

N O R T H W E S T E R N JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY

EXECUTIVE BOARD

EDITOR-IN-CHIEF
Benjamin Hoffart

SUBMISSIONS EDITOR
Ashish Nagdev

MANAGING EDITOR
David Greenfield

PRODUCTION EDITOR
Michael J. Word

EXECUTIVE ARTICLES EDITOR
Randall Hirsch

SUPERVISING NOTES & COMMENTS
EDITOR
Mayah Solh

DEVELOPMENT EDITOR
Brandon Scruggs

ARTICLES EDITORS

Frances Cahill
Heather Harrell
David Kraut

Alex Perez
Ethan White

NOTES & COMMENTS EDITORS

Meredith Baron
Nikola Colic
Sean Kennedy

Yevgeniy Markov
Laurie Perez
Troy Smith

STAFF MEMBERS

Ellen Augustiniak
John Dantzler-Wolfe
Ashlee Davis
Jacob Ewerdt
Leslie Garbarino
Andy Ham

Michael Hammer
Irene Han
Jonathan Hillel
Kenneth Jeng
Gabriel Juarez
David P. Kohn
Jason Kunze

Lawrence Lien
Peter Lish
Laura Pelletier
Brianna Straka
Michelle Sumner
Jessica Talati

FACULTY ADVISOR

Clinton W. Francis

Fall 2007

VOL. 6, NO. 1



ARTICLES

Social Networking Web Sites and the DMCA: A Safe-Harbor from
Copyright Infringement Liability or the Perfect Storm?
Jonathan J. Darrow & Gerald R. Ferrera.....1

The Duty to Disclose Patent Rights
Richard M. Lebovitz.....36

Caveat Venditor: Technologically Protected Subsidized Goods and the
Customers Who Hack Them
Christopher Soghoian46

PERSPECTIVES

A (My)Space of One’s Own: On Privacy and Online Social Networks
Patricia Sanchez Abril73

COMMENTS

Well Duh: Obviousness, Gas Pedals, and the Teaching-Suggestion-
Motivation Test
Randall J. Hirsch, M.D.89

Permanent Establishment in the Digital Age: Improving and Stimulating
Debate Through an Access to Markets Proxy Approach
Benjamin Hoffart106

Should Fashion Design Be Copyrightable?
Brandon Scruggs.....122

Importing Western Style, Exporting Tragedy: Changes in Indian Patent
Law and Their Impact on AIDS Treatment in Africa

Pooja Van Dyck138

Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?

By Jonathan J. Darrow* & Gerald R. Ferrera**

The inducement rule “premises liability on purposeful culpable expression and conduct.”¹ It prohibits “deliberately urging consumers to make illicit use of the product or showing them how it could be done.”²

I. INTRODUCTION

¶1 Is it a prudent business judgment to purchase a web site company for \$1.65 billion that streams amateur video clips and allows anyone to upload copyrighted videos?³ That sounds like a classroom hypothetical illustrating potential copyright infringement liability and bad business judgment.

¶2 It appears the contemporary proliferation of social networking web sites⁴ and the millions who use YouTube⁵ convinced Google to acquire YouTube for that extravagant price. Months later, Viacom sued YouTube for copyright infringement seeking injunctive relief and \$1 billion in damages⁶ for showing 150,000 of its copyrighted clips illegally 1.5 billion times.⁷ The *Viacom* complaint alleges that “YouTube’s brazen disregard of the intellectual property laws fundamentally threatens not just Plaintiffs, but

* Assistant Professor of Business Law, Plymouth State University; Duke University (J.D.), Boston College (M.B.A.), Cornell University (B.S.).

** Gregory H. Adamian Professor of Law, Bentley College; Executive Director of the Bentley Global Cyberlaw Center, New England School of Law (J.D.), Bentley College (M.S.T.), Boston College (B.S.).

¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 915-16 (2005).

² Linda Greenhouse & Lorne Manly, *Justices Reinstate Suits on Internet File Sharing*, N.Y. TIMES, June 28, 2005, at A1.

³ *Viacom and YouTube: War Is Declared*, ECONOMIST, Mar. 17, 2007, at 70.

⁴ Social networking web sites include well-known sites such as Facebook and MySpace, but also many others. For a list of numerous social networking web sites, see Wikipedia, List of Social Networking Websites, http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Aug. 28, 2007).

