Copyright Infringement Pushin': Google, YouTube, and Viacom Fight for Supremacy in the Neighborhood That May Be Controlled by the DMCA's Safe Harbor Provision

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Recommended Citation
William Henslee, Copyright Infringement Pushin': Google, YouTube, and Viacom Fight for Supremacy in the Neighborhood That May Be Controlled by the DMCA's Safe Harbor Provision, 51 IDEA 607 (2011)
COPYRIGHT INFRINGEMENT PUSHIN’: GOOGLE, YOUTUBE, AND VIACOM FIGHT FOR SUPREMACY IN THE NEIGHBORHOOD THAT MAY BE CONTROLLED BY THE DMCA’S SAFE HARBOR PROVISION

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INTRODUCTION

The Ninth Circuit stood up for copyright protection for authors against infringement by the masses by attempting to kick the pushers out of the author’s neighborhood (of 17 U.S.C. § 106 rights). Napster, the pusher, created thousands of copyright infringing addicts when it went online in 1999. By the time the court kicked the pushers and addicts out of the neighborhood in 2001 by

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1 Under 17 U.S.C. § 106 (2006), authors have “exclusive rights in copyrighted works” which include reproduction, preparation of derivative works, distribution of copies, performance, display, and in the case of sound recordings to perform the work via digital audio transmission. Id. It is the premise of this article that these rights have been undermined by a lack of enforcement through the courts interpretation of the Copyright Act.

shutting Napster down, the neighborhood was under siege. Internet connectivity changed the way authors control their § 106 rights neighborhoods.

In 2010, seventy-three percent of wired American teens now use social networking sites. Forty-seven percent of online adults use social networking sites. Fourteen percent of online teens blog. Fifty-two percent of teen social networking users comment on friends’ blogs. Fifteen percent of online eighteen to twenty-nine year-olds blog, while seventy-two percent of young adults say they use social networking sites. Facebook announced on July 21, 2010 that it had 500 million members. Facebook indicated that each month, thirty billion photographs, links to websites, and news articles are shared through the site, with members spending about 700 billion minutes there. While it is generally known and accepted that young adults and teens use the internet to post comments, share video and photos, and communicate instantly, the copyright status of that content varies depending on the source and originality of the material. This “User Generated Content” (UGC) has triggered a number of lawsuits to determine the rights of the content creator and the content poster.


Id.

Id.

Id.

Id.

Id.


Id.

See e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, 545 U.S. 913 (2005) (finding that peer to peer software encouraged and fostered copyright infringement); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (finding fair use when infringing copies of copyrighted images were thumbnailed in an internet search); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 114 (9th Cir. 2007) (discussing the extent of the DMCA’s protection of copyrighted photographs via the extent and burden of the knowledge requirement under the DMCA’s safe harbor provision—in this case, the ninth circuit found that specific knowledge is required for liability); In re Aimster, 334 F.3d 643 (7th Cir. 2003) (finding developers of
nomenon was possibly best described in Time Magazine’s 2006 person of the year story:

It’s a story about community and collaboration on a scale never seen before. It’s about the cosmic compendium of knowledge Wikipedia and the million-channel people’s network YouTube and the online metropolis MySpace. It’s about the many wrestling power from the few and helping one another for nothing and how that will not only change the world, but also change the way the world changes.

The tool that makes this possible is the World Wide Web. Not the Web that Tim Bernes-Lee hacked together (15 years ago, according to Wikipedia) as a way for scientists to share research. It’s not even the overhyped dotcom Web of the late 1990s. The new Web is a very different thing. It’s a tool for bringing together the small contributions of millions of people and making them matter. Silicon Valley consultants call it Web 2.0, as if it were a new version of some old software. But it’s really a revolution.13

This “revolution” in the ability to create and distribute original content has changed the music business from an album-oriented, major label-dominated model to a do-it-yourself singles-oriented independent model.14 The Web has turned fairly honest citizens into copyright infringers15 and has created a new

software were willfully blind of infringing material on their site by intentionally encrypting the files); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (finding the owners of Napster, and internet service, had specific knowledge of copyright infringement making them liable for the infringement); Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010) (Lime Wire was found liable under an inducement theory of copyright infringement following and finding that Lime Wire was aware of the prevalence of copyrighted material on their site); UMG Recording, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081 (C.D. Cal. 2008) (Veoh claimed its software was a means of “democratizing the distribution of user-generated content, while plaintiffs claimed it was simply a means of copyright infringement); Columbia Motion Picture Indus., Inc. v. Fung, 447 F. Supp. 2d 306 (S.D.N.Y. 2006) (motion picture studios brought secondary copyright infringement action against individual who operated computer servers and website that encouraged infringement); Corbis Corp. v. Amazon.com Inc., 351 F. Supp. 2d 1090 (W.D. 2004) (discussing the red flag provision of the DMCA and the extent of knowledge required to trigger the provision).


14 See generally, Jeff Carter, Comment Strictly Business: A Historical Narrative & Commentary on Rock & Roll Business Practices, 78 TENN. L. REV. 213 (2010) (describing how the record companies and recording contracts developed and how the digital revolution has brought about both the “360 deal”—where record companies own a piece of everything from merchandising to publishing—and the rise of the independent artist).

business model where companies can make money by posting the copyrighted material of another without compensating the creative content generators for their efforts. The Web revolution threatens traditional notions of copyright ownership and the 17 U.S.C. § 106 rights that flow from that ownership. Prior to the revolution, the copyright owners retained the right to control the dissemination of their material through licenses. These 17 U.S.C. § 106 “powers” used to be held exclusively by those who actually owned the copyrights. The revolution has apparently shifted the power to the masses, and the masses have virtually unfettered access to copyrighted material, which has led the courts to become copyright activists finding new ways to limit the traditional rights of the copyright owners. No longer does it seem that a copyright infringer is “anyone who violates any of the exclusive rights of the copyright owner.” Now, one

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Exclusive rights in copyrighted works.

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

1. To reproduce the copyrighted work in copies or phonorecords;
2. To prepare derivative works based upon the copyrighted work;
3. To distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

18 See Edward Lee, Warming Up To User-Generated Content, 2008 U. Ill. L. Rev. 1459, 1460 (2008) (“Under some, if not most, conventional accounts, the author’s exclusive rights and the exceptions to those rights are all fixed in the Copyright Act, as delimited by Congress. Under this view of copyright, copyright holders are at the center of the copyright universe and exercise considerable control over their exclusive rights.”).

who uses the copyrighted material without the permission of the owner is not an infringer until the court decides that the infringer has gone too far in appropriating content that he or she did not create.

This new world order was most recently challenged in *Viacom International Inc. v. YouTube, Inc.*, where Viacom alleged that while YouTube claimed "to be a forum for users to share their own original ‘user generated’ video content" it was in reality a way for YouTube to generate income from the copyrights of others. While the case is steeped in acrimony, this Article will explore why the Viacom/YouTube litigation should be the case that reestablishes the rights of copyright owners and clarifies the seemingly disparate views of copyright ownership between the Ninth and Second Circuits, in addition to reconciling the most prominent copyright decisions of the Supreme Court.

I. **THE GENTRIFICATION OF THE NEIGHBORHOOD**

The Copyright Act has had to react to changes in technology since its inception. Napster, forced the established media to take notice of the distribution potential available over the then-emerging internet. Napster introduced copyright infringement to the masses via digital downloads and file sharing in June of 1999. Napster kicked the Sony generation of infringers into the wild World Wide Web. Programming and recording a copyrighted program, which

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20 718 F. Supp. 2d 514.
22 See White-Smith Music Publ’g Co. v. Apollo Co., 209 U.S. 1, 17-18 (1908) (assessing whether the perforated rolls used in player pianos violated the Copyright Act); William Henslee, *Marybeth Peters Is Almost Right: An Alternative to Her Proposals to Reform the Compulsory License Scheme For Music*, 48 WASHBURN L. J. 107, 112-16 (2008); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 275-76 (1989) (“This is a story about private parties, vested interests, and the inexorable pace of technological change. . . . In the past few years, Congress has been inundated with proposals to revise copyright law in light of new technology.” Note, that while Litman’s law review was written in 1989, the struggle between technology and the law is ubiquitous and unchanging.)
23 239 F.3d 1004 (9th Cir. 2001).
was once fairly labor-intensive endeavor, became acts that children could perform by simply clicking a mouse.

