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THE DESTRUCTION OF AN EMPIRE: WILL VIACOM END YOUTUBE'S REIGN?

*Adam Shatzkes**

I. INTRODUCTION

In a pre-Napster world Congress sought to promote the advancement and development of the Internet. To facilitate this expansion, Congress enacted the Digital Millennium Copyright Act ("DMCA"), which protects internet service providers from copyright infringement liability.¹ Due, in part, to the DMCA, the Internet has expanded beyond Congress' expectations. With the growth of the Internet, however, inequities have been created. YouTube epitomizes these inequities and Viacom's suit highlights the injustices that have been created. The ease with which copyrighted materials are published on the Internet has made it impossible for copyright owners to adequately protect their works. It is time for Congress to revise the DMCA because the burden on copyright owners to protect their works from infringement greatly outweighs the burden placed on service providers.

This Comment discusses the disproportionate burdens confronted by copyright owners compared to service providers and the significant changes to the DMCA which are required to alleviate this problem. Part II explores the history of the DMCA and the rules that govern its application. Part III examines the lawsuit Viacom brought against YouTube alleging direct, contributory, and vicarious copyright infringement. Part IV analyzes YouTube's defense predicated on the DMCA. Part V offers suggestions to correct the imbalance in the burden on copyright owners and service providers.

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¹ 17 U.S.C.A. § 512(a) (West 2009).

II. THE DIGITAL MILLENNIUM COPYRIGHT ACT

With the growth of the Internet came concerns about copyright liability. Congress realized that “the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.”² It was with this goal in mind that Congress enacted the DMCA in 1998.³ “The Digital Millennium Copyright Act (DMCA) in Title I implements the World Intellectual Property (WIPO) treaties on copyright and on performers and phonograms, and in Title II limits the copyright infringement liability of on-line and Internet service providers (OSPs and ISPs) under certain circumstances.”⁴ This Comment focuses on Title II.

A “service provider” is defined as “a provider of online services or network access, or the operator of [the] facilities” or “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁵ In order to protect service providers, a series of safe harbor provisions were created.⁶ “These safe harbors provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.”⁷ A service provider must meet the eligibility standards set forth in Section 512(i) to qualify. Further, safe harbor protection applies only to service providers that both: (A) maintain and reasonably implement a policy that allows for the termination of subscribers when they are known repeat infringers;⁸ and (B) do not impede on standard technical measures.⁹ If the service provider’s activity “qualifies for any of the safe harbors in the DMCA, then it is not liable for any monetary relief for claims of direct, vicarious or contributory copyright infringement based on that activity.”¹⁰

² S. REP. NO. 105-90, at 2 (1998).

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

⁴ S. REP. NO. 105-90, at 8.

⁵ 17 U.S.C.A. § 512(k)(1)(A)-(B).

⁶ *Ellison*, 357 F.3d at 1076 (citing S. REP. NO. 105-90, at 19).

⁷ *See id.* at 1076–77 (footnotes omitted); 17 U.S.C.A. § 512 (a)-(d).

⁸ 17 U.S.C.A. § 512(i)(1)(A).

⁹ *See id.* § 512(i)(1)(B).

¹⁰ Mark F. Radcliffe, *The Digital Millennium Copyright Act: A Retrospective After Three*

This Comment focuses on the third safe harbor provision, “information residing on systems or networks at [the] direction of users.”¹¹ The third provision exempts a service provider from liability when it:

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹²

The service provider must also designate an agent to receive take down notices sent pursuant to the statute by copyright owners.¹³

To further understand the statute and its nuances, we can look at the Ninth Circuit’s recent application of the DMCA in *Perfect 10, Inc. v. CCBill L.L.C.*¹⁴ *Perfect 10*, publishers of an adult magazine and owners of the website perfect10.com, brought suit against CCBill and CWIE.¹⁵ CCBill is a subscription service, in which one can pay for membership to various sites, and CWIE is a webhost. *Perfect 10* alleged that users had posted stolen images onto sites hosted by CWIE, with memberships paid through CCBill.¹⁶ To be eligible for any of the safe harbors, “a service provider must first meet the threshold conditions set out in § 512(i).”¹⁷ Section 512(i) requires

Years, 697 PRAC. L. INST. 593, 596 (2002).

¹¹ 17 U.S.C.A. § 512(c).

¹² *Id.* § 512(c)(1)(A)-(C).

¹³ *See id.* § 512(c)(2)-(3).

¹⁴ 488 F.3d 1102 (9th Cir. 2007).

¹⁵ *Id.* at 1108.

¹⁶ *Id.*

¹⁷ *Id.* at 1109.

that the service provider reasonably implement a system to terminate subscribers when appropriate.¹⁸ Implement means “it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and . . . it does not actively prevent copyright owners from collecting information needed to issue such notifications.”¹⁹ For the implementation to be “reasonable” the service provider must terminate users who “repeatedly or blatantly infringe copyright[s].”²⁰ In *CCBill*, the court held that because CCBill maintained a DMCA log and kept track of repeat infringers it met the “implements” part of the “reasonably implements” test.²¹ With respect to the “reasonably” part of the test, the statute “only requires that a service provider terminate users who are ‘repeat infringers.’”²² In *CCBill*, the court determined that *Perfect 10* did not comply with the notice requirement of § 512(c)(3); therefore, CCBill did not have knowledge of the infringement.²³

The remaining questions of the threshold test were whether CCBill complied with the “red flag test” and interfered with “standard technical measures.”²⁴ The red flag test provides that: “[A] service provider may lose immunity if it fails to take action with regard to infringing material when it is ‘aware of facts or circumstances from which infringing activity is apparent.’”²⁵ Due to an insufficient factual basis, the court remanded to determine if any red flags had been posed by third parties, which would make CCBill aware of repeat infringement.²⁶ “Standard technical measures” are measures used by copyright owners to find copyrighted works that are developed by copyright owners and “do not impose substantial costs on service providers.”²⁷ There was not enough factual information regarding possible interference with “standard technical measures,” so the issue was remanded.²⁸ On remand, if CCBill failed the red flag test or was found to interfere with technical measures,

¹⁸ 17 U.S.C.A. § 512(i)(1)(A).

¹⁹ *Perfect 10*, 488 F.3d at 1109.

²⁰ *Id.*

²¹ *Id.* at 1110-11.

²² *Id.* at 1111.

²³ *Id.* at 1117.

²⁴ *Perfect 10*, 488 F.3d at 1114-15.

²⁵ *Id.* at 1114 (quoting 17 U.S.C.A. § 512(c)(1)(A)(ii)).