⁵ See *Google’s YouTube Unit Dominates Online Video Business*, COMPUTERWORLD, July 17, 2007, http://www.computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=networking_and_internet&articleId=9027227&taxonomyId=16 (reporting that Americans recently viewed more than eight billion online videos in a single month, 1.7 billion of which were viewed on YouTube).

⁶ Complaint for Declaratory and Injunctive Relief and Damages, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07-CV-2103 2007 WL 775611, ¶ 10 (S.D.N.Y. Mar. 13, 2007).

⁷ *Id.* ¶ 3. See also *Viacom, Viacom Files Federal Copyright Infringement Claim Against YouTube and Google*, Mar. 13, 2007, <http://www.viacom.com/NEWS/NewsText.aspx?RID=1009865>. A separate class action suit has also been filed against YouTube by The Football Association Premier League and Bourne Co., which suit has recently been joined by the heavyweight National Music Publishers’ Association. See Ethan Smith & Kevin J. Delaney, *Music Publishers to Join YouTube Copyright Suit*, WALL ST. J., Aug. 7, 2007, at A2; see also Class Action Complaint, *Football Ass’n Premier League v. YouTube, Inc.*, No. 07-CV-3582 WL 1992627 (S.D.N.Y. filed May 4, 2007).

the economic underpinnings of one of the most important sectors of the United States economy.”⁸ If Viacom is successful, could this be the end of social networking sites and what appears to be a cultural shift in the digital media?

¶3 The recent phenomenon of social networking has vast social and political consequences as presidential candidates and others have adopted them to project their electronic messages.⁹ Millions of students have pages on MySpace and other social networking sites that display intimate personal information,¹⁰ which is often accompanied by copyrighted content that has been uploaded without the owner’s consent. The potential copyright violations of social networking sites creating this cyber phenomenon are the basis of this paper.

¶4 Part II discusses the context of the internet copyright issues at stake and presents the overarching policy goals that guide courts and legislators alike in formulating copyright policy. Part III reviews the common law history of secondary copyright infringement liability, which permits a copyright owner to sue a web site that enables a direct infringer to use its site to copy or upload copyrighted content without the owner’s permission. Part IV analyzes 17 U.S.C. § 512, the “safe harbor” of the Digital Millennium Copyright Act (DMCA), and its application to social networking sites. This statute is the principal defense in the *Viacom v. YouTube* case.¹¹ Because one can expect the uploading of copyrighted video clips without the owner’s consent to be common practice on social networking sites, the application of the DMCA’s safe harbor provisions to secondary copyright infringement is the salient issue to be resolved. To the extent that social networking sites are ineligible for DMCA safe harbor protection, their liability will be determined under traditional copyright doctrines. Part V therefore explains the United States Supreme Court’s decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* that established the new inducement rule’s application to social networking sites.¹² Part V also discusses whether social networking sites are likely to escape liability in the absence of safe harbor protection under the *Grokster* standard. This analysis has special significance because the DMCA was adopted by Congress in 1998, long before the existence of social networking sites.¹³ Part VI concludes by proposing an outcome to the *YouTube* case that would largely allow social networking sites to remain within the safe harbor of the DMCA.

⁸ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 2.

⁹ *Campaigning on the Internet: Of Slips and Video Clips*, ECONOMIST, Mar. 17, 2007, at 80.

¹⁰ MySpace, <http://www.myspace.com> (last visited Aug. 24, 2007). See Associated Press, *District to Monitor Students’ MySpace Pages*, MSNBC, May 23, 2006, <http://www.msnbc.msn.com/id/12937962/> (“[MySpace] allows its nearly 80 million users to post pictures and personal information . . .”).

¹¹ See Defendant’s Answer and Demand for Jury Trial at 10, *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07-CV-02103 (S.D.N.Y. Apr. 30, 2007).

¹² *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005).

¹³ See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (“[The DMCA] was not passed with Napster-type services in mind . . .”).

II. COPYRIGHT ON THE INTERNET

A. *The Nature of the Issue*

¶5 In discussing copyright liability in the context of social networking sites, it is easy to fixate on content that has been created by large motion picture studios, widely published authors, or well-known songwriters. Perhaps this is so because those who have been the most vocal in expressing concern over copyrighted content on the internet have included or represented these types of companies or individuals. Yet because copyright subsists from the moment of a work's creation, with no additional steps required by the author to secure a copyright in that work,¹⁴ nearly all recently-created content on the internet is copyrighted, including pedestrian user-created content. This means that a short home video of a birthday party given in honor of the family pet or a two-minute video demonstration of "How to Tear a Phone Book in Half"¹⁵ are both entitled to the protections of federal copyright law.

