)(1)(B) (2006).

79 17 U.S.C. §512(i)(2).

80 17 U.S.C. §512(k)(1)(B).

81 The *In re Aimster Copyright Litigation* plaintiffs provide the commonplace definition: “[I]nternet service providers generally provide a way to connect to the Internet (e.g., phone or cable modem) as well as a mechanism that tells a computer how and where to access information on the Internet...,” 252 F. Supp. 2d 634, 658 (N.D. Ill. 2002), *aff’d*, 334 F.3d 634 (7th Cir. 2003).

82 *Id.* (holding Aimster to be a service provider).

83 *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001). See *infra* Part III.D.2.

84 *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004).

85 See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1175 (C.D. Cal. 2002).

86 *Id.*

87 See *infra* Part III.E. The service provider can challenge the claim that the notice substantially complied with the requirements. See 17 U.S.C. §512(e)(3)(B) (2006).

88 *Corbis*, 351 F. Supp. 2d at 1107.

89 *Id.* at 1108.

90 See *id.* at 1107 (Where no notice of infringement was provided for photos, actual knowledge was not established when Corbis supplied evidence of third party notices regarding non-Corbis photos or evidence of awareness by Amazon.com that Corbis licensed photos.).

91 Id. at 1104.

92 17 U.S.C. §512(c)(1)(A)(ii) (2006).

93 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §12B.04[A] [1], at 12B-49 (Matthew Bender & Co., Inc. 2007).

94 H.R. Rep. No. 105-551, pt. 2, at 57 (1998).

95 *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

96 Id.

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

98 Id. at 1107.

99 Id.

100 Id. at 1108-09.

101 See, e.g., *Hendrickson v. eBay Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

102 *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1098 (C.D. Cal. 2004).

103 *Viacom Complaint*, supra note 19, ¶ 36.

104 *Viacom Complaint*, supra note 19, ¶ 36.

105 17 U.S.C. §512(c)(1)(A)(iii) (2006).

106 *Terms of Service*, supra note 31, §5(C).

107 17 U.S.C. §512(c)(1)(B) (2006).

108 *CoStar Group Inc. v. LoopNet, Inc. (CoStar I)*, 164 F. Supp. 2d 688, 705 (D. Md. 2001).

109 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

110 CoStar I, 164 F. Supp. 2d at 692.

111 Id.

112 Id. at 705 (quoting H.R. Rep. No. 105-551, pt. 2, at 54 (1998)).

113 Id.

114 Fonovisa, 76 F.3d at 263.

115 CoStar I, 164 F. Supp. 2d at 705.

116 Id. The plaintiff attempted to use Playboy Enterprises., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503 (N.D. Ohio 1997), a contributory infringement cause of action, as controlling precedent. The test discussed from Hardenburgh relies on Fonovisa's vicarious liability precedent. I believe Hardenburgh misapplied this precedent in a contributory negligence context.

117 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996).

118 Interestingly, at the same time, the court states that "the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability." CoStar I, 164 F. Supp. 2d at 704 (citing Nimmer, supra note 93, §12B.04[A][2], at 12B-38). The Cybernet court expressed "no opinion on the question whether the 'directly attributable' language is narrower or equivalent to the general vicarious infringement requirements." Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002).

119 Cybernet, 213 F. Supp. 2d at 1181.

120 Adult Check is an age verification service, which is designed to prevent minors from accessing online pornographic content. See id. at 1157-58.

121 Cybernet, 213 F. Supp. 2d at 1158-59.

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

123 Cybernet, 213 F. Supp. 2d at 1162.

124 See id. at 1174 (citing H.R. Rep. No. 105-551, pt. 2).

125 H.R. Rep. No. 105-551, pt. 2, at 54 (1998).

126 See id.

127 Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d, 1146, 1181 (C.D. Cal. 2002).

128 Id.

129 In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 661 (N.D. Ill. 2002), aff'd, 334 F.3d 634 (7th Cir. 2003).

130 Id. at 655.

131 Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006), aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 729 (9th Cir. 2007). See supra Part IV.B.1. for a more detailed description of this case's vicarious liability precedent.