²⁶ *Perfect 10*, 488 F.3d at 1115.

²⁷ 17 U.S.C.A. § 512(i)(2)(C).

²⁸ *Perfect 10*, 488 F.3d at 1115.

then it would not be entitled to safe harbor protections.²⁹

Next, the court evaluated CCBill's case for § 512(c) protection.³⁰ The first issue was whether CCBill had knowledge or was aware of the infringement.³¹ *Perfect 10*'s notice was earlier determined to be improper; therefore, it followed that CCBill did not have knowledge.³² The next issue was whether CCBill received "direct financial benefit from the infringing activity."³³ The standard used in *CCBill* was the same as the one for vicarious liability,³⁴ and therefore the relevant question is "whether the infringing activity [was] a draw for subscribers."³⁵ The court noted that CCBill did not receive a direct financial benefit because *Perfect 10* had not provided any real proof of financial benefit.³⁶ The § 512(c) discussion concluded: "If the district court finds that CWIE meets the threshold requirements of § 512(i), CWIE is entitled to safe harbor under § 512(c)."³⁷

The Ninth Circuit Court of Appeals in *CCBill* thoroughly examined the § 512 issues.³⁸ It began with the threshold test, which requires that a service provider have a system in place to terminate subscribers when appropriate, remove infringing materials when appropriate, and not interfere with standard technical measures necessary to find both the appropriate subscribers and infringing materials that should be removed.³⁹ The court's analysis concluded with an examination of the test for § 512(c) protection.⁴⁰ After finding that CCBill was not aware of the infringement and was not receiving a direct financial benefit, the court concluded that, subject to passing the threshold test, CCBill would be protected by § 512(c).⁴¹

²⁹ *Id.* at 1113-15.

³⁰ *Id.* at 1117.

³¹ *Id.*

³² *Id.*

³³ *Perfect 10*, 488 F.3d at 1117.

³⁴ *See infra* Part III(iii) (discussing the standard used).

³⁵ *Perfect 10*, 488 F.3d at 1117.

³⁶ *Id.* at 1118.

³⁷ *Id.*

³⁸ *Perfect 10*, 488 F.3d at 1109-18.

³⁹ *Id.* at 1109, 1114-15.

⁴⁰ *See infra* Part IV(B) (discussing the test for § 512(c) protection).

⁴¹ *Perfect 10*, 488 F.3d at 1118.

III. VIACOM v. YOUTUBE

Internet use has grown at an incredible rate since 1998.⁴² YouTube epitomizes this growth hosting seventy-seven million unique viewers in July 2008,⁴³ more than half the total number of Internet users in 1998.⁴⁴ In 1998, YouTube and similar sites did not exist, as they would have been impractical given the technology at the time. The slower speeds of the connections in 1998 did not allow for streaming video.⁴⁵ Thus, the DMCA is ill suited to address the issues presented by modern technology and sites like YouTube.

Issues arise on mediums such as YouTube when individuals post content that is not theirs to share freely. The staggering number of these violations led Viacom to bring a one billion dollar lawsuit against YouTube for copyright infringement.⁴⁶ In Viacom's suit against Google—which wholly owns YouTube—Viacom alleges Google is liable for direct, contributory, and vicarious copyright infringement.⁴⁷ The results of Viacom's case against YouTube may cause a tremendous change in the way we use, not only YouTube, but the Internet as a whole.

An understanding of the allegations brought by Viacom requires some introduction to the way YouTube functions. Prior to uploading any content to YouTube, a user must create a free account.⁴⁸ This process is quite simple and can be completed in under a minute. Once an account is created, a member can upload a video using videos in several formats.⁴⁹ After “a user uploads a video, YouTube copies the video in its own software format, adds it to its own servers, and makes it available for viewing on its own

⁴² InternetWorldStats.com, Internet Growth Statistics, <http://www.internetworldstats.com/emarketing.htm> (last visited Nov. 25, 2008) (stating that there were 147 million users in 1998 and 1.46 billion users in 2008).

⁴³ WEBSITEOPTIMIZATION.COM, YOUTUBE DWARFS TOP VIDEO SITES (2008), *available at* <http://www.websiteoptimization.com/bw/0808>.

⁴⁴ InternetWorldStats.com, Internet Growth Statistics, <http://www.internetworldstats.com/emarketing.htm> (last visited Nov. 25, 2009) (stating that there were 147 million users in 1998).

⁴⁵ Michael Russell, Broadband vs. Dial Up, <http://ezinearticles.com/?Broadband-vs.-Dial-Up&id=268857> (last visited Nov. 25, 2009).

⁴⁶ Complaint ¶ 10, Viacom Int'l Inc. v. YouTube Inc., No. 07CV02103, 2007 WL 775611 (S.D.N.Y. Mar. 13, 2007).

⁴⁷ *Id.* ¶¶ 47, 74, 83.

⁴⁸ YouTube.com, Create Your YouTube Account, http://www.youtube.com/signup?next=my_account (last visited Nov. 25, 2008).

⁴⁹ *Id.*

website.”⁵⁰ During this automated process, several thumbnails are extracted from the video, which are shown to the user when searching the YouTube site.⁵¹ When uploading a video, the user adds tags to make for easier searching.⁵² According to Google, “[t]ags are keywords that describe videos. For example, a surfing video might be tagged with ‘surfing,’ ‘water,’ and ‘waves.’ Users who enjoy watching surfing videos can then search for any of those terms and the video associated with these tags will show up in their search results.”⁵³

A. Direct Infringement

Two elements are necessary to prove direct infringement: ownership and copying of a protectable expression.⁵⁴ Viacom’s ownership of the copyrighted material is easily established.⁵⁵ For the second element of direct copyright infringement, copying of a protectable expression, Viacom alleges that the rights to public display, public performance, and reproduction have been infringed.⁵⁶ In *A&M Records, Inc. v. Napster, Inc.*,⁵⁷ a monumental case in the history of copyright law because of its pertinence to the Internet, the Ninth Circuit Court of Appeals found that the right to reproduction was violated.⁵⁸ The court explained, “users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”⁵⁹ In YouTube’s answer, it “admit[ted] that when a user uploads a video to the YouTube service, the video is copied into a software format, stored on YouTube’s computers, and made available for viewing through the YouTube service.”⁶⁰ Videos on YouTube

⁵⁰ Complaint, *supra* note 46, ¶ 31.

⁵¹ *Id.*

⁵² *Id.*

⁵³ YouTube.com, YouTube Help Center, Promoting videos: Tags definition, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=55769> (last visited Nov. 25, 2008) (internal quotations omitted).

⁵⁴ See *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989).