¶6 Because a growing number of social networking sites allow users to post photos, videos, and other digital files for public viewing, inevitably resulting in their copying and distribution, copyright issues within social networking sites are pervasive. Prominent among these sites with respect to video sharing is YouTube, where approximately 100 million videos are watched every day.¹⁶ Users wishing to upload videos must expressly grant to YouTube "a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform" the videos.¹⁷ Copyright infringement of purely user-created videos that do not contain copyrighted works thus becomes a non-issue.

¶7 Copyright concerns arise not when users upload their own videos, but when a user uploads a third party's video or a video that contains within it content belonging to a third party. This would include blatant copyright violations such as uploading the full-length film "Schindler's List," but may also include less obvious acts of infringement, such as posting a five-minute video of a fifth-grader's dance recital that is performed to copyrighted music.¹⁸ It is possible, of course, that even non-permissive uses of

¹⁴ 17 U.S.C. § 302 (2006) ("Copyright in a work created on or after January 1, 1978, subsists from its creation . . ."); 17 U.S.C. § 104 (2006) (In many cases, United States copyright law protects works fixed outside the United States or created by those who are not United States nationals.). Note that works of the United States government, whether or not online, are not entitled to copyright protection. 17 U.S.C. § 105 (2006).

¹⁵ See YouTube, *How to Tear a Phone Book in Half*, <http://www.youtube.com/watch?v=2oJ4L9cyyrI> (last visited Aug. 28, 2007).

¹⁶ *YouTube Hits 100m Videos Per Day*, BBC NEWS, July 17, 2006, <http://news.bbc.co.uk/1/hi/technology/5186618.stm>. Although much of this article draws on the circumstances surrounding the *Viacom v. YouTube* dispute, the issues are by no means unique to YouTube. Universal Music Group is maintaining a similar copyright infringement suit against MySpace for "encouraging and facilitating" the illegal sharing by MySpace users of its videos and songs. See Complaint for Direct, Contributory, and Vicarious Copyright Infringement, for Inducement of Copyright Infringement, and for Violations of California Business and Professions Code §17200, *UMG Records, Inc. v. MySpace, Inc.*, No. CV-06-07361, 2006 WL 3466446 (C.D. Cal. Nov. 17, 2006). Other suits are sure to follow.

¹⁷ YouTube, *Terms of Use*, ¶ 6(C), <http://youtube.com/t/terms> (last visited Nov. 16, 2007).

¹⁸ See Cynthia Blake Sanders & Sara L. Alpert, *Background Music in Sports Sampling, Copyright Law and the Infringing Gymnast*, 40 Md. B.J. 4, 10 (2007) (noting that such use of copyrighted music is likely infringing the exclusive right to public performance).

copyrighted works may be legal under the fair use doctrine.¹⁹ However, if fair use does not apply and permission has not been granted, a person uploading copies of a work to the internet with the intent that they be copied, distributed, and viewed by others commits copyright infringement.

¶8 Locating end-users who infringe copyrighted works can be difficult and expensive, however,²⁰ so copyright holders have sought to aggregate their legal claims by bringing suit against the entities which made the copyright violations possible — in this case, YouTube — under secondary copyright liability theories.²¹ The road to such secondary liability for facilitating digital content exchange was paved by suits against music file-sharing companies Napster,²² Aimster,²³ and Grokster,²⁴ all of which resulted in decisions favorable to the imposition of secondary copyright liability. Is YouTube destined to go the way of Napster, being forced to radically alter its business model until it is nothing but a shadow of its former self?²⁵ Should it be? What is YouTube’s culpability for the copyright violations that are occurring on its web site?

B. Copyright: A Balancing of Interests

¶9 As is frequently the case with novel legal issues, the answers to new questions can be inspired by considering existing analogous scenarios, then determining which of those scenarios most closely animates the current fact pattern.

¶10 Copyright infringement is in the nature of a tort,²⁶ so it is worth considering torts that are enabled by the products or services of third parties. No one suggests that

¹⁹ 17 U.S.C. § 107 (2006). See *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 321-22 (S.D.N.Y. 2000) (The fair use doctrine “limits the exclusive rights of a copyright holder by permitting others to make limited use of portions of the copyrighted work, for appropriate purposes, free of liability for copyright infringement.”); see also *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (“The [fair use] doctrine. . . . ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (quoting *Iowa State Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980))).