This Article will first address how Sony, Napster, Grokster, and the Digital Millennium Copyright Act ("DMCA") have created seemingly conflicting standards to guide users and companies as they navigate the digital highway in an effort to avoid copyright infringement liability. Courts seem to be confused based on disparate rulings in similar cases. The most recent example of a court getting overwhelmed by the confusion is the trial court's decision in Viacom v. YouTube, which was recently appealed. The court declared YouTube an Internet Service Provider protected by the DMCA rather than a direct infringer similar to Napster and Grokster.

Later, this article will discuss in detail the Viacom court's decision, including the pleadings submitted by both parties. Finally, this article will discuss the current problems with 17 U.S.C. § 512 and offer some potential solutions to the problems created by the "safe harbor" provision.

II. SONY (MISTER ROGERS' NEIGHBORHOOD)

In 1984, the Supreme Court held that the Sony Betamax did not induce copyright infringement when individuals recorded shows to watch them at a

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26 See Richard Zoglin et al., Can Anybody Work This Thing?, TIME, Nov. 23, 1992, available at http://www.time.com/time/magazine/article/0,9171,977030,00.html#ixzz0zRnr53Hg ("Ashamed, perhaps, but hardly alone. The dirty little secret of the VCR age is that almost nobody can work the darn thing—at least for anything besides plunking in a movie from the corner video store. Much of the befuddlement, understandably, afflicts older folks who have never really cottoned to the computer age. But many younger, technology-savvy people also seem utterly defeated by the maze of buttons and pages of instructions. Authoritative statistics are not available, but estimates are that as many as 80% of all VCR owners have never learned how to set their machines to record a program.").


28 239 F.3d 1004 (9th Cir. 2001).


32 Id. at 526.

33 See Sony Corp. v. Universal City Studios, 464 U.S. 417, 445 (1984) (Utilizing the testimony of Fred Rogers from Mister Rogers' Neighborhood, who supported the home recording of public television of his program, because "it is a real service to families to be able to record children's programs and to show them at appropriate times.").
later time. The Sony Betamax was designed to allow individuals to record copyright protected programs from their television sets to watch at a more convenient time. The Court identified this practice as “time-shifting.” The case was initiated by Universal and Walt Disney, who feared that the technology allowing individuals to make a home recording of their movies from a broadcast would eventually lead to a tremendous loss in profits, and would constitute a violation of their exclusive rights. The studios feared that people would no longer go to the theater to watch a show that they could watch at home. Ultimately, the studios found a way to turn the new technology into an additional revenue stream. For Universal and Disney to prevail against Sony, they had to prove that their interests outweighed the public interest in home recording and that individual Betamax users infringed their copyrights by making unauthorized copies of protected materials.

The Supreme Court noted that the courts have always had to respond to significant changes in technology when interpreting the Copyright Act. To reach its desired conclusion, the Court had to introduce a patent law concept, the “staple article of commerce,” which had never before been used in Copyright law. The introduction of the “staple article of commerce” concept of “significant noninfringing uses” shifted the inquiry from focusing on the copyright infringement facilitated by the machine to whether or not the Sony Betamax was capable of “significant noninfringing uses.” While the Court did not define how much noninfringing use was necessary to be “significant,” it found that approximately nine percent of the home video taping on the Sony Betamax’s

34 Id. at 456.
35 Id. at 420–21.
36 Id. at 423.
37 Id. at 421–22.
38 See id. at 459.
40 Id. at 430–31.
41 See id. at 490–91 (Blackmun, J., dissenting) (indicating that the “staple article of commerce” law governs patent liability for contributory infringement and is therefore based on patent law concepts).
42 Id. at 442.
43 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 950–51 (2005) (while discussing the Sony case, the Court stated “roughly 9% of all VCR recordings were of the type—namely, religious, educational, and sports programming—owned by producers and distributors testifying on Sony’s behalf who did not object to time-shifting.”)
was noninfringing, and that was sufficiently “significant.”\textsuperscript{44} The Court decided that based on the “substantial noninfringing uses” for the Sony Betamax, “private, noncommercial time-shifting in the home” was a “fair use”\textsuperscript{45} and not infringement.\textsuperscript{46} By the time the Court issued its opinion, the Court noted that millions of home recording devices were in use in homes across the United States and responded to the concern that these machines were also being used by millions of Americans for potentially noninfringing uses.\textsuperscript{47} The majority ended their analysis by indicating that if Congress would like to examine this new innovation and exclude it from a finding of fair use, it must do so by rewriting the statute.\textsuperscript{48}

Before the \textit{Sony} case reached the Supreme Court, copyright heavyweights Melville B. Nimmer and William Patry offered their opinions on the correctness of the Ninth Circuit’s ruling on the case.\textsuperscript{49} Patry stated that the Ninth Circuit’s opinion “closed a loophole which threatened to undermine the very structure of copyright law, and simultaneously brought intelligibility to one of the previously most arcane areas of copyright litigation.”\textsuperscript{50} He stated, [the Court of Appeals held that fair use involves ‘productive’ use, the use by a second author of a first author’s work. It does not involve ‘convenience,’ ‘entertainment’ or ‘increased access.’ Specifically, the court stated, ‘It is our conviction that the fair use doctrine does not sanction home video recording. Without a ‘productive use,’ i.e., when copyrighted material is reproduced for

\begin{itemize}
\item Jessica Litman, \textit{The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler}, in \textit{INTELLECTUAL PROPERTY STORIES}, 370 (Jane C. Ginsberg & Rochelle Cooper Dreyfuss eds., 2006).
\item \textit{Sony Corp.}, 464 U.S. at 442.
\item See id. at 446 (“If there are millions of owners of VTR’s who makes copies of televised sports events, religious broadcasts, and educational programs such as \textit{Mister Rogers’ Neighborhood}, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents’ works.”); Litman, \textit{supra} note 44, at 378 (“[Sony’s attorney] noted that by the end of the year [1983] nine and one-half million households, or roughly ten percent of the television viewing audience, would own videotape recorders.”).
\item \textit{Sony Corp.}, 464 U.S. at 456.
\item Patry, \textit{supra} note 49, at 236.
\end{itemize}
its intrinsic use, the mass copying of the sort involved here precludes an application of fair use.\textsuperscript{51}

Professor Nimmer also believed that the Ninth Circuit understood the issues and that "an otherwise infringing reproduction of a copyrighted work [should] not be protected by the fair use defense simply because the reproduction is made by the process of audio recording and is intended for the private use of the person making the copy."\textsuperscript{52} Nimmer endorsed the solution offered by the Ninth Circuit.\textsuperscript{n1} In order to avoid "the problems of enforcing the copyright laws against private individuals ... [the simple solution is to impose] a royalty on manufacturers or audio equipment and tape."\textsuperscript{53} As it turns out, neither scholar predicted the bizarre interpretation of fair use created by the Supreme Court when they introduced the "substantial non-infringing uses" standard in order to justify an economic decision rather than one based on logical legal analysis of 17 U.S.C. §§ 106 and 107.\textsuperscript{54}

Sony began their advertising campaign in 1975.\textsuperscript{55} By the time the Court requested a second oral argument on the case, home recording devices had become a phenomenon the Court could not ignore with more than five million such devices in households across America.\textsuperscript{56} The Court justified the introduction of the patent law concept to shift the focus away from the ninety-one percent of the uses that were infringing someone’s copyright.\textsuperscript{57} This justified a

\textsuperscript{51} Id.
\textsuperscript{52} Nimmer, supra note 49, at 1506.
\textsuperscript{53} Id. at 1506.
\textsuperscript{55} Sony Betamax Display Ad., N.Y. TIMES, Nov. 5, 1975, at 19.
\textsuperscript{56} Litman, supra note 44, at 366.

Sony’s survey indicated that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax. Respondents offered no evidence of decreased television viewing by Betamax owners. Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection to the recording of their televised events for home use.

Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR’s on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR’s for time-shifting.
“fair use” defense because a reasoned analysis of 17 U.S.C. § 107 would lead to the conclusion that home recording of copyrighted material for personal use is not covered by the fair use section of the Copyright Act. While the neighborhood did not suffer all of the parade of horribles that Universal and Disney warned against in their fight to require licenses for home recordings, the introduction of the internet and the expansion of home bandwidth have eroded the foundation of a copyright owner’s exclusive rights, unleashing the horribles only imagined at the time the Sony suit was initiated.

III. IT’S FUN TO BE AT THE DMCA

As a result of a perceived need to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age,” Congress passed the DMCA. The Act was designed to provide incentives for service providers and copyright owners to cooperate when dealing with copyright infringers. The Act was also designed to provide service providers greater certainty concerning their legal exposure for facilitating infringement. Congress noted that the Copyright Act

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When these factors are all weighed in the “equitable rule of reason” balance, we much conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony’s sale of such equipment to the general public does not constitute contributory infringement of respondent’s copyrights.