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

133 Google, 416 F. Supp. 2d at 857. To participate in AdSense, "a website publisher places code on its site that asks Google's server to algorithmically select relevant advertisements based on the content of that site." Id. at 834 (quotation omitted).

134 von Lohmann, supra note 10.

135 Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

136 The Cybernet court applied a concept borrowed from contributory infringement cases to hold that the company had a right and ability to control the infringing activity. Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1181-82 (C.D. Cal. 2002). CoStar I seems to indicate that the courts are adopting a vicarious infringement standard: "LoopNet does not have the 'right and ability' to control its users commensurate with the standard for vicarious infringement." CoStar I, 164 F. Supp. 2d 688, 704 (D. Md. 2001). The Aimster court refers the reader to the section discussing vicarious liability in coming to its conclusion that this requirement is met. In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 661 (N.D. Ill. 2002), aff'd, 334 F.3d 634 (7th Cir. 2003).

137 Hendrickson, 165 F. Supp. 2d at 1093-94.

138 Id.

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

140 Hendrickson, 165 F. Supp. 2d at 1094.

141 See supra Part III.C.2.

142 This does not appear to include the type of pre-screening that the Hendrickson court allowed. See Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d, 1146, 1181 (C.D. Cal. 2002).

143 Id. at 1181-82.

144 Id.

145 Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004).

146 In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 654 (N.D. Ill. 2002), *aff'd*, 334 F.3d 634 (7th Cir. 2003).

147 *Id.* at 654-55.

148 Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996).

149 Bronstad, *supra* note 19. In its answer to the Tur complaint, YouTube denied editing the content posted on its site. Answer to Tur, *supra* note 19, ¶ 34.

150 It is unclear how “featured videos” are selected. It is at least speculated that the featured videos are not selected based on “metrics that involve user interest or ratings.” Richard Tur, ScrewTube (Oct. 16, 2006), <http://www.richardtur.com/2006.10.16.shtml>. Rather, it is hypothesized that the YouTube staff selects the “Featured Videos” and “Director Videos” featured on the right side of the page: “Some of the videos [are] actually just corporate marketing.” *Id.* Please note that this source may be biased, as Robert Tur is currently suing YouTube for copyright infringement. See Tur Complaint, *supra* note 6.

151 Specifically, the statute lists the requirements in 17 U.S.C. §512(c)(3)(A)(i)-(vi) (2006).

152 17 U.S.C. §512(c)(1)(A)(iii). Some content holders do not believe that YouTube’s policies are satisfactory. Disney stated that “[i]t’s not efficient and [they] think there is a larger conversation to be had.” Matt Whip & Reuters, Disney Asks YouTube to Crack Down on Copyright Misuse, PC Pro, Nov. 30, 2006, <http://www.pcpro.co.uk/news/99238/disney-asks-youtube-to-crack-down-on-copyright-misuse.html>.

153 Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1087 (C.D. Cal. 2004), *aff’d in part, rev’d in part*, 481 F.3d 751 (9th Cir. 2007), modified, 488 F.3d 1102 (9th Cir. 2007).

154 Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082, 1091 (C.D. Cal. 2001).

155 “Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.” 17 U.S.C. §512(c)(3)(A)(ii) (2006). “Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. §512(c)(3)(A)(iii) (2006).

156 See Hendrickson, 165 F. Supp. 2d at 1089-92, for an example of how a court may deal with the notice requirement.

157 17 U.S.C. §512(g)(2)(A)-(B) (2006).

158 17 U.S.C. §512(g)(2)(C) (2006). The NFL has provided an interesting example of how content providers can abuse this takedown provision if a service like YouTube does not adhere to this requirement. After a video clip of the Super Bowl was removed following proper notification, YouTube reposted the video after the poster claimed educational fair use in his counter-notification. Mike Masnick, NFL Continues to Help Professor Demonstrate How Copyright Owners Abuse the DMCA, Techdirt (Mar. 20, 2007), <http://www.techdirt.com/articles/20070319/162906.shtml>. The NFL filed another DMCA takedown notice, at which time the video was removed again. *Id.* Under the DMCA, the video should have remained posted and the courts should have decided the ultimate outcome. *Id.* The Masnick article calls into question whether the fair use defense has any traction in preventing video

removal.