²⁰ See Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 397 (2003).

²¹ The Supreme Court seems to agree with copyright holders that in some cases, suing a direct infringer is “impractical.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005) (“When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.”); see also *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003) (“Recognizing the impracticability or futility of a copyright owner’s suing a multitude of individual infringers . . . the law allows a copyright holder to sue a contributor to infringement instead . . .”).

²² *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). See generally Daniel D. Hill, *A&M Records, Inc. v. Napster, Inc.: A Victory in the War To Sound the Digital Death Knell for Peer-To-Peer Online File Sharing*, 12 WIDENER L.J. 161 (2003).

²³ *Aimster*, 334 F.3d 643.

²⁴ *Grokster*, 545 U.S. 913.

²⁵ Some think that it will. See, e.g., Eric Benderoff, *Billion-Dollar Battle: Viacom vs. YouTube*, CHI. TRIB., Mar. 14, 2007, at C1 (“[Video sharing] ‘will get reined in like file sharing, where the major sites were closed down.’” (quoting Brian Heidelberger, Partner, Winston & Strawn LLP)); Mark Cuban: *Only a ‘Moron’ Would Buy YouTube*, FOXNEWS.COM, Sept. 30, 2006, <http://www.foxnews.com/story/0,2933,216714,00.html> (quoting Silicon Valley billionaire Mark Cuban as stating that YouTube will be “sued into oblivion”).

²⁶ Sverker K. Högberg, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 914 n.33 (2006).

manufacturers of baseball bats should be held liable for battery committed by users of the bats.²⁷ Similarly, the authors could not find a reported case holding camera manufacturers (whether of digital or analog cameras) liable for the derivative works created when camera owners take pictures of underlying copyrighted works.²⁸ Nor is there a widespread movement seeking to hold typewriter or computer manufacturers liable for the copyright infringement of typewriter or computer owners, though the question has been posed.²⁹ Nor have companies that manufacture photocopying machines been held liable for copyright infringement by the machine's owners.³⁰

¶11 Each of these products could be used to break the law, yet society, via the legislative and judicial processes, has largely chosen not to impose liability on the manufacturers of these products. Why? Perhaps the most obvious answer is that these products can be used lawfully in a variety of ways that are considered valuable. Imagine banning the game of baseball because of the number of crimes committed each year using bats,³¹ or forbidding the manufacture of cameras or photocopy machines because they could be used to commit copyright infringement.³²

¶12 Clearly, there is a balancing of interests occurring in the decision of whether and when to impose copyright liability, whether direct or secondary. "In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public?"³³ Copyright rewards owners and thus

²⁷ See, e.g., *Bunch v. Hoffinger Indus., Inc.*, 123 Cal.App.4th 1278, 1302 (Cal. Ct. App. 2004) ("A manufacturer is liable only if the product was a proximate cause of the plaintiff's injury.").

²⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 462 (C.D. Cal. 1979) ("Vicarious liability has not been extended so far [as to bring camera manufacturers within its reach]."), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

²⁹ See Lichtman & Landes, *supra* note 20, at 396; see also David Nimmer, *On the Sony Side of the Street*, 34 SW. U. L. REV. 205, 218 (2004) ("[A]ny rule that would say that . . . manufacturers [of personal computers] should be held liable simply because they can and, in fact, are used for infringing purposes is a rule that we as a society really can't live with. It's a rule that pushes the copyright monopoly too far into the area of technology regulation. . . ." (quoting Fred von Lohmann, Senior Staff Attorney, Electronic Frontier Foundation)).

³⁰ See *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) ("[A] copy machine owner who makes the machine available to the public to use for copying is not, without more, strictly liable [for copyright infringement]."). Judge Posner, analogizing to even more distantly related wrongs, noted: "A retailer of slinky dresses is not guilty of aiding and abetting prostitution even if he knows that some of his customers are prostitutes--he may even know which ones are." *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003). See also Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 815, 853 (2005) (noting that courts do not consider gun manufacturers, railroads, or drug companies intentional tortfeasors even though these companies know with substantial certainty that injury or death will result from their products or services); Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 277 (2006) ("[T]he upstream makers of photocopying machines and similar technologies are insulated from contributory liability for the act of producing and distributing the technologies.").