60 Id.
61 Id. at 40.
62 Id.

51 IDEA 607 (2011)
had difficulty keeping pace with emerging technology: “[T]he law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted material.” Congress recognized that “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurances that they will be protected against massive piracy.”

Congress predicted that the internet would “facilitate making available quickly and conveniently . . . , the movies, music, software, and literary works that are the fruit of American creative genius.” “At the same time, without clarification, of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” Congress also noted that “by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”

In 1998, Congress provided two definitions of service providers in 17 U.S.C. § 512(k). The first definition of a service provider is derived from the definition of telecommunications in recognition that the activities are conduit activities. “For example, hosting a World Wide Web site was not contemplated to fall within the subsection . . . definition; [while] providing connectivity for a world wide web site [would] fall within the definition.” The second definition was broader than the first, “covering providers of online services” such as “internet access, email chat rooms, and web page hosting services,” or network access. Congress provided some examples of the major Online Service Providers (“OSPs”) and Internet Service Providers (“ISPs”) stating that they were local telephone companies, long distance telephone carriers, and America Online.

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63 Id. at 2.
64 Id. at 8.
65 S. REP. NO. 105-190, at 8.
66 Id.
67 Id.
70 Id.
71 Id.
72 Id. at 8–9.
Additional analysis of the DMCA\textsuperscript{73} will accompany the discussion of the Viacom v. YouTube\textsuperscript{74} case.

IV. \textit{NAPSTER (WE'RE NOT IN MISTER ROGERS' NEIGHBORHOOD ANYMORE)}

In \textit{A&M Records v. Napster},\textsuperscript{75} the Ninth Circuit heard the competing claims of copyright holders and a digital music system that permitted the transmission and retention of sound recordings.\textsuperscript{76} The Napster system allowed users to:

(1) make MP3\textsuperscript{77} music files stored on users hard drives available to other Napster users for the purpose of copying; (2) search for MP3 music files stored on other user’s computers; and (3) transfer exact copies of the contents of other users’ MP3 files from one computer to another via the internet.\textsuperscript{78}

To copy the MP3, the user needed to: (1) access Napster’s Internet site and download a particular software to the user’s individual computer; (2) access the Napster system with the software installed; (3) “register with Napster by creating a ‘username’ and ‘password’”; (4) create a user library by saving their MP3 files in the “library directory using self-designated file names”; (5) allow the installed software to search for the available files, making sure the files are properly formatted; and (6) allow for Napster to copy the formatted files onto Napster’s server while the original remains on the hard drive of the user’s computer.\textsuperscript{79} The Napster server did not search the contents of any MP3 file.\textsuperscript{80} Napster did allow files to be uploaded to its server and actively searched a user’s files while a user was logged onto the Napster server.\textsuperscript{81} Because the user was able to name all of his or her files, any typographical errors or description errors would be listed in Napster’s library for others to search.\textsuperscript{82} The files were trans-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} 17 U.S.C. § 512.
\item \textsuperscript{74} 718 F. Supp. 2d 514 (S.D.N.Y. 2010).
\item \textsuperscript{75} 239 F.3d 1004 (9th Cir. 2001).
\item \textsuperscript{76} \textit{Id.} at 1011.
\item \textsuperscript{77} MP3 is an abbreviation for MPEG-3, which is a standard file format for the storage of audio recordings in a digital format developed by the Moving Picture Experts Group in 1987. \textit{Id.}
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 1011-12.
\item \textsuperscript{80} \textit{Id.} at 1012.
\item \textsuperscript{81} \textit{Napster}, 239 F.3d R 1012
\item \textsuperscript{82} \textit{Id.}
\end{itemize}
\end{footnotesize}
ferred from one user’s computer hard drive to another. This technology became known as “peer-to-peer” transferring because the songs were downloaded through the Napster server where the copy was located, but it could only be done while “peers” were simultaneously logged on.

Napster was sued on claims of direct infringement, contributory infringement and vicarious infringement. The court noted that up to eighty-seven percent of the files located on the Napster server may have been uploaded without the copyright owner’s permission. The court held that the majority of Napster users used the service to download and upload copyrighted music. Napster was found to be liable for direct copyright infringement because the copyright holders’ exclusive rights of distribution and reproduction were violated. The reproduction rights were violated when users uploaded the files to the server’s search index for others to copy. The distribution rights were violated when users downloaded those files containing copyrighted music. In addition, the Ninth Circuit found that Napster was liable for contributory infringement because Napster had both actual and constructive knowledge that its users exchanged copyrighted music. In addition, the court stated that Napster should have known that they provided the site and facilities for direct copyright infringement by others. Napster was also found liable for vicarious copyright infringement because Napster had a direct financial interest in the infringing activity, and had control over their users’ conduct. While Napster did not have the ability to read the content of the indexed files, they did have the ability to police the material listed on its search indexes and terminate infringing users’ access to the system.

83 *Id.*
84 *Id.*
85 See *id.* at 1011, 1013.
86 *Id.* at 1013.
87 *Id.* at 1013–14.
89 17 U.S.C. § 106(1).
90 *Napster,* 239 F.3d at 1014.
91 *Id.*
92 *Id.*
93 *Id.* at 1020.
94 *Id.*
95 *Id.* at 1023–24.
96 See *Napster,* 239 F.3d at 1024 (“As shown by the record, the Napster system does not ‘read’ the content of indexed files, other than to check that they are in proper MP3 format. Napster, however, has the ability to locate infringing material listed on its search indices, and the right
V. **GROKSTER (THE BOYS IN THE HOOD ARE ALWAYS HIP)**

After the *Napster* decision, Grokster’s software was designed and distributed as a Napster alternative. Grokster believed that if it distributed software that allowed computer users to share electronic files directly through peer-to-peer networks without a copy being made on a central server, it could not be directly liable for copyright infringement, nor could it be contributory or vicariously liable due to *Sony*’s substantial non-infringing uses standard. During discovery, it was revealed that billions of files were shared across peer-to-peer networks each month. It was also revealed that Grokster’s objective was to encourage infringement, generating income by selling advertising space while users downloaded music files. The advantage of the peer-to-peer network was that it did not require a central computer server to mediate the exchange of files. When Grokster distributed its software, it did so with the mindset that its software would be compatible with the Napster program, thus making it easier for those who were using the Napster service to continue their pattern of infringing behavior. By the time Napster was shut down, Grokster had attracted over fifty million users.

The Court found Grokster liable for indirect infringement because the Grokster product was used to directly infringe by millions of computer users. Out of a policy concern, the Court found that the most effective way to protect the copyrighted work was to go against the distributors of the copying devices and find them liable for secondary infringement. By advertising an infringing

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98. *Id.* at 920–21.
99. *Id.* at 923.
100. *Id.*
101. *Id.* at 920.
102. *Id.* at 924.
103. *Grokster*, 545 U.S. at 924.
104. *Id.* at 929–30.
105. See *id.* (“When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for second-
use and instructing users on how to engage in an infringing use, Grokster showed intent to use the product in an infringing manner. Just as the Sony Court adapted the staple article of commerce doctrine to reach its desired result, the Grokster Court adapted the inducement rule to allow a finding of secondary infringement when a producer actively encourages infringement.

VI. THE BIGGEST PUSHER OF THEM ALL: YOUTUBE

Along with the exponential growth of social media, there has been an explosive proliferation of user generated content. YouTube is the largest facilitator for the distribution of user generated content.

YouTube was launched on December 14, 2005. In November of 2006, YouTube was acquired by Google for $1.775 billion. YouTube allows anyone to post a video by visiting the website, creating an account, and uploading a video for YouTube to store on its computer servers. YouTube’s system automatically processes uploaded video files so that anyone with internet access can view them. YouTube does not charge to upload or download videos.