⁵⁵ Complaint, *supra* note 46, ¶¶ 43-44 (explaining that Viacom’s copyrighted works include such programming as “The Daily Show,” “The Colbert Report,” and “South Park”).

⁵⁶ *Id.* ¶ 31.

⁵⁷ 239 F.3d 1004 (9th Cir. 2001).

⁵⁸ *Id.* at 1013-14.

⁵⁹ *Id.*

⁶⁰ Answer ¶ 31, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07CV02103, 2007 WL 1724620 (S.D.N.Y. Apr. 30, 2007).

are streamed to the user's computer.⁶¹ When data is received, it is stored in a buffer file and sent to the player to translate into video.⁶² Through this process, the entire video will be played. Viacom alleges that it "identified more than 150,000 unauthorized clips of their copyrighted programming on YouTube."⁶³ Since many of those videos are unauthorized clips of copyrighted programming, based on the reasoning in *Napster*, YouTube is directly infringing on the copyrights of Viacom.

A defense to direct infringement is fair use.⁶⁴ To find fair use the court is guided by four factors: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for the work or the value of the work."⁶⁵ The first factor focuses on "whether the new work merely 'supercede[s] the objects' of the original creation, . . . or instead adds . . . a further purpose or different character."⁶⁶ In other words, this factor asks "whether and to what extent the new work is 'transformative.'"⁶⁷ As part of this element, the court must determine whether the infringing use is commercial, which would "weigh[] against a finding of fair use but is not conclusive on the issue."⁶⁸ The second factor, nature of the work, asks how creative in nature the work is.⁶⁹ Works that are more creative receive greater copyright protection.⁷⁰ The third factor focuses on the portion used, which, on its own, does not preclude the defense of fair use even when the entire work is copied, but it does weigh against a finding of fair use.⁷¹ The fourth factor is the extent to which the work damages

⁶¹ YouTube.com, YouTube Help Center, Video Player Issues: The video won't play, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=56115> (last visited Nov. 25, 2008).

⁶² Ehow.com, How Does a Streaming Video Work, http://www.ehow.com/how-does_4564632_streaming-video-work.html (last visited Nov. 25, 2008).

⁶³ Complaint, *supra* note 46, ¶ 3.

⁶⁴ *Napster*, 239 F.3d at 1014; *see also* 17 U.S.C.A. § 107 (West 2009).

⁶⁵ *Napster*, 329 F.3d at 1014 (internal quotation omitted).

⁶⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citations omitted).

⁶⁷ *Id.*

⁶⁸ *Napster*, 239 F.3d at 1015.

⁶⁹ *Id.* at 1016.

⁷⁰ *Id.*

⁷¹ *See Hustler Magazine Inc., v. Moral Majority Inc.*, 796 F.2d 1148, 1154-55 (9th Cir. 1986).

the present or future market for the original work.⁷²

In its answer, Google raises the defense of fair use.⁷³ Similarly, in *Napster*, “Napster contend[ed] that its users do not directly infringe plaintiffs’ copyrights because the users are engaged in fair use of the material.”⁷⁴ With respect to the first factor, purpose and character of the use, the *Napster* court concluded “that downloading . . . files does not transform the copyrighted work [The court is] reluctant to find fair use when an original work is merely retransmitted in a different medium.”⁷⁵ Applying this principle to YouTube, the alleged use of Viacom’s copyrighted clips through retransmission in other formats is not a transformative use. As part of this element, the court will have “to determine whether the allegedly infringing use is commercial.”⁷⁶ A showing of repeated copying of copyrighted works is sufficient to demonstrate a commercial use, even without the sale of the works.⁷⁷ While there will be further examination of the financial benefit Google receives from the allegedly copyrighted materials, it is clear that a court could reasonably find that there was a commercial use without it.⁷⁸

The second factor is nature of the work.⁷⁹ In *Napster*, the court found that “copyrighted musical compositions and sound recordings are creative in nature . . . which cuts against a finding of fair use.”⁸⁰ Following that logic, there is no reason to believe that copyrighted video, television programming, or movie clips, are any less creative; therefore, contradicting a finding of fair use.

The third factor focuses on the portion of the material used.⁸¹ Although the court in *Hustler* concluded that copying the whole file did not preclude the defense of fair use, it explained that this would hurt a fair use argument.⁸² While YouTube limits the length of

⁷² *Napster*, 239 F.3d at 1016.

⁷³ Answer, *supra* note 60, ¶ 7.

⁷⁴ *Napster*, 239 F.3d at 1014.

⁷⁵ *Id.* at 1015.

⁷⁶ *Id.*

⁷⁷ See *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (stating that the church that copied religious text for its members “unquestionably profit[ed]” from the unauthorized “distribution and use of [the text] without having to account to the copyright holder”).

⁷⁸ See *infra* Part III(B)(a).

⁷⁹ *Napster*, 239 F.3d at 1014.

⁸⁰ *Id.* at 1016 (internal quotation omitted).

⁸¹ *Id.* at 1014.

⁸² *Hustler Magazine Inc.*, 796 F.2d at 1155.

uploaded videos to ten minutes, users are still able to upload three separate ten minute videos in order to post a full half hour television show or several more in order to post a full movie.⁸³ Similarly, using a small portion of a work, which amounts to the “heart” of the work, weighs against a finding of fair use.⁸⁴ Without posting a whole episode or movie, a ten minute video could take the place of the full episode or movie if the “heart” of the work has been copied.

The fourth factor is impact on “the potential market for the [original] work.”⁸⁵ Viacom alleges that it found 150,000 infringing video clips, and that this caused damage to the market for the works because it was posted to YouTube before it could be sold.⁸⁶ It uses the example of “An Inconvenient Truth” being posted in its entirety before it could be sold on DVD.⁸⁷ If just the one example of “An Inconvenient Truth” were subject to widespread reproduction before a DVD was released, there would clearly be a “substantial impact on the market for the original.”⁸⁸ In sum, all four factors militate against a finding of fair use.

Google may also try to defend itself by stating that the services YouTube provides are passive. “As to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another.”⁸⁹ At a preliminary hearing, Google explained that the search function, for instance, uses an automatic algorithm and does not favor infringing materials over non-infringing ones.⁹⁰ While this could be a valid argument, YouTube is not simply a passive service provider. In *Netcom*, the court explained that “a system that automatically . . . creates temporary copies of all the data sent through it is” passive.⁹¹ The court relates it to a copy machine. YouTube does not just copy the files but “copies the video in its own software format, adds it to its own servers, and makes it available for viewing on its own

⁸³ YouTube.com, YouTube Help Center, Learn More: Longer Videos, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=71673> (last visited Nov. 25, 2008).