159 17 U.S.C. §512(g)(1).

160 17 U.S.C. §512(f). Copyright owners should be cautious about claiming infringement without justification. Section 512(f) provides that anyone who fraudulently claims copyright infringement is liable to anyone who suffers any damages because of that misrepresentation, including court costs and attorneys' fees. See Hyman, *supra* note 30. "Thus, the copyright holder can become liable to YouTube or the poster for any damages that resulted from the improper removal of the material." Hyman, *supra* note 30.

161 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

162 *Tur Complaint*, *supra* note 6.

163 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). The rights granted by 17 U.S.C. §106 include the ability to reproduce, prepare derivative works, distribute copies, perform publicly, display publicly, and perform the work publicly by means of a digital transmission.

164 *Id.* at 1014. YouTube's users could be protected under the fair use defense provided under 17 U.S.C. §107. The factors considered by the court include "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the 'amount and substantiality of the portion used' in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work." *Id.* (quoting 17 U.S.C. §107). The analysis of the applicability of this defense is beyond the scope of this paper. If the court found that this defense was available to YouTube's users (for example, if a lip-sync video of a copyrighted song was found to be fair use), then YouTube would not be found liable of contributory or vicarious liability for posting such a video. At least one commentator believes that YouTube's users have a good fair use defense, as the end user is engaging in a non-commercial activity and most copyrighted material in user created videos does not have a licensing market. von Lohmann, *supra* note 10.

165 *CoStar Group, Inc. v. LoopNet Inc. (CoStar II)*, 373 F.3d 544, 548 (4th Cir. 2004).

166 *Id.* at 550.

167 *Id.* at 551. LoopNet apparently did not have an interest in the copy of the infringing pictures, as they were not found guilty of direct infringement. *Id.* at 549-51. The court never explicitly held on this point, which suggests that having an interest in the copy was mere dicta. If not, the court must have found that LoopNet's interest in the infringing pictures used to advertise real estate listings was insufficient to find the company liable. It could be argued that LoopNet had an interest in such pictures, as the pictures themselves could act as a draw for customers. Unlike LoopNet, where the text of the listings is likely the primary attraction, YouTube's videos are the basis of its business. It would be hard to argue that YouTube did not have an interest in the posted video content, as it is the principal allure for users.

168 *Id.* at 556.

169 See Bronstad, *supra* note 19.

170 See *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 509 (N.D. Ohio 1997).

171 *Id.* at 506.

172 Id. at 513.

173 Commentators have weighed in on whether YouTube could be held directly liable for infringement under the CoStar II precedent. “[B]ecause its systems are largely automated, it may be that YouTube simply hasn’t engaged in the necessary ‘volitional act’ to cross into the realm of copyright infringement.” von Lohmann, *supra* note 10. “[T]he court held that an [online service provider] that simply owns and manages a system used by others who are violating copyrights, and is not an actual duplicator itself, is not directly liable for copyright infringement. Thus, current case law likely requires a volitional act from YouTube to attach liability.” Hyman, *supra* note 30.

174 *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004).

175 Id. at 1079.

176 Id.

177 Id.

178 Id.

179 *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002).

180 Id. at 1172.

181 Id.

182 Id. at 1172-73.

183 *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 857 (C.D. Cal. 2006), *aff’d in part, rev’d in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007).

184 Id.

185 Id.

186 Id.

187 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

188 Id. at 263.

189 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023-24 (9th Cir. 2001).

190 Id.

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

192 Id. at 1024.

193 The Google court distinguished Google's service from that of Napster, stating that "Napster did control the 'particular environment' in which its file-sharing operated; its architecture was based on a proprietary, closed-universe system, not an open, web-based service." *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 857 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007). In comparison, Google's search service did not have the right and ability to control. "Google does not exercise control over the environment in which it operates --i.e., the web. Google's ability to remove a link from its search index does not render the linked-to site inaccessible." Id.