YouTube described their meteoric rise in their motion for summary judgment in its litigation with Viacom. By the time YouTube officially launched its service in December of 2005, it was receiving more than 6,000 video uploads each day, and its users were watching more than 2.5 million videos

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106 Id. at 939.
107 Id. at 936–37.
110 Id. at 17.
111 Id. at 5.
112 Id.
113 Id.
114 Id.
each day. In February 2006, YouTube was receiving more than 20,000 uploads a day, and its users were watching more than eighteen million videos a day. By July 2006, users had uploaded more than 2.1 million video clips, and watched more than three billion videos. In December of 2007, users were uploading more than 300,000 videos each day, and YouTube had more than 800 million daily video views. By July 2008, there were more than 400,000 video uploads per day. Since the launch of YouTube, over 500 million videos have been posted. Every day, more than twenty-four hours of new video is uploaded every minute, meaning that in order to watch all the video uploaded in a single day one would have to watch YouTube twenty-four hours a day, seven days a week for four years. According to YouTube, seventy percent of the most popular material uploaded on its site is copyright protected and owned by someone other than YouTube. According to Viacom, YouTube has built its business model around making money from the videos of others. The revolution has been good for YouTube. This unauthorized access to copyrighted material by millions of individuals concerns major studios and copyright holders. Viacom stated in its complaint that of the 150,000 unauthorized clips of its copyrighted programming found on YouTube, those clips had been visited around 1.5 billion times.

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116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
122 Id. at 10.
123 Id. at 30–31.
A. Viacom v. YouTube (There's Gold in Them There Hills)

On March 13, 2007, Viacom International sued YouTube for direct and secondary copyright infringement. At the heart of the claim was the DMCA, and whether YouTube qualified for the safe harbor protection of the Act. Viacom claimed that YouTube created a technology to “willfully infringe copyrights on a huge scale, depriving writers, composers and performers of the rewards they are owed for effort and innovation, reducing the incentives of America’s creative industries, and profiting from the illegal conduct of others as well.” While both parties agreed that there was infringing content on YouTube, the threshold issues became the court’s interpretation of the DMCA and the holding of the Supreme Court’s decision in MGM, Inc. v. Grokster, Ltd.

The following statutes became the center of the debate: 17 U.S.C. § 512(c)(1) (limiting liability to injunctive and equitable relief unless the service provider has actual knowledge, constructive knowledge, a financial benefit, or does not remove infringing material), 17 U.S.C. § 512(c)(2) (requiring a ser-

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126 See id.
128 Id. at ¶ 2.

(c) Information residing on systems or networks at direction of users.

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider

(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;
vice provider to designated an agent to receive notifications of copyright infringement;\(^1\) 17 U.S.C. § 512(m) (preventing a service provider to invade the privacy of its consumers without specific reason to believe the individual is engaging in infringing material);\(^2\) and 17 U.S.C. § 512(n) (indicating that all sections in the DMCA are to be constructed independent from one another).\(^3\) Viacom alleged direct and vicarious copyright infringement because:

\[
\begin{align*}
(B) & \text{ does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and} \\
(C) & \text{ upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.}
\end{align*}
\]

\(^1\) 131 IDEA § 512(c)(2):

(2) Designated agent. The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, [in both electronic and hard copy formats,] and may require payment of a fee by service providers to cover the costs of maintaining the directory.

\(^2\) Id. § 512(m):

(m) Protection of privacy. Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i), or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

\(^3\) Id. § 512(n):

(n) Construction. Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service pro-

51 IDEA 607 (2011)
(1) Defendants had “actual knowledge” and were “aware of facts and circumstances from which infringing activity [was] apparent,” but failed to “act [] expeditiously” to stop it; (2) Defendants “receive[d] a financial benefit directly attributable to the infringing activity” and “had the right and ability to control such activity;” and (3) Defendants’ infringement does not result solely from providing “storage at the direction of a user” or any other Internet function specified in § 512.134

At issue were claims of “safe harbor” under the DMCA, in contrast with interpretations of the DMCA from other courts.135 As indicated in YouTube’s Memorandum of Law in Support of Defendants’ Motion for Summary Judgment, YouTube is owned by Google and operates a website where users may upload video files free of charge.136 Uploaded files are copied and formatted by YouTube’s servers, which then makes them available for dissemination on YouTube.137

On March 18, 2010, both sides submitted motions for summary judgment.138 At the heart of their concerns were the definition of an Internet Service Provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

Id.


Provider (ISP) under the DMCA, applicability of the safe harbor provisions, the extent of the knowledge requirement, the degree of control exercised over the infringing activity, and interpretation of the Grokster holding.

B. There's a Fine Line Between Clever and Stupid

YouTube's business model was designed to maximize the number of site viewers in order to increase advertising revenue to attract a buyer. To increase the number of viewers, they needed infringing material. Viacom cited internal emails to substantiate their claims:

By September, 2005 the founders largely abandoned even the half-hearted attempt to create the illusion of respect for copyrights and adopted a policy that YouTube followed until at least May 2008: they decided to keep substantially all infringing videos on the site as a draw to users, unless and until YouTube received a “takedown notice” from the actual copyright owner indentifying a specific infringing clip by URL and demanding its removal from the site, in which case YouTube would remove the specific clip at that URL—but no others. This decision is reflected in a key September 3, 2005, email exchange between the three founders, which started when Hurley emailed the others re “copyright material!!!!”: “aaahhh, the site is starting to get out of control with copyrighted material.”

Rather than responding by proposing steps to clean up the site, Chen strongly argued against removing the illegal videos because of the effect on traffic. In fact, the September 3 internal email exchange resulted in the first of several internal YouTube documents that quantified the vast extent and importance of infringement on the site. Chen twice wrote that eighty percent of user traffic depended on pirated videos. He opposed removing infringing videos on the ground that “if you remove the potential copyright infringements... site traffic and virality will drop to maybe twenty percent of what it is.” Karim proposed they “just remove the obviously copyright infringing

140 ld. at 27 (citing § 512(c)(1)).
141 ld. at 30 (citing § 512(c)(1)(A),(B),(C)).
142 ld. at 22 (citing § 512(c)(1)(B)).
143 ld. at 80 (citing Metro-Golden-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005)).
144 THIS IS SPINAL TAP (MGM Studios 1984).

51 IDEA 607 (2011)
stuff.” But Chen again insisted that even if they removed only such obviously infringing clips, site traffic would drop at least eighty percent (“if [we] remove all that content[,] we go from 100,000 views a day down to about 20,000 views or maybe even lower”).

Viacom used these internal documents and emails to claim that the founders of YouTube adopted a policy of “willful blindness” to profit from the infringing content.

YouTube claimed it qualified for the safe harbor provision under the DMCA. YouTube had to meet several threshold requirements including: qualifying as an ISP; registering a DMCA agent responsible for administering takedown notices; and implementing a “repeat infringer policy.”

Viacom claimed that regardless of these DMCA threshold requirements, YouTube should not receive protection from the DMCA because YouTube knew about the infringing videos on its site. YouTube’s defense was that it complied with the DMCA by removing every video that they received a takedown notice for, thus qualifying for safe harbor protection.

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146 Id. at 8–9.

147 17 U.S.C. § 512(k)(I)(B) (2006) (“The term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor . . . .”).


knowledge was required to protect the copyrights; general knowledge was not enough.\textsuperscript{152}

The conflict was governed by two competing provisions in the DMCA.\textsuperscript{153} If YouTube had actual, specific knowledge that “material or an activity using the material on the system or network [wa]s infringing” it was required to take it down without receiving an official takedown notice from the copyright owner(s).\textsuperscript{154} However, “in the absence of such actual knowledge [they must not be] aware of facts or circumstances from which infringing activity is apparent.”\textsuperscript{155}

This second provision is commonly referred to as the “red flag” provision, which requires that the infringement must be obvious to a reasonable person.\textsuperscript{156}

\section*{C. Who’s Your Daddy?}

YouTube claimed that its website qualifies for protection under the DMCA because 17 U.S.C. § 512(c)(1) “applies to any claim for ‘infringement of copyright by reason of the storage at the direction of the user of material that resides on a system or network controlled or operated by or for the service provider.’”\textsuperscript{157} Under YouTube’s interpretation of the DMCA, anything that is uploaded by users, in this case, individuals posting videos, qualifies under this safe harbor of the DMCA.\textsuperscript{158} While both Viacom and YouTube agreed on the process that occurs when the videos are uploaded, they disagreed on the significance of those facts.

Viacom and YouTube agreed that: (1) videos are uploaded by users to the YouTube server;\textsuperscript{159} (2) during the process of storing the videos, copies are

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{152} Id. at 32.
\item \textsuperscript{154} Id. § 512(c)(1)(A)(i).
\item \textsuperscript{155} Id. § 512(c)(1)(A)(ii) (emphasis added).
\item \textsuperscript{156} H.R. REP. No. 105-551, pt. 2, at 53, 57 (1998); S. REP. No. 105-190, at 44 (1998).
\item \textsuperscript{158} Id. at 27–28.
\end{enumerate}
\end{footnotesize}
made of that video by YouTube’s system; and (3) YouTube then streams on-demand the videos that have been posted by the user. YouTube claimed this process is specifically protected by the DMCA. YouTube cited a series of cases from the Central and Northern Districts of California to support that claim.