⁸⁴ *Campbell*, 510 U.S. at 587.

⁸⁵ *Napster*, 239 F.3d at 1014.

⁸⁶ Complaint, *supra* note 46, ¶¶ 3, 44.

⁸⁷ *Id.* ¶ 44.

⁸⁸ *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999).

⁸⁹ *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622 (4th Cir. 2001).

⁹⁰ *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256, 260 (S.D.N.Y. 2008).

⁹¹ *Religious Tech. Ctr. v. Netcom On-Line Comm'n Serv., Inc.*, 907 F. Supp. 1361, 1369 (N.D. Cal. 1995).

website.”⁹² YouTube also takes several thumbnails from the video provided to the user when searching for a video, which has been indexed by the tags provided by the uploader.⁹³ Once uploaded, the file is in YouTube’s format, on its servers and available for viewing by users who use its search function; this does not sound like the “passive, automatic act” the court meant to protect.

B. Contributory Infringement

Viacom next alleged contributory infringement.⁹⁴ “[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.”⁹⁵ A dissection of this statement indicates that the plaintiff must show that the defendant had knowledge of the infringement, and materially contributed to the infringing conduct.

It was reported that when Google purchased YouTube for \$1.65 billion it set aside money to fund legal costs because it recognized the possibility that YouTube may face lengthy court battles.⁹⁶ Google has also entered into costly licensing agreements with more than one thousand small and large media companies, in exchange for either ad revenue⁹⁷ or use of filtering technology to remove copyrighted materials.⁹⁸ In the last year, a research group at MIT has monitored videos that have been taken down from the YouTube site.⁹⁹ It determined that more than 45,000 videos have been removed with over 9000 of those being removed due to take-down notices by copyright owners.¹⁰⁰ With this being just a small percentage of the videos that have been removed, it is hard to believe

⁹² Complaint, *supra* note 46, ¶ 31.

⁹³ *Id.*

⁹⁴ *Id.* ¶ 74.

⁹⁵ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (internal footnote omitted).

⁹⁶ See ANNE BROACHE, VIACOM SUES GOOGLE OVER YOUTUBE CLIPS (2007), http://news.zdnet.com/2100-9588_22-151503.html.

⁹⁷ See Miguel Helft, *Google Aims to Make YouTube Profitable with Ads*, N.Y. TIMES, Aug. 22, 2007, at C1.

⁹⁸ Complaint, *supra* note 46, ¶ 7.

⁹⁹ YouTomb.mit.edu, YouTomb Statistics, <http://youtomb.mit.edu/statistics> (last visited Nov. 20, 2008).

¹⁰⁰ *Id.*

Google can say it did not have knowledge of infringement.¹⁰¹

A more difficult question is whether the court will find that Google is materially contributing to the infringement. In *Fonovisa, Inc. v. Cherry Auction, Inc.*,¹⁰² the court found “it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by [Cherry Auction].”¹⁰³ “These services include, inter alia, the provision of space, utilities, parking, advertising, plumbing, and customers.”¹⁰⁴ Also, “providing the site and facilities for known infringing activity is sufficient to establish contributory liability.”¹⁰⁵ In the instant case, YouTube provides the support services by converting the videos into its format and then storing them on its servers. It is estimated that YouTube spends one million dollars a day just on bandwidth.¹⁰⁶ The alleged massive quantity of infringement could not occur without YouTube because the average user could not afford even a small portion of that cost.

Therefore, subject to the DMCA defense,¹⁰⁷ YouTube should be found liable for contributory infringement.

C. Vicarious Infringement

Vicarious infringement, the next allegation, imposes liability even if the service provider is unaware of the infringement. “[O]ne may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁰⁸ In order to prove vicarious liability, both direct financial benefit and the right and ability to supervise must be present.¹⁰⁹ These elements are commonly referred to as “control and benefit.”¹¹⁰

¹⁰¹ *Id.*

¹⁰² 76 F.3d 259 (9th Cir. 1996).

¹⁰³ *Id.* at 264.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 1147 (1994) (stating that “[m]erely providing the means for infringement may be sufficient” to incur contributory copyright liability).

¹⁰⁶ Yi-Wyn Yen, *YouTube Looks for the Money Clip*, CNNMONEY.COM, Mar. 25, 2008, <http://techland.blogs.fortune.cnn.com/2008/03/25/youtube-looks-for-the-money-clip/>.

¹⁰⁷ See *infra* Part III.

¹⁰⁸ *Gershwin*, 443 F.2d at 1162.

¹⁰⁹ *Fonovisa*, 76 F.3d at 263.

¹¹⁰ See *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1327 (D.

“[D]efendants are found to have ‘control’ over a performance if they ‘either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program.’”¹¹¹ In *Polygram*, the control element was found based on two facts: “(1) Interface exercised authority and control over its exhibitors through its Rules and Regulations and (2) the exhibitors were bound to follow these rules.”¹¹² In *Napster*, the court found with respect to control that Napster

has the ability to locate infringing material listed on its search indices, and the right to terminate users’ access to the system. The file name indices, therefore, are within the ‘premises’ that Napster has the ability to police. We recognize that the files are user-named and may not match copyrighted material exactly For Napster to function effectively, however, file names must reasonably or roughly correspond to the material contained in the files, otherwise no user could ever locate any desired music.¹¹³

Similarly, YouTube uses its Terms of Service in order to exercise control.¹¹⁴ Under section two of the terms, simply employing the services provided by YouTube binds the user to the Terms of Service.¹¹⁵ YouTube, also in the Terms of Service, reserves the right to remove videos or users at its own discretion.¹¹⁶ A user, who uploads a video to the site, is bound by the terms of service and grants YouTube a non-exclusive license to the work.¹¹⁷ Under the test provided by *Polygram*, YouTube is vicariously liable because control is gained by YouTube through the Terms of Service. The findings of *Napster* are on point with what is occurring on YouTube and bolsters this decision. Instead of file names, YouTube users provide the site with tags that have to “reasonably or roughly

Mass. 1994).

¹¹¹ *Id.* at 1328 (citation omitted) (emphasis in the original).

¹¹² *Id.*

¹¹³ *Napster*, 239 F.3d at 1024.

¹¹⁴ YouTube.com, YouTube Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 20, 2008).

¹¹⁵ *Id.* ¶ 2.

¹¹⁶ *Id.* ¶ 7.

¹¹⁷ *Id.* ¶ 6.

correspond to the material contained in the files[;]" otherwise the videos would never be located or watched.¹¹⁸ YouTube has the ability to monitor these terms using filters, which it does for companies that license the material to it.¹¹⁹ Therefore, YouTube should be found to have satisfied the element of control of the infringing activity for vicarious liability.