³¹ See Craig Perkins, *Bureau of Justice Statistics Special Report: National Crime Victimization Survey, 1993-2001*, U.S. DEPT. OF JUSTICE, Sept. 2003, at 2, available at <http://www.ojp.gov/bjs/pub/pdf/wuvvc01.pdf> (reporting that between 1993 and 2001, approximately 356,000 crimes were committed with blunt objects "such as a brick, bat, or bottle").

³² Libraries are specifically protected from secondary copyright liability for copies made by library patrons at a library photocopy machine, provided that the copying is "unsupervised" and that the library post a notice "that the making of a copy may be subject to the copyright law." 17 U.S.C. § 108(f)(1) (2006).

³³ H.R. REP. NO. 2222, at 7 (1909).

stimulates them to create works that contribute to the public good. Nevertheless, “[t]he copyright law, like the patent statute, makes reward to the owner a secondary consideration.”³⁴ “[T]he ultimate aim [of copyright law] is . . . to stimulate artistic creativity for the general public good.”³⁵ It is therefore unsurprising that, when balancing the public good created by cameras, computers, and photocopying machines against the potential copyright infringement that is enabled by their manufacture, society has come to tolerate some increased likelihood of copyright violations in exchange for the significant benefits derived from these products.

¶13 Cameras, photocopiers, and computers have existed for decades or longer, and recognizing their value is a comparatively simple matter. With new technologies, it is not always readily apparent to what extent those technologies are, or will be, beneficial.³⁶ Caution must therefore be exercised when legislating or deciding that a certain piece of new technology imposes too great a cost to copyright holders. What would society be like if the four dissenting justices in *Sony*³⁷ had carried the day and Sony was forced to alter or discontinue its product? Nor is it clear that the pro-copyright resolution of *Napster*³⁸ and its progeny have led to an optimal state of affairs. Theft of musical works on the internet is still rampant³⁹ and public respect and support for copyright laws may be waning.⁴⁰ More importantly, five years after *Napster*, there is still no alternative web site where the public may legally (and by payment of appropriate fees) obtain as wide a variety of music with the ease and efficiency that had been enabled by Napster.⁴¹

³⁴ United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

³⁵ Sony Corp. of Am. v. Universal City Studios, Inc., 480 F.Supp. 429, 432 (C.D. Cal. 1979); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

³⁶ *See, e.g.,* R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 877, 889-90 (2005) (arguing that courts are likely to both underestimate the social benefits of new technologies and overestimate their costs); Yen, *supra* note 30, at 829 (“[S]ociety rarely appreciates the full benefits of new technologies immediately upon their invention.”); *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 649-50 (7th Cir. 2003). (“The [Sony] Court’s action in striking the cost-benefit tradeoff in favor of Sony came to seem prescient when it later turned out that the principal use of video recorders was to allow people to watch at-home movies that they bought or rented rather than to tape television programs. (In 1984, when *Sony* was decided, the industry was unsure how great the demand would be for prerecorded tapes compared to time shifting)”).

³⁷ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 457 (1984) (Blackmun, J., dissenting).

³⁸ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

³⁹ *See, e.g.,* *YouTube Signs Licensing Deal with British Composers’ Group*, INT’L HERALD TRIB., Aug. 30, 2007, <http://www.iht.com/articles/2007/08/30/business/youtube.php> (“[M]ajor media companies say piracy of copyrighted works is rampant.”); *The Role of Technology in Reducing Illegal Filesharing: A University Perspective: Hearing Before the H. Comm. on Sci. & Tech.*, 110th Cong. 10-11 (2007) (statement of Rep. Ralph M. Hall, Minority Ranking Member, Comm. on Sci. & Tech.), *available at* <http://gop.science.house.gov/hearings/full07/June%205/Hall.pdf> (“[I]llegal file-sharing of music, movies, software, and other content is easier than ever. . . . This rampant disregard for copyright law needs to end.”); Bryan H. Choi, *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 410 (2006) (“[I]llegal file-sharing has . . . continued at ever-increasing rates. . . .”); Zittrain, *supra* note 30, at 286 (“[U]nauthorized file sharing continued unabated, and indeed grew [after *Napster*]. . . .”).

⁴⁰ *See* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 679 (2005) (“Since the MP3.com and Napster battles, the public has become increasingly aware of copyright issues, and a growing portion has viewed copyright law with disdain.”).