Recently, a video streaming site, Veoh, came under scrutiny by copyright holders who claimed their exclusive rights were being violated. In those cases, the courts found that the automatic copying of copyrighted works by a server, at the direction of the user, did not violate 17 U.S.C. § 512(c) because it was only used as a means to facilitate user access to material on the Veoh website.

Viacom claimed that the process of copying the infringing material and formatting it for streaming was direct infringement because YouTube makes exact copies and streams the copies on demand to users’ computers in violation of the copyright holder’s exclusive rights. The plaintiffs’ attorneys relied

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163 Id.


primarily on *Cartoon Network LP v. CSC Holdings, Inc.*, which discussed a volition requirement for direct infringement. In *Cartoon Network*, the Second Circuit stated that the key inquiry focused on the question: “who made this copy.” The *Cartoon Network* court found that a copy made automatically by a server constituted direct infringement because it was made at the direction of the designer.

Another example of an exact copy made at the direction of a server is found in the *A&M Records, Inc. v. Napster, Inc.* case, where the Napster server performed almost the exact same functions as the YouTube server. As indicated earlier, Napster was found to be liable for direct copyright infringement, because the copyright holder’s exclusive rights of distribution and reproduction were violated when Napster copied the sound recording on its server and distributed it to online users. The reproduction rights were violated when users uploaded the files to the server’s search index for others to copy. The distribution rights were violated when users downloaded those files containing copyrighted music.

YouTube performs the same function whereby exact copies are copied on its server for streaming to its users. Based on 17 U.S.C. § 106, YouTube violates the copyright owner’s performance and distribution rights when it per-

167 536 F.3d 121 (2d Cir. 2008).
168 Id. at 130–31.
169 Id. at 130.
170 Id. at 130–32.
171 239 F.3d 1004, 1012 (9th Cir. 2001).
172 Id. at 1013–14 (referring to 17 U.S.C. § 106(3) (2006)).
173 Id. (referring to 17 U.S.C. § 106(1)).
174 *Cartoon Network*, 536 F.3d at 1014.
175 Id.
176 Id.
177 Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 5, Viacom Int’l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Nos. 1:07-cv-02103-LLS & 1:07-cv-03582-LLS), 2010 WL 1004562 (“A user uploads a video by visiting the YouTube website, creating an account, and then selecting a video file from the user’s computer to upload and store on YouTube’s computer servers. Uploaded video files are automatically processed by YouTube’s system into various formats that are stored in such a way that anyone with Internet access can view them, whether from a personal computer or a mobile device . . . ”).
mits users to stream perfect copies of copyrighted works. In contrast to YouTube, Napster’s program was primitive in that copies could only be distributed when two users were logged onto the server at the same time. YouTube “makes multiple additional transcoded copies without any prompt request by the user, and then performs that video to millions of viewers on demand.”

D. Knock, Knock, Knockin’ on Heaven’s Door

YouTube claimed it did not have the ability to proactively find and remove the allegedly infringing clips. The DMCA expressly states, “Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on: (1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure . . . .” YouTube stated that this part of the statute proved that YouTube not only lacked control of the content posted on its website, but it was not required to preemptively take down potentially infringing material. In addition, since over twenty-four hours of video footage is up-

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loaded every minute, YouTube does not have the man power to actively view and research every clip that is posted.\textsuperscript{185} Viacom alleged that YouTube possessed digital fingerprinting technology capable of finding infringing uploads.\textsuperscript{186} YouTube has never denied the assertion that it possesses the technology, but it has claimed that it needs to further develop the technology to perform as Viacom claims the program should. Bob Pisano, interim CEO of the MPAA, said, "[i]t’s technologically doable," and noted that it is "easy for software to detect contraband movies through tags embedded in content files."\textsuperscript{187}

YouTube’s user agreement states that YouTube reserves the right to remove videos and terminate user accounts for any cause.\textsuperscript{188} At one point during its developmental stage, YouTube instituted community flagging to identify infringing videos.\textsuperscript{189} YouTube stopped the process after two weeks because too many of the most popular videos were getting flagged.\textsuperscript{190} In addition, YouTube has always had the ability to find videos using keyword searches such as "The Daily Show" to identify infringing clips.\textsuperscript{191} Viacom claimed that YouTube had an automated search tool that could locate copyrighted material, "but abandoned


\textsuperscript{187} Diane Garrett, MPAA Goals, Image at Crossroads, VARIETY, June 6, 2010, at 1, 26.

\textsuperscript{188} YouTube’s User Agreement, available at http://www.youtube.com/t/terms (last visited May 08, 2011):

A. YouTube will terminate a user’s access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer.

B. YouTube reserves the right to decide whether Content violates these Terms of Service for reasons other than copyright infringement, such as, but not limited to, pornography, obscenity, or excessive length. YouTube may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user’s account for submitting such material in violation of these Terms of Service.


\textsuperscript{190} Id. at 34.

\textsuperscript{191} Id.
it precisely because it would be effective." Viacom also claimed that YouTube had access to a more sophisticated tool, Audible Magic, which is a unique digital identifier for content of audio/visual tracks of work, but refused to use it "unless the owner first granted YouTube a content license and revenue sharing deal."

E. Money, Money, Money, Money . . . Money?¹⁹⁴

YouTube’s advertising-based business model allows them to earn revenue when users watch or click on advertisements that run on their website.¹⁹⁵ Looking at the legislative history from the DMCA, YouTube argued:

The legislative history of § 512(c)(1)(B) enunciates the proper test for financial benefit under the DMCA. Both the Senate and House reports instruct that "a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kinds of payment as non-infringing users of the provider’s service." S. Rep. 105-190, at 44 (emphasis added); H.R. Rep. 105-551 (Part 2), at 54 (same). In other words, a service provider earns a “financial benefit directly attributable to the infringing activity” only when the infringing activity at issue generates revenue different in kind from the revenue the service provider earns from noninfringing activity, or when its business model is similarly illegitimate.¹⁹⁶

This distinction, YouTube claimed, demonstrates that its value does not lie in providing access to infringing material, but instead lies in providing advertisers with access to individuals.¹⁹⁷ YouTube also claimed that this advertising-based business model is the industry standard, and cited Daily Motion, Vimeo, Veoh, and Atom (a Viacom operated website) as examples of websites that used the traffic on their sites to generate revenue.¹⁹⁸ Viacom insisted that these individuals visited YouTube primarily because of infringing material, and therefore

¹⁹² Id.
¹⁹³ Id. at 35–36.
¹⁹⁶ Id. at 73.
¹⁹⁷ Id. at 74–78.
¹⁹⁸ Id. at 77.
without the traffic generated by copyright infringing material, there would be no income.\textsuperscript{199}

Until January 2007, ads appeared on YouTube pages regardless of whether YouTube had a license to play certain videos.\textsuperscript{200} Claiming that YouTube knew this practice would end in a lawsuit, Viacom cited another internal email, which states:

A major decision is in the works that you should be aware of—for legal reasons (that I don't fully understand what has changed, and our GC will be back in SF on Monday to articulate) all ads/monetization on the watch pages for user generated content will need to come down. This will have a tremendous impact on inventory.\textsuperscript{201}

As a result, Viacom claims that YouTube had a direct financial benefit from the hits generated by infringing clips.\textsuperscript{202}

\textbf{F. Grokster}

Since Grokster was decided, it has stood as the landmark for the inducement theory.\textsuperscript{203} When Napster was shut down, Grokster intentionally went after Napster’s user base, and made sure that Grokster’s technology was compatible with the MP3 files that former Napster users would have.\textsuperscript{204}

"[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."\textsuperscript{205} YouTube claimed their website was never designed to foster infringement and thus the inducement theory that the Grokster Court adopted...
does not apply to its business model. YouTube also pointed to the fact that the defendants in Grokster never attempted to develop filtering technology to diminish the infringing activity which allowed ninety percent of the material exchanged over their peer-to-peer network to be infringing. YouTube claimed that as its name expresses, the purpose of its website is to “Broadcast Yourself” and not to broadcast others’ copyrighted works.

Viacom pointed to the recorded emails describing the infringement as evidence that YouTube not only knew about the infringing actions, but induced them. Viacom claimed that YouTube was a haven for infringement and that it offered its service with the intent and purpose of facilitating infringement.