In *Fonovisa*, the Ninth Circuit Court of Appeals found that vicarious liability should be imposed on "the operator of a business where infringing performances enhance the attractiveness of the venue to potential customers."¹²⁰ Forbes estimates that YouTube will generate approximately \$200 million in ad revenue this year.¹²¹ Viacom has been granted access to the records of YouTube so that it can show that infringing content makes up a substantial portion of the total content on YouTube.¹²² In *Polygram*, the United States District Court found financial benefit due to the use of a copyrighted song at five of the over 2000 booths of the swap meet where the total gross revenue was merely forty-four million dollars.¹²³ The court explained that "[e]ven if only one exhibitor played music for only one hour, the benefit to Interface could be very substantial."¹²⁴ Even on the limited sample taken by researchers at MIT, there have been 665 videos removed from YouTube by Viacom.¹²⁵ Twelve of those videos have been viewed more than one million times, several of which are music videos taken directly from MTV, one of Viacom's copyrights.¹²⁶ Also significant is Google's purchase of YouTube for \$1.65 million,¹²⁷ indicating that Google intends to profit from YouTube. Taking everything into account, YouTube has clearly benefited financially from the infringing material.

Therefore, similar to contributory infringement, subject to the

¹¹⁸ *Napster*, 239 F.3d at 1024.

¹¹⁹ Complaint, *supra* note 46, ¶ 7.

¹²⁰ *Fonovisa*, 76 F.3d at 263.

¹²¹ Quentin Hardy & Evan Hessel, *Gootube*, FORBES.COM, June 16, 2008, <http://www.forbes.com/forbes/2008/0616/050.html>.

¹²² *Viacom Int'l Inc.*, 253 F.R.D. at 261.

¹²³ *Polygram*, 855 F. Supp. at 1331.

¹²⁴ *Id.* at 1333.

¹²⁵ Youtomb.mit.edu, YouTomb Statistics, <http://youtomb.mit.edu/statistics> (last visited Nov. 20, 2008).

¹²⁶ Youtomb.mit.edu, YouTomb Statistics, <http://youtomb.mit.edu/statistics> (follow "down:copyright:Viacom International Inc." hyperlink; then, follow "view" hyperlink).

¹²⁷ Anne Broache, *Viacom Sues Google Over YouTube Clips*, ZDNET.COM, Mar. 13, 2007, http://news.zdnet.com/2100-9588_22-151503.html.

DMCA defense,¹²⁸ YouTube should be held liable for vicarious copyright infringement.

IV. DMCA: GOOGLE'S MAIN DEFENSE

If an Internet service provider “qualifies for any of the safe harbors in the DMCA, then it is not liable . . . for claims of direct, vicarious or contributory copyright infringement based on that activity.”¹²⁹ Therefore, in the name of efficiency, several courts have determined whether a defendant qualified for safe harbor protection under the DMCA before discussing liability.¹³⁰

A. Threshold Test

To be protected by the DMCA safe harbor provisions, Google must first meet the threshold requirements of the DMCA.¹³¹ Thus, “it must be a ‘service provider’ and it must adopt . . . a policy providing that it may, in appropriate circumstances, terminate the accounts of repeat infringers.”¹³² And, “the service provider is obliged to accommodate, and must not interfere with, ‘standard technical measures’ used by copyright owners to identify or protect copyrighted works.”¹³³

Is YouTube a “service provider?”¹³⁴ In its complaint, Viacom argues that “the YouTube conduct . . . is not simply providing storage space, conduits, or other facilities to users [but] [t]o the contrary, YouTube itself commits the infringing duplication, public performance, and public display of Plaintiffs’ copyrighted works.”¹³⁵ “Generally, these liability limitations apply only to passive activities, where the ISP does not exercise any control over, or interact with, the content of the infringing material.”¹³⁶ Most courts have interpreted

¹²⁸ See *infra* Part III.

¹²⁹ Radcliffe, *supra* note 10, at 596.

¹³⁰ See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1141 (N.D. Cal. 2008).

¹³¹ *Corbis*, 351 F. Supp. 2d at 1098.

¹³² *Veoh*, 586 F. Supp. 2d at 1142 (citation omitted).

¹³³ *Id.* at 1142-43 (citation omitted).

¹³⁴ See 17 U.S.C.A. § 512(k)(1)(A)-(B) (defining “service provider”).

¹³⁵ Complaint, *supra* note 46, ¶ 31.

¹³⁶ Christopher Paul Boam, *The Internet, Information, and the Culture of Regulatory Change: A Modern Renaissance*, 9 COMM.LAW CONSPECTUS 175, 187 (2001).

the definition of “service provider” broadly.¹³⁷ If the court finds that Google is not a “service provider,” then the DMCA safe harbor defense will fail.

Assuming Google is found to be a “service provider,” the next question is whether Google “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of . . . repeat infringers;” and “accommodates and does not interfere with standard technical measures.”¹³⁸ YouTube has an automated system in place that takes down videos whenever a take-down notice is sent;¹³⁹ however, Viacom argues that this is not enough.¹⁴⁰ Viacom alleges that repeat infringers who are removed can create a new account under a different name and YouTube has no mechanism to prevent this abuse.¹⁴¹ Viacom’s successful motions to compel production of several records of YouTube should prove whether this occurs¹⁴² and, if so, would demonstrate that YouTube’s policy for terminating repeat infringers is ineffectual. The district court in *Corbis v. Amazon*, however, found that “[t]he mere fact that [the repeat infringer] appeared on zShops under a different user name and identity does not, by itself, create a legitimate question of fact regarding the procedural implementation of Amazon’s termination policy.”¹⁴³ This policy, if followed, would seem to help YouTube’s case, but the *Amazon* Court did not decide what would happen if this were done by a large number of users. Widespread creation of new user aliases by repeat infringers after their termination would render the termination policy essentially useless. Congress, in using the words “reasonably implements,” did not intend for such an easy workaround to occur.

Whether YouTube “interferes with standard technical measures,” is another point in dispute. Viacom argues that YouTube’s search function interferes with such measures because it

¹³⁷ See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004); *Veoh*, 586 F. Supp. 2d at 1142-43.

¹³⁸ 17 U.S.C.A. § 512(i)(1)(A)-(B).

¹³⁹ Google Copyright Blog: Automation in Takedowns, <http://googlecopyright.blogspot.com/2007/04/automation-in-takedowns.html> (last visited Nov. 25, 2008).

¹⁴⁰ Complaint, *supra* note 46, ¶ 6.