194 Interestingly, the Google court applied the *Hendrickson* standard for the right and ability to control requirement of the DMCA safe harbor in coming to its conclusion. "[T]he 'right and ability to control'... infringing activity... cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its system." *Google*, 416 F. Supp. 2d at 858 (citation omitted). Google's AdSense policy, which "reserve[d] the right to monitor and terminate partnerships with entities that violate others' copyright," did not constitute a right and ability to control infringing activity. Id. Because Google did not have the right to prevent the websites from posting infringing pictures, this requirement was not met. Id.

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

196 *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

197 Id.

198 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (quoting *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845, 846 n.29 (11th Cir. 1990)).

199 Id. at 1021.

200 Id. at 1020 n.5. The *Cybernet* court found that notification of generic potential copyright infringement by users should have alerted the defendant to infringing activities occurring on its member websites. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1169 (C.D. Cal. 2002).

201 *A&M Records*, 239 F.3d at 1022 n.6.

202 Id. at 1021 (citing *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995)).

203 *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

204 Id.

205 Id. at 652.

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

207 Id. at 653.

208 For example, 30,000 Japanese copyrighted videos were requested to be taken down, which YouTube promptly removed. Associated Press, YouTube Deletes 30,000 Files After Japanese Group Complains About Copyright Infringement, Int'l Herald Trib., Oct. 30, 2006, available at http://www.ihf.com/articles/ap/2006/10/20/business/AS_TEC_Japan_YouTube_Copyrights.php. Following failed negotiations to achieve a licensing deal, Viacom demanded over 100,000 videos be pulled from YouTube's website. Li & Gershberg, *supra* note 20. YouTube claims that the company immediately took down the requested videos. Michael Kwun, Letter to the Editor, An End Run on Copyright Law, Wash. Post, Mar. 29, 2007, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032802057.html>.

209 See *supra* notes 18-20, 54-57 and accompanying text.

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

211 *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004).

212 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001).

213 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005).

214 Id.

215 Id. at 939-40.

216 Id.

217 Tur Complaint, *supra* note 6, ¶ 20. Commentators see this as an important point in determining liability. "If discovery in the Tur case turns up evidence that YouTube was banking on infringing material to increase viewership, it will likely fall prey to Grokster's demise" Hyman, *supra* note 30.

218 The message presented by YouTube does not appear to fill a void for a Grokster-like service. YouTube's current message to users is as follows: "YouTube is a place for people to engage in new ways with video by sharing, commenting on, and viewing videos. YouTube originally started as a personal video sharing service, and has quickly grown into the leading entertainment destination on the Internet. Our users determine what is popular on the site, and can unleash their creativity and broadcast their talents to a global audience." YouTube, YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited Sept. 16, 2007).

219 Tur Complaint, *supra* note 6, ¶ 20.

220 See *supra* notes 54-57 and accompanying text.

221 Tur Complaint, *supra* note 6, ¶ 20.

²²² Mary Kastens, YouTube Community Fears They'll Be Pushed Out After Google Acquisition of the Video Web Site (Oct. 12, 2006), [http:// record.wustl.edu/clip/page/normal/11482.html](http://record.wustl.edu/clip/page/normal/11482.html).

²²³ A commentator aptly voiced the many potential hazards that YouTube may soon encounter: "As we've seen before in this space, young Web 2.0 fans have no problem leaving one technology for a newer or better one. We saw that when Friendster lost ground to MySpace, and even today, MySpace seems to be losing some of its own young audience. With YouTube, the major risk I see is that their core audience could decide tomorrow to go somewhere else, especially since YouTube's core technology is not very advanced--meaning that a newer, more advanced online video service could pretty easily capture those users." Dawn Anfusio, The Beginning of a Trend (Oct. 10, 2006), [http:// www.imediaconnection.com/content/11666.asp](http://www.imediaconnection.com/content/11666.asp).