Viacom also alleged that Google had knowledge of YouTube’s infringement before Google acquired it. Prior to acquiring YouTube, Google had its own video service called Google Video. Google Video screened videos for infringement and effectively protected owner’s copyrights, but website traffic suffered and it was never as popular as YouTube. As a result, when Google acquired YouTube, Google allowed YouTube’s liberal copyright policies to continue.

G. The District Court Decision in Viacom

The district court began their analysis with a discussion about how a jury could reasonably find that “defendants [YouTube] not only were generally aware of, but welcomed, copyright-infringing material being placed on their website.” The court acknowledged that the material was attractive to users

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207 Id. at 82 (citing Grokster, 545 U.S. at 939–40).
208 Id. at 86.
210 Id.
211 Id. at 13.
212 Id.
213 Id.
214 Id. at 13–15.
and generated income through advertisements for YouTube.\footnote{126} The court was impressed that YouTube designated an agent, pursuant to § 512(c)(2), and swiftly took down copyrighted material when it was given specific notice.\footnote{127} The court then focused on the construction of § 512(c)(1)(A)(i) and (ii) to determine whether the statutory phrases “actual knowledge that the material . . . on the system or network is infringing,”\footnote{128} and “facts or circumstances from which infringing activity is apparent”\footnote{129} are meant to describe a “general awareness” of or actual knowledge of a specific instance.\footnote{130}

The court turned to the legislative history to aid their analysis.\footnote{131} The court noted that the purpose of the DMCA was to allow copyright owners to protect their works while still making the works available quickly and conveniently via the Internet.\footnote{132} The Committee’s stated purpose was to “leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers.”\footnote{133} The DMCA was not created to imply that a service provider could never be liable for infringement, but that the determination must be found under “existing principles of law.”\footnote{134} In discussing subsection (c)(1)(A), the court stated that “the Committee intends such activity to refer to wrongful activity that is occurring at the site on the provider’s system or network at which the material resides, regardless of whether copyright infringement is technically deemed to occur at that site or at the location where the material is received.”\footnote{135} In addition, the “red flag” test enumerated in § 512(c)(1)(A)(ii) has a subjective and objective element, which can be referred to as the reasonable person standard.\footnote{136} However:

Section 512 does not require use of the notice and take-down procedure. A service provider wishing to benefit from the limitation on liability from the limitation on liability under subsection (c) must ‘take down’ or disable access to infringing material residing on its system or network of which it

\begin{footnotes}
\footnote{126} Id.
\footnote{127} Id. at 519.
\footnote{129} Id. § 512(c)(1)(A)(ii).
\footnote{130} Viacom, 718 F. Supp. 2d at 519.
\footnote{131} Id. at 519–24.
\footnote{132} Id. at 519 (citing S. Rep. No. 105-190, at 8 (1998)).
\footnote{133} Id (citing S. Rep. No. 105-190, at 8 (1998)).
\footnote{134} Id at 520 (citing S. Rep. No. 105-190, at 40–41 (1998); H.R.Rep. No. 105-551, pt. 2, at 50 (1998)).
\end{footnotes}
has actual knowledge or that meets the “red flag” test, even if the copyright owner or its agent does not notify it of a claimed infringement. On the other hand, the service provider is free to refuse to “take down” the material or site, even after receiving a notification of claimed infringement from the copyright owner; in such a situation, the service provider’s liability, if any, will be decided without reference to § 512(c). For their part, copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights. However, neither actual knowledge nor awareness of a red flag may be imputed to a service provider based on information from a copyright owner or its agent that does not comply with the notification provisions of subsection (c)(3)...

The court also found that the legislative history indicated that the financial benefit test discussed in § 512(c)(1)(B) should be discussed in a “common-sense, fact-based approach.” In addition, § 512(d), which deals with information location tools, was found to need specificity. For these reasons, the “red flag” test was found to strike the right balance. The court was specifically concerned with directories, indicating that they believed this was the correct classification for YouTube. The court indicated that § 512(d) was intended to promote directories which serve to facilitate information gathering, thereby allowing them to show infringing material without liability.

General knowledge is not enough, and the burden is on the copyright holder to bring specific knowledge. “The DMCA is explicit: it shall not be construed to condition ‘safe harbor’ protection on ‘a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.’”

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229 Id. at 522.
230 Id. at 523.

In this way, the ‘red flag’ test in section 512(d) strikes the right balance. The common-sense result of this ‘red flag’ test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a ‘red flag.’ A provider proceeding in the face of such a red flag must do so without the benefit of a safe harbor.

Id.
231 Id.
233 Id.
234 Id. at 524 (citing 17 U.S.C. § 512(m)(1) (2006)).
Quoting the Ninth Circuit in *Perfect 10, Inc. v. CCBill, LLC*, the court stated, “[w]e impose no such investigative duties on service providers.” Awareness is not enough; general knowledge is not enough; and infringement must be blatant. In addition, the district court dismissed the *Grokster* claims, stating that the DMCA does not cover peer-to-peer networks, and the DMCA was never mentioned in that case.

The *Grokster* model does not comport with that of a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complaints of infringement, and removes identified material when he learns it infringes.

The court also found reading § 512(c)(1) to exclude YouTube’s functionality from the “storage at the direction of a user” provision would be too narrow. “Surely, the provision of such [online] services, access, and operation of facilities are within the safe harbor when they flow from the material’s placement on the provider’s system or network: it is inconceivable that they are left exposed to be claimed as unprotected infringements.” The court also declined to determine the “outermost” limits of the definition of an online service provider or internet service provider, finding it unnecessary. In a crucial paragraph, the court noted:

To the extent defendants’ activities go beyond what can fairly be characterized as meeting the above-described collateral scope of “storage” and allied functions, and present the elements of infringements under existing principles of copyright law, they are not facially protected by § 512(c). Such activities simply fall beyond the bounds of the safe harbor and liability for conducting them must be judged according to the general law of copyright infringement. That follows from the language of § 512(c)(1) that “A service provider shall not be liable . . . for infringement of copyright by reason of the storage . . . .” However, such instances have no bearing on the coverage of the safe harbor in all other respects.

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235 488 F.3d 1102, 1114 (9th Cir. 2007).
236 *Viacom*, 718 F. Supp. 2d at 524 (quoting *Perfect 10*, 488 F.3d at 1114).
237 *Id.*
238 *Id.* at 525–26 (citing Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at *15 (C.D. Cal. Dec. 21, 2009)).
239 *Id.* at 526.
240 *Id.* (quoting 17 U.S.C. § 512(c)(1) (2006)).
241 *Id.* at 526–27.
243 *Id.*

51 IDEA 607 (2011)
The court stated that because YouTube must have a direct financial benefit from displaying copyright infringing material, and YouTube’s business model is predicated on advertising revenue generated by users viewing videos (regardless of whether the videos being viewed are infringing material) means that YouTube does not derive a direct financial benefit from the infringing material. The court also found that YouTube’s three strikes policy was within the purview of the DMCA, because “repeat infringer” is never defined. In addition, the court decided that YouTube had no responsibility or duty to use filtering technology, regardless of whether or not the technology was available. YouTube was only required to take down specific clips indentified in DMCA notices, and not other clips, which were not sufficiently identified. In sum, on June 23, 2010, the Southern District of New York found that YouTube qualified for safe harbor protection under the DMCA.

VII. NOT IN MY BACK YARD: THE DMCA

As Jane Ginsberg noted in Separating the Sony Sheep From The Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs, the immediate reaction to Grokster was fear that anyone who developed technology that benefitted from using other’s copyrighted work would be held secondarily liable. However, the recent holding from the

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The safe harbor requires that the service provider “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. . . .” § 512(c)(1)(B). The “right and ability to control” the activity requires knowledge of it, which must be item-specific. . . . There may be arguments whether revenues from advertising, applied equally to space regardless of whether its contents are or are not infringing, are “directly attributable to” infringements, but in any event the provider must know of the particular case before he can control it.


Id. at 528.

Id.

Id. at 528–29.


Southern District of New York demonstrates that the construction of the DMCA has allowed for copyright infringement to continue, even with general knowledge, as long as a service provider takes down infringing material once it receives a takedown notice from the copyright owner. While the initial fear was that the Grokster inducement standard had replaced the Sony substantial non-infringing use standard, it appears that the decisions have cancelled each other out, leaving only the DMCA.

Currently, the DMCA has no teeth to protect copyrights unless certain “blatant” actions occur or the copyright holder polices the internet searching for its copyrighted material. Copyright has traditionally been a top-down system, with copyright owners having a close nexus to those who used their works.