¹⁴¹ *Id.* ¶ 41.

¹⁴² *Viacom Int’l Inc.*, 253 F.R.D. at 259.

¹⁴³ *Corbis*, 351 F. Supp. 2d at 1104.

only identifies one thousand clips for any search.¹⁴⁴ It also argues that YouTube, by allowing people to make items available only to friends, a private use, deters it from finding infringing materials.¹⁴⁵ These conclusions have led Viacom to believe that “no matter how much effort and money copyright owners expend to protect their rights, there will always be a vast collection of infringing videos on YouTube.”¹⁴⁶ With respect to Viacom’s allegations, YouTube can argue that allowing search results to be unlimited would impose “substantial costs on service providers or substantial burdens on their systems or networks” and it, therefore, does not need to expand its searches to be in compliance with the DMCA.¹⁴⁷ While limiting searches to one thousand results is a reasonable technical measure, keeping items private is not. This measure could make it impossible for a copyright owner to find infringements, and therefore should be considered interference with standard technical measures.

The next part of the threshold test as defined by *CCBill* is the red flag test.¹⁴⁸ Viacom, in its complaint, directly commented on red flags when it alleged “YouTube’s site is also filled with ‘red flags’ from which infringing activity is apparent, such as description terms and search tags using Plaintiffs’ well-known trademarks.”¹⁴⁹ This may be compounded by the recent reports of the effectiveness of filtering used by NBC, one of YouTube’s partners, for Olympic coverage.¹⁵⁰ Although imperfect,¹⁵¹ YouTube should enable filtering technology for known copyrights or at least apply them after a takedown notice has been sent to keep similar material off the site.

In a similar case, *Io Group v. Veoh Networks*, the United States District Court, in examining the threshold test, found that “Veoh (a) has a working notification system, (b) has a procedure for dealing with DMCA-compliant notifications, and (c) does not actively prevent copyright owners from collecting information necessary to issue such notices.”¹⁵² With respect to blocking

¹⁴⁴ Complaint, *supra* note 46, ¶ 43.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 17 U.S.C.A. § 512(i)(2)(C).

¹⁴⁸ *CCBill*, 488 F.3d at 1114.

¹⁴⁹ Complaint, *supra* note 46, ¶ 36.

¹⁵⁰ See Janko Roettgers, *Youtube Filters 75-80 Percent Accurate*, NEWTEEVEE, Nov. 6, 2008, <http://newteevee.com/2008/11/06/youtube-filters-75-80-percent-accurate-nbcu-exec/>.

¹⁵¹ *Id.*

¹⁵² *Veoh*, 586 F. Supp. 2d at 1145.

previously infringing content, “Veoh does track content that has been identified as infringing and permanently blocks that content from ever being uploaded by any user.”¹⁵³ Based on these findings, the court held that Veoh met the threshold requirements.¹⁵⁴ In YouTube’s case, Viacom does not argue that YouTube’s notification system is inadequate. It does argue that YouTube’s procedure for dealing with the notifications is ineffectual because “users routinely alter as little as a frame or two of a video and repost it.”¹⁵⁵ In *ALS Scan*, the court explained that “the notification requirements are relaxed to the extent that, with respect to multiple works, not all must be identified—only a ‘representative’ list.”¹⁵⁶ “[T]he requirements of a notification does not seek to burden copyright holders with the responsibility of identifying every infringing work—or even most of them—when multiple copyrights are involved. Instead, the requirements are written as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.”¹⁵⁷ This approach, which looks to the intent of the DMCA and better balances the burdens placed on copyright holders and service providers, should apply. Viacom complains that YouTube does not comply with the requirements set out in *ALS Scan* stating: “[YouTube] removes only the specific infringing clips at the specific web addresses (URLs) identified in a takedown notice, rather than all infringing works that can be reasonably located using the representative lists and other information in the notice.”¹⁵⁸ Following the decision in *Veoh*, YouTube is more likely to meet the threshold test of the DMCA. But if the more expansive view in *ALS Scan* with respect to notice is used, then this may jeopardize YouTube’s protection under the safe harbors.

B. Section 512(c) Protection

YouTube seeks to protect itself from liability with the “at the direction of users” safe harbor under § 512(c).¹⁵⁹ The most difficult

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1147.

¹⁵⁵ Complaint, *supra* note 46, ¶ 40.

¹⁵⁶ *ALS Scan*, 239 F.3d at 625.

¹⁵⁷ *Id.*

¹⁵⁸ Complaint, *supra* note 46, ¶ 41.

¹⁵⁹ 17 U.S.C.A. § 512(c).

issues for the court arise under § 512(c)(1)(B) and § 512(c)(1)(A): (a) whether YouTube “receive[s] a financial benefit directly attributable to the infringing activity;”¹⁶⁰ (b) if a direct financial benefit occurs, does YouTube have the ability to control the infringing activities;¹⁶¹ (c) does YouTube have actual or apparent knowledge of the infringement;¹⁶² and (d) if YouTube does have knowledge, does it then remove the content expeditiously?¹⁶³

1. *Direct Financial Benefit*

Whether YouTube receives a direct financial benefit from the infringing activity may be the most important issue in the case. It may also be one of the hardest issues for the court to decide. One consistently cited source of case law that defines direct financial benefit is *Fonovisa*.¹⁶⁴ In *Fonovisa*, the Ninth Circuit found direct financial benefit existed when “infringing performances enhance the attractiveness of the venue to potential customers.”¹⁶⁵ When this test was applied to the particular facts of *Fonovisa*, the court stated “the sale of pirated recordings . . . is a ‘draw’ for customers,” and therefore provided a direct financial benefit.¹⁶⁶ The court in *CoStar Group v. Loopnet* disagreed.¹⁶⁷ In *CoStar*, the United States District Court used a narrow interpretation based on the plain language of the statute.¹⁶⁸ It decided that for a direct financial benefit to exist the benefit must be “directly attributable to the infringing activity.”¹⁶⁹ Taking such a narrow approach is impractical and provides too little protection for copyright owners. The courts in *Napster*,¹⁷⁰ *CCBill*,¹⁷¹ and *Veoh*¹⁷² all followed the reasoning from *Fonovisa*.

Viacom alleges that YouTube receives a direct financial

¹⁶⁰ 17 U.S.C.A. § 512(c)(1)(B).

¹⁶¹ *Id.*

¹⁶² *See* 17 U.S.C.A. § 512(c)(1)(A).