⁴¹ *See, e.g.,* Anne Broache, *Politicos Warn Schools for Campus Piracy*, USATODAY.COM, June 6, 2006,

¶14 The copyright conundrum thus remains and, in the online context, begs for a rebalancing. On the one hand, the internet has been described as a “giant photocopier,”⁴² and its ability to make perfect copies has been cited as a reason why the internet “threatens copyright holders as never before.”⁴³ On the other hand, this ability to make perfect copies cheaply, easily, and without respect to distance or geography is the source of tremendous potential and provides the foundations for services that may in the future confer tremendous public benefits.

III. SECONDARY COPYRIGHT INFRINGEMENT LIABILITY

A. *Secondary Copyright Liability — Two Theories*

¶15 There are two related but distinct theories by which one entity can be held secondarily liable for copyright infringement, or liable for the copyright infringement of another: contributory copyright infringement and vicarious copyright infringement. Although the lines of distinction between contributory and vicarious infringement are not clearly drawn,⁴⁴ contributory infringement requires an intent to induce another to commit infringement,⁴⁵ while vicarious infringement occurs when one party profits from the infringing activities of another while failing to exercise a right to stop the infringing activity.⁴⁶ The Copyright Act does not reference either of these common law theories of

available at http://www.usatoday.com/tech/products/cnet/2007-06-06-politicos-schools-copyright-sharing_N.htm (“So long as the right thing remains more daunting, awkward and unsatisfying than the wrong thing [i.e., illegal downloading], too many people will do the wrong thing.” (quoting Greg Jackson, Chief Information Officer, University of Chicago)); *see also* Choi, *supra* note 39, at 404-05 (suggesting that there is a trade-off between immunity from secondary copyright liability and efficient network architecture). “[N]o solution today offers the incredible combination of ease, speed, reliability, and scalability that Napster was able to achieve.” *Id.* at 410.

⁴² Michael J. Madison, *The Narratives of Cyberspace Law (or, Learning from Casablanca)*, 27 COLUM. J.L. & ARTS 249, 251 (2004) (“Cyberspace has been characterized as a giant photocopier...”); Paul Ganley, *Digital Copyright and the New Creative Dynamics*, 12 INT’L J.L. & INFO. TECH. 282, 284 (2004) (“A new layer of protection is needed: technical fences to curtail the ceaseless operation of the giant networked photocopier.”). An internet service provider whose services did not involve creating or controlling the content of user-posted messages was held to be similar to the owner of a copy machine who lets the public make copies with it. *Religious Tech. Ctr. v. Netcom On-line Commc’n Serv., Inc.*, 907 F.Supp. 1361, 1369 (N.D. Cal. 1995).

⁴³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

⁴⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 435 n.17 (C.D. Cal. 1979).

⁴⁵ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another may be liable as a contributory copyright infringer.” (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971))); *Online Policy Group v. Diebold Inc.*, 337 F. Supp. 2d 1195, 1200 (N.D. Cal. 2004) (“The party alleging contributory infringement must show ‘(1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement.’” (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160 (9th Cir.2004)); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 728 (9th Cir. 2007) (noting that the contribution to infringement must be material).

⁴⁶ *Grokster*, 545 U.S. at 930 (“One. . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. . . .”); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 500 (E.D. Pa. 2006), *aff’d*, *Parker v. Google, Inc.*, 2007 WL 1989660, at *4 (3d Cir. July 10, 2007) (“There are two elements to a successful claim of vicarious copyright infringement: (1) the right and ability to supervise the infringing conduct and (2) an obvious and direct financial interest in the exploitation of copyrighted materials.”) (internal quotations omitted); *Diebold*, 337 F.Supp.2d at 1200 (“A defendant may be liable under a vicarious liability theory if the plaintiff demonstrates ‘(1) direct infringement by a primary party,

secondary liability.⁴⁷ Nevertheless, secondary liability “is imposed in virtually all areas of the law”⁴⁸ and, more to the point, has long been a fixture in copyright law jurisprudence.⁴⁹

B. Contributory Infringement Liability

¶16 In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, the seminal case on contributory infringement liability, the court ruled that a person “who, with knowledge of the [direct] infringement activity, induces, causes or materially contributes to the infringing conduct of another, [he] may be held liable as a ‘contributory’ infringer.”⁵