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250 See Viacom, 718 F. Supp. 2d at 526; see also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) (“The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider . . . .”); UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F.Supp.2d 1099, 1108 (C.D. Cal. 2010) (“In light of the principles articulated in CCBill that the burden is on the copyright holder to provide notice of allegedly infringing material, and that it takes willful ignorance of readily apparent infringement to find a ‘red flag,’ Veoh provided substantial evidence that it fulfilled the requirements of section 512(c)(1)(A). UMG has provided no material evidence to the contrary.”); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1109 (W.D. Wash. 2004) (“Congress’ discussion of apparent knowledge, and what evidence demonstrates such knowledge, is instructive. Absent evidence of its own efforts to notify a service provider, a copyright owner could establish apparent knowledge if she could show that an online location at which her copyrighted material was available was clearly a ‘pirate site.’ Pirate sites are ones that are ‘obviously infringing because they typically use words such as ‘pirate,’ ‘bootleg,’ or slang terms in their URL and header information to make their illegal purpose obvious.’ Congress described the advertisement of illegal copyright activity through such slang words as a ‘red flag’ of obvious infringement,” and indicated that the infringing nature of the sites containing such red flags would be apparent from even a ‘brief and casual viewing.’ Thus, once a service provider is aware of a site containing such ‘red flags,’ the service provider would have apparent knowledge of the infringing activity.”).

251 See generally Ginsberg, supra note 249, at 577 (indicating a possible emergence of an obligatory good faith effort to avoid infringement, and reconciling that with the current safe harbors would require a statutory change); Sverker Högborg, Note, The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law, 106 COLUM. L. REV. 909, 952–53 (2006) (discussing the potential dangers of targeting a risky demographic).

252 See Perfect 10, 488 F.3d at 1113; UMG Recordings, Inc., 665 F. Supp. 2d at 1108; Corbis Corp., 351 F.Supp.2d at 1109; see generally Viacom, 718 F. Supp. 2d at 526.

253 See Lee, supra note 18, at 1460 (“UGC challenges conventional understandings of copyright law under which copyrights are understood largely as static and fixed from the top down. Under some, if not most, conventional accounts, the author’s exclusive rights and the exceptions to those rights are all fixed in the Copyright Act, as delimited by Congress. Under this
For this system to remain in place, the DMCA, or another statute, must be rewritten to protect the "American creative genius" that the DMCA was designed to protect. While there are those who argue for a "bottom up system," meaning the control over the use of material shifts from the copyright owners to the users, the anarchy created by such a system would render traditional 17 U.S.C. § 106 rights nugatory.

The DMCA has been criticized since its enactment. After eight years of cases and activity under the DMCA, the Chilling Effects Project studied the effect of the statute on internet copyright infringement. The results of the study convinced the Chilling Effects Project that the DMCA is in dire need of reform:

view of copyright, copyright holders are at the center of the copyright universe and exercise considerable control over their exclusive rights. Obtaining prior authorization from the copyright holder is typically assumed to be necessary for others legally to reuse the copyrighted work, apart from a fair or other permitted use (which often is not easy to determine in advance). Although the language of the Copyright Act may be open textured in many places, courts can define the relevant copyright standards on a case-by-case basis. Under this formalist approach, there is little, if any, acknowledgement of a possible role for the users to shape copyright law from the bottom up.

255 See Glynn S. Lunney, Jr., The Death of Copyright: Digital Technology, Private Copying, and The Digital Millennium Copyright Act, 87 VA. L. REV. 813, 814-15 (2001) ("Copyright is dead. The Digital Millennium Copyright Act (‘DMCA’) has killed it. This does not mean that copyright has or will become irrelevant to the protection of creative works in this country. To the contrary, the exclusive rights set forth in Title 17 of the United States Code will continue to provide an important source of protection for works of authorship. The term ‘copyright,’ however, means more than a system of protecting creative works against unauthorized copyright. Copyright signifies a system of protection designed and intended primarily to serve the public interest in the creation and dissemination of creative works, rather than the private interests of enriching those who create and disseminate such works. Where the first is copyright, the second is mere guild monopoly. With the enactment of the DMCA, there is a very real danger that our system of protecting creative works will serve primarily private interests. If so, then the protection of creative works will have come full circle, from the guild monopoly of the Stationers’ Company to the guild monopoly of the DMCA, and copyright, in the sense of the protection intended primarily to serve public interest, will surely have died."). See David Nimmer, A Riff on Fair Use In The Digital Millennium Copyright Act, 148 U. PA. L. REV. 673, 739–40 (2000) ("The lengthy analysis of how section 1201 works in practice leads to the conclusion that its entire edifice of user exemptions is doubtful puissance. The user safeguards so proudly heralded as securing balance between owner and user interests, on inspection, largely fail to achieve their stated goals. If the courts apply section 1201 as written, the only users whose interests are truly safeguarded are those few who personally possess sufficient expertise to counteract whatever technological measures are placed in their path.").
For nearly four years, the Chilling Effects project has attempted to fill some gaps in this knowledge by collecting and archiving cease-and-desist notices of all kinds. Chilling Effects has collected 512 takedown notices from a variety of sources, including all notices received by Google Inc. For this Article, we analyzed nearly 900 of these notices along various axes in an attempt to begin answering some of these questions. Unfortunately, however, our findings comprise a rather negative snapshot of the ways in which the 512 process is being used, and reveal little benefit to some of the constituencies it was intended to support.

The Chilling Effects Project found "an unfortunately high incidence of questionable use[s] of the process." Noting that copyright analysis depends on the particular facts, they found that even the most careful of senders may send a notice that should be reviewed by a court. Part of the difficulty resides in the statutory language itself. First, the takedown notice requires the ISP or OSP to comply with the takedown notice with no examination of the facts. In addition, regardless if the material is actually infringing, if the ISP does not comply with the takedown notice, the ISP risks losing its safe harbor protection. Compliance is further encouraged by § 512(g)(1), which exempts the ISP from liability for good faith removal of non-infringing content. There are few protections for individuals. To garner protection one must: submit a counter notice, file suit, and have the court review the suit. One rarely used remedy under § 512(f) applies when either the copyright holder, the alleged infringer, or the ISP, "can be awarded damages, costs, and attorney’s fees if either the copyright holder or the alleged infringer makes knowing, material misrepresentations in a notice or counter notice." However, the bar to recovery is set high. Copyright holders may send out insufficient notices, or notices based on suspicion, and still not trigger § 512(f). In addition, ISP service con-

258 Id. at 681.
259 Id.
260 Id. at 626 (citing 17 U.S.C. § 512(c)(3)(A) (2006)).
261 Id.
262 Id. (citing § 512(g)(1)).
263 Urban &Quilter, supra note 257, at 628 (citing 17 U.S.C. § 512(g)(3)).
264 But see Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004) (finding a company that sent out take down notices for reproductions of internal memos liable under 512(f) because the company should have known it was a fair use).
265 § 512(f).
266 Urban, supra note 257, at 628 (citing § 512(f)).
tracts limit most of the legal and financial incentives to investigate the notices, out of fear that they may trigger the “substantial knowledge” component of 512(c)(1)(A)(ii), thereby giving them additional incentive to take any material down without investigation.\textsuperscript{267} These statutory flaws, which allow the DMCA to be used offensively to stifle non-infringing uses by competitors who issue takedown notices to harass, illustrate why § 512 does not fit within the Copyright Act and its common law scheme, which benefits value from its nuance and fluidity.\textsuperscript{268}

In their findings, the Chilling Effects Project stated, “[w]e were particularly surprised by the findings that such a large number of notices present serious substantive questions about the underlying claim . . . . [T]he high number of problematic notices we found strikes at the very heart of the § 512 process . . . .”\textsuperscript{269} The Chilling Effects Project discussed three findings that were disturbing: (1) a large number of the takedown notices presented a serious substantive question of law;\textsuperscript{270} (2) when based on a faulty takedown notice, the removal of links from search indexes can cause the information to essentially disappear without cause;\textsuperscript{271} and, (3) notices often address a noncopyright concern, but removal occurs automatically pursuant to statute.\textsuperscript{272} In addition, peer-to-peer technology was not anticipated by the DMCA, and it fails to provide statutory guidance on how to deal with peer-to-peer servers.\textsuperscript{273}

Essentially, when the study is read in conjunction with the Viacom case, the DMCA’s statutory guidelines for ISPs allows them too much protection against infringement, potentially allowing a company like YouTube to design its business model around benefiting from infringing material with no legal ramifications. After all, as long as a company qualifies as an ISP, and they takedown any potentially infringing material once the copyright owner sends proper notice, the ISP is exempt from liability.\textsuperscript{274} The DMCA potentially stifles creativity in two ways: first, noninfringing material may be unjustly taken down based on a faulty notice or an unproven claim of ownership under the safe harbor provisions and terms of service agreements; and second, infringing material can stay up on a website with no repercussions as long as a takedown notice is not issued.

\begin{footnotes}
\footnote{267} Id. at 629.
\footnote{268} Id. at 681.
\footnote{269} Id.
\footnote{270} Id.
\footnote{271} Id. at 682.
\footnote{272} Urban, supra note 257, at 628
\footnote{273} Id. at 686–87.
\footnote{274} See generally id.
\end{footnotes}
for the specific material. While the Chilling Effects study showed that the balance 17 U.S.C. § 512 aimed to strike has never occurred, the Viacom case showed that the entire burden of policing copyrights rests with the Copyright owner. In order to make the burden more equitable, the statute should be rewritten to require more policing by the ISPs and more culpability for profiting from infringing material.