¹⁶³ *Id.*

¹⁶⁴ *Fonovisa*, 76 F.3d at 263 (demonstrating that *Fonovisa* was a vicarious liability case, where the DMCA was not applicable).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *CoStar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 705 (D. Md. 2001).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (citing 17 U.S.C.A. § 512(c)(1)(B)).

¹⁷⁰ 239 F.3d at 1023.

¹⁷¹ 488 F.3d at 1117.

¹⁷² 586 F. Supp. 2d at 1151.

benefit from its conduct.¹⁷³ In its complaint Viacom alleges that “YouTube derives advertising revenue directly attributable to the infringing works, because advertisers pay YouTube to display banner advertising to users whenever they log on to, search for, and view infringing videos.”¹⁷⁴ In accordance with the findings of *Fonovisa*, Viacom stated that copyrighted materials were used “to draw millions of users to [YouTube’s] website.”¹⁷⁵ Based upon the *Costar* standard, Viacom will argue that YouTube realizes a direct financial benefit attributable to the infringing content.¹⁷⁶ However, this standard will be more difficult for Viacom to satisfy. Since Viacom alleges such a large amount of infringing materials, it must show that the ads that are presented on the YouTube homepage as well as on the various search pages are sources of direct financial benefit to YouTube. The standard articulated in *Fonovisa* will likely be used by the Second Circuit because of its wide adoption in recent cases and the impracticability of determining what profits are directly attributable to infringing content in a web environment. Under the *Fonovisa* standard, a court should find that YouTube is receiving a direct financial benefit from the infringing content.

2. *Right and Ability to Control*

A finding of direct financial benefit on its own does not bar safe harbor protection. If the court finds that YouTube receives a direct financial benefit from the infringing activities and has the right and ability to control the infringement, then it will be barred from using § 512(c). In *Hendrickson v. eBay*, the United States District Court explained 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 in its system.”¹⁷⁷ In determining that eBay did not have control over the infringing material, the court found that “eBay is not actively involved in the listing, bidding, sale and delivery of any item offered for sale on its website.”¹⁷⁸

¹⁷³ Complaint, *supra* note 46, ¶ 37.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Costar*, 164 F. Supp. 2d at 705.

¹⁷⁷ *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

¹⁷⁸ *Id.* at 1094.

In contrast, although dealing with the control element from a vicarious infringement perspective, the Ninth Circuit in *Napster* found that “Napster retains the right to control access to its system.”¹⁷⁹ It reasoned that, “Napster has an express reservation of rights policy, stating on its website that it expressly reserves the ‘right to refuse service and terminate accounts . . . if Napster believes that user conduct violates applicable law . . . or for any reason in Napster’s sole discretion, with or without cause.’”¹⁸⁰ In order to protect itself from liability, Napster’s “reserved right to police must be exercised to its fullest extent . . . [because] [t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.”¹⁸¹

Hendrickson and *Napster* both fall onto a continuum with one end being no right and ability to control and the other being total right and ability to control. *Hendrickson* would be placed somewhere on the left of this continuum, while *Napster* would fall somewhere on the right of the continuum. YouTube, like *Napster*, will fall on the right side and the court should find that YouTube has the right and ability to control infringing materials on its site. YouTube’s Terms of Service state that when uploading a video “you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions.”¹⁸² It also states that “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.”¹⁸³ Based on the court’s findings in *Hendrickson*, this alone does not imply that YouTube has control.¹⁸⁴ YouTube does not simply monitor, as Viacom alleges, it determines who it protects from infringement based on whether the copyright owner enters a licensing agreement.¹⁸⁵

YouTube is easily distinguishable from eBay. YouTube is actively involved in the posting and listing of the infringing content.

¹⁷⁹ *Napster*, 239 F.3d at 1023.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² YouTube.com, YouTube Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 20, 2008).

¹⁸³ *Id.*

¹⁸⁴ *Hendrickson*, 165 F. Supp. 2d at 1094.

¹⁸⁵ Complaint, *supra* note 46, ¶ 7.

It converts the file, extracts images, and stores the file and images on its own servers.¹⁸⁶ It is also taking a license in the file “to use, reproduce, distribute, prepare derivative works of, display, and perform.”¹⁸⁷ Another difference between eBay and YouTube is that YouTube has the ability to inspect the videos that are posted to its site; eBay, however, could not inspect the products offered for sale. Since “YouTube proactively reviews and removes pornographic videos from its library,” Viacom questions why the same cannot be done with infringing videos.¹⁸⁸ Although the decision of whether a video infringes the copyright laws is much harder than whether a video contains pornographic content, this does not explain why blatantly infringing materials cannot be removed prior to their being made publicly available.

The *Napster* court explained that “[t]urning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.”¹⁸⁹ In its complaint, Viacom repeatedly implies that this is exactly what YouTube is doing.¹⁹⁰ By requiring copyright owners to provide YouTube with licenses, YouTube is trying to profit directly from the infringing videos.¹⁹¹ Many of these agreements also allow YouTube to place ads in or around the videos.¹⁹² Viacom also alleges that were it not for the infringing materials, YouTube would lose a substantial number of its users, thereby losing ad revenue.¹⁹³ The court in *ALS Scan* stated that “[t]he DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence.”¹⁹⁴ YouTube’s inaction for the sake of profit, along with the other elements of control, removes its innocence as a service provider.

¹⁸⁶ Answer, *supra* note 60, ¶ 31.

¹⁸⁷ YouTube.com, YouTube Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 20, 2008).

¹⁸⁸ Complaint, *supra* note 46, ¶ 38.

¹⁸⁹ *Napster*, 239 F.3d at 1023.

¹⁹⁰ Complaint, *supra* note 46, ¶¶ 3, 6, 8, 28.

¹⁹¹ See Candace Lombardi, *YouTube Cuts Three Content Deals*, CNET, Oct. 9, 2006, http://news.cnet.com/YouTube-cuts-three-content-deals/2100-1030_3-6123914.html.

¹⁹² *Id.*

¹⁹³ Complaint, *supra* note 46, ¶ 6.

¹⁹⁴ *ALS Scan*, 239 F.3d at 625.

3. *Actual or Apparent Knowledge*

The knowledge requirement of § 512(c) is consistent with the knowledge requirement under the threshold test of § 512(i).¹⁹⁵ Pursuant to § 512(c)(1)(A), the service provider cannot have actual knowledge of infringement or “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.”¹⁹⁶ If the service provider does have knowledge then the only way for it to still be protected by the safe harbors of § 512(c) is if it acts expeditiously to remove the material when it obtains that knowledge.¹⁹⁷ The court, in *Veoh*, broke this down into two categories: (1) “Actual Knowledge of Infringing Activity”; and (2) “Apparent Infringing Activity.”¹⁹⁸ Since Io Group did not send any take down notices, the court found that there was no actual knowledge because notice was not adequately provided of the infringement.¹⁹⁹ For apparent infringing activities, the court looked to *Corbis* stating that “ ‘the question is whether the service provider deliberately proceeded in the face of blatant factors of [infringement of] which it was aware.’ ”²⁰⁰ It further clarified that “ ‘apparent knowledge requires evidence that a service provider ‘turned a blind eye to ‘red flags’ of obvious infringement.’ ”²⁰¹

Does YouTube have actual knowledge of infringement? In *Veoh*, the court found that there was not actual knowledge because of the lack of adequate notice.²⁰² In this case it is clear that there was adequate notice. Viacom sent YouTube 100,000 take down notices after negotiations failed between the two.²⁰³ This provided YouTube with adequate knowledge of infringing materials. For the safe harbor to apply, YouTube would have to “act expeditiously to remove, or disable access to, the material.”²⁰⁴

¹⁹⁵ *Veoh*, 586 F. Supp. 2d at 1144.

¹⁹⁶ 17 U.S.C.A. § 512(c)(1)(A)(i)-(ii).

¹⁹⁷ See 17 U.S.C.A. § 512(c)(1)(C).

¹⁹⁸ *Veoh*, 586 F. Supp. 2d at 1148.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (quoting *Corbis*, 351 F. Supp. 2d at 1108).

²⁰¹ *Id.* (quoting *Corbis*, 351 F. Supp. 2d at 1108).

²⁰² *Veoh*, 586 F. Supp. 2d at 1148.

²⁰³ Steve Bryant, *Viacom Orders Google to Remove 100,000 YouTube Videos*, GOOGLEWATCH, Feb. 2, 2007, http://googlewatch.eweek.com/content/youtube/viacom_orders_google_to_remove_100000_youtube_videos.html.

²⁰⁴ 17 U.S.C.A. § 512 (c)(1)(A)(iii).

4. *Remove Infringing Materials Expeditiously*

Since YouTube will likely be found to have actual knowledge, and, as discussed previously, may also be found to have apparent knowledge, YouTube will have to prove that it “act[ed] expeditiously to remove, or disable access to, the [infringing] material.”²⁰⁵ If YouTube was only required to remove the infringing material stated in the takedown notices, then it would clearly be protected due to its system which automatically takes down videos when notices are sent. However, the court in *ALS Scan* explained that for removal not all works need to be identified, only a ‘representative’ list.²⁰⁶ As the court explained, this is done in order to achieve a balance of responsibilities between the service provider and the copyright owner.²⁰⁷ It seems that this is the critical issue in this case; neither side wants to spend the money needed to properly stop the infringement and both sides argue that the burden is too great.

V. CONCLUSION

It appears clear that YouTube will be found liable for copyright infringement. YouTube’s main defense is the § 512(c) safe harbor under the DMCA.²⁰⁸ Conflicting opinions exist as to what standards must be met before the safe harbors apply.²⁰⁹ When the DMCA was created, the expansion of service providers and the production of faster service were of greater import than the rights of the copyright owner. At the time, this preference seemed legitimate because, at the Internet speeds in 1998, mass infringement was unlikely, if not impossible, for video content; however, with such contemporary technology such as broadband internet and streaming video, infringement occurs in alarming amounts.

Even if Viacom and Google come to a settlement and enter into a licensing agreement, this discussion is important because other cases will arise that require the resolution of these issues. Therefore, Congress should amend the DMCA to make the burden on service providers comparable to the burden on copyright owners. In its

²⁰⁵ *Id.*

²⁰⁶ *ALS Scan*, 239 F.3d at 625.

²⁰⁷ *Id.*

²⁰⁸ 17 U.S.C.A. § 512(c).

²⁰⁹ See *Hendrickson*, 165 F. Supp. 2d 1082; *Napster*, 239 F.3d 1004.

current form, the DMCA merely requires the service provider to abide by take down requests of the copyright owner.²¹⁰ With the expansion of the Internet and the speed at which the copyrighted materials may be distributed and reproduced, the burden on the copyright owner is far too great.

This burden may be alleviated in several ways. The legislature may make the fair use exception simpler to apply in cases dealing with a DMCA issue. If lay people could understand what a fair use is, they would be more likely to find a way to come within the fair use protections, rather than infringing on the copyright owner's content. In the case of YouTube, even if an automated method were impossible, YouTube would be able to train employees to recognize what is not fair use of a copyright and would then be able to remove infringing works. Under current law, YouTube could not do so because even lawyers educated in the fair use doctrine can disagree as to whether it applies.²¹¹

Another way to alleviate some of the burden on copyright holders would be to expand on the ideas provided in *ALS Scan* and amend the DMCA to explicitly explain the proper rule. Takedown notices need to be "substantially" comporting to the format provided in § 512(c)(3)(A).²¹² The Fourth Circuit found that when multiple infringing works exist not all must be identified, but only a 'representative' list.²¹³ In YouTube's case, if a few takedown notices were sufficient to remove a large number of videos, it would reduce the burden that is currently imposed on Viacom of pointing out every infringing video.

Alternatively, the market may solve this problem. Services such as Hulu, created by News Corp. and NBC, are earning profits due to advertising.²¹⁴ While YouTube is only selling advertising on three to four percent of its videos viewed, Hulu is able to sell advertisements on eighty percent of its videos because it has licenses to do so.²¹⁵ YouTube cost Google \$1.65 billion dollars to purchase

²¹⁰ 17 U.S.C.A. § 512(c).

²¹¹ Timothy B. Lee, *Fair Use Gets a Fair Shake: YouTube Tot to Get Day in Court*, ARS TECHNICA, Aug. 21, 2009, <http://arstechnica.com/news.ars/post/20080821-fair-use-gets-a-fair-shake-youtube-tot-to-get-day-in-court.html>.

²¹² *ALS Scan*, 239 F.3d at 625.

²¹³ *Id.*

²¹⁴ Matt Asay, *Quality Pays: Hulu Trumping YouTube*, CNET NEWS, Nov. 19, 2008, http://news.cnet.com/8301-13505_3-10102220-16.html.

²¹⁵ *Id.*

and is “bleeding cash” by providing videos from which it cannot make any profit.²¹⁶ Many other large copyright holders have taken the hint and have started providing their videos with advertising on their own sites.²¹⁷ This could spell the end for sites like YouTube if the legislature does not act promptly.

²¹⁶ *Id.*

²¹⁷ *See, e.g.*, NBA.com, <http://nba.com>; <http://comedycentral.com> (last visited Sept. 17, 2009).