VIII. PROPOSED CHANGES TO THE DMCA

Currently, § 512(c) provides that a service provider shall not be liable for copyright infringement by reason of storage at the direction of a user for material that resides on a system or network, as long as it does not have “actual knowledge,” or is “not aware of facts or circumstances from which infringing activity is apparent,” or fails to act when faced with such knowledge. The problem with this definition is that it completely ignores the fact that the material, while “posted” at the direction of a user, is shaped by the limits of the software. Since the software is created by the programmer, he or she knows exactly what the software can and cannot do, i.e. how many copies it will make, how it will format the copies, and how it will be distributed. To claim that copies are made “at the direction of the server” with no interference from an individual, is absurd since the individual is the one who created the software that runs the server. The server is only capable of doing what the programmer designed it to do.

Brandon Brown, Note, Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World, 23 BERKELEY TECH. L. J. 437, 441-42 (2008) (“In practical application, Web 2.0 websites as they exist today rely on the content of their end-users but the programming of their own developers. The materiality of the content can range from posted articles to digital family movies and form personal profiles to online photo albums. While the content is provided by the end-users, the forum in which the content is posted is designed by the OSP. The distinction between the role of the end-user and the role of the OSP is important for a legal analysis of secondary liability in this area. It is true that a Web 2.0 environment is heavily shaped by the posting of its users. This, in turn, creates significant difficulties for OSPs who wish to police material posted to their website. However, the posted material is still shaped by the limits of the software and thus by the will of its programmers. Since the software does not evolve organically, but rather is only changed by conscious choices made by its developers, the theory of a Web 2.0 environment being completely of the hands of the online service providers is a legal and technological fiction.”) (emphasis added) (footnotes omitted).
While the legislative history states that the legislature believed that the copyright owner was the individual or entity most capable of determining whether a work posted by a user was a copyright violation,\textsuperscript{279} the burden to police the internet squarely falls on the copyright owner rather than the company benefiting from the infringing use of the copyright owner’s work. When YouTube flagrantly touted that their traffic was eighty percent generated by copyrighted material, the general knowledge standard should have been met. The courts have disregarded the “red flags” provision in a naive attempt to maintain balance, thus thrusting the copyright owners into a position where they are powerless to protect their copyrights without a search team actively perusing websites and search engines for copies of their work.

IX. PARLEZ-VOUS FRANÇAIS?

Copyright law is usually territorial;\textsuperscript{280} however, because of the international nature of the internet, there are still some international cases that shed light on steps the United States could take to further protect domestic and international works. In 2000, the European Union created an Electronic Commerce Directive that is very similar to § 512 of the DMCA.\textsuperscript{281} Essentially, both laws allow for limited liability for ISP’s for “storage at the direction of a user.”\textsuperscript{282}


\textsuperscript{280} Jane C. Ginsberg & Sam Ricketson, Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster Decision and the Australian Federal Court’s KaZaa Ruling, 11 MEDIA & ARTS L. REV. 1, 23 (2006) (“Copyright law is generally territorial: liability in a given State arises out of wrongful acts occurring or impacting that State. Unexcused copying in the US violates US copyright law, and unexcused copying in Australia violates Australian copyright. Unexcused communication to the US public violates US law, and unexcused communication to the Australian public violates Australian law.”).


Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that
Recently, four French decisions came down which assigned liability to social networking websites who did not prevent infringing material from reappearing once it was removed. The French courts interpreted the Electronic Commerce Directive to require a more balanced burden. This in turn led to a policy called “take down-stay down” which allows for copyright holders to shift the burden to ISP’s once a takedown notice has been served. However, while there is a shared burden, the French courts have stopped short of sharing liabil-

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Id.


See Jane C. Ginsberg, Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs, 50 ARIZ. L. REV. 577, 607 (2008) (“As a practical matter, these [Google Video] decisions instruct user-generated content sites to create a black list: once a site receives the first take-down notice, it should not only remove the noticed content, but add the identifying information to a filter that will block future postings of the same content.”).

Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., May 13, 2009 (Fr.), available at: http://www.legalis.net/breves-article.php3?id_article=2642:

Par ailleurs, la société propose un service ‘takedown-staydown’ qui est une prise d'empreinte permettant d'empêcher toute nouvelle mise en ligne de contenu litigieux une fois que celui-ci a été retiré.

Translated:

In addition, the company offers a service “takedown-staydown” which is a fingerprinting program designed to prevent further distribution of online content once it was removed. Since 2007, it also offers the solution “audible magic” for filtering data that automatically reject data containing the fingerprints recorded and auditory signature technology developed by INA.
ity when the service is a blog service,\textsuperscript{286} preserving the true nature of “storage of information provided by a recipient of the service”\textsuperscript{287} or “storage at the direction of a user.”\textsuperscript{288}

X. CONCLUSION

Congress needs to restore the historic rights that copyright owners had prior to the passage of the DMCA. In particular, the § 512 “safe harbor” provision needs to be modified so that it protects the truly innocent infringer but punishes anyone who makes a living by infringing the copyrights of others. While the French have made great positive strides in making the burden of policing the internet for infringement more equitable, the system still requires copyright owners to dedicate employees solely to the task of scouring the internet for potentially infringing material. The “take down-stay down” policy is a good first step. However, ISP’s and OSP’s seeking protection under the safe harbor provision should be required to use “finger printing” and other marking and searching technology available to search for infringing material. When the ISP or OSP finds the potentially infringing material, they need to contact the copyright owner to determine whether the material should be taken down. Use of the technology now available would allow the ISP or OSP to claim protection under the

\textsuperscript{286} Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Ordonnance de référé, July 22, 2010 (Fr.), available at: http://www.legalis.net/breves-article.php3?id_article=2974:

Sur la mise hors de cause de la société Google France

Il ressort des éléments versés aux débats que seule la société Google Inc. est l’hébergeur des sites (blogs) en cause et responsable du service Google suggest, cette société étant à contacter en cas de question ou réclamation.

En conséquence, la demanderesse ne démontrant pas que la société Google France soit à l’origine des faits qu’elle dénonce, il convient de la mettre hors de cause.

Translated:

On the downfall of the company due to Google France

The evidence shows that Google Inc is only the host of the blogs in question, and the company should be contacted in case of question or complaint.

Accordingly, the claim should be dismissed if there is a failing to show that Google France was behind the facts alleged.

\textit{Id.}


“new” safe harbor provision as long as they notified the copyright owner of the potentially infringing material in a timely manner. A programmer innovative enough to create the infringing program ought to be able to create an infringement detecting program if the current technology is not adequate to police the internet.

Congress has allowed lobbyist and special interest groups representing users to erode the rights of the creators. It is time for Congress to restore some of the rights that copyright owners have lost over the years. Rewriting § 512 so as not to shield intentional infringers from liability would be a good start.

Sony started the slow erosion of the neighborhood of rights that copyright owners enjoyed by introducing the “drug” of free copyrighted material to regular, law-abiding citizens. Napster accelerated the decline of the neighborhood by introducing the drug to a new generation. This drug turned teenagers and soccer moms into copyright infringing addicts. A number of services have sprung up on the internet to feed their addictions. iTunes and several other services have attempted to restore some dignity to the neighborhood by selling copyrighted content to consumers and paying the copyright owners.

YouTube created the ultimate cash cow, designing a business whereby they got paid for infringing others’ copyrighted material. If YouTube is allowed to avoid liability for intentionally profiting by intentionally infringing the copyrights of some of the most popular television shows, the neighborhood of § 106 rights will become ruins—like the Roman and Greek ruins—vibrant and significant at one point in time and now only relevant for its place in history.


51 IDEA 607 (2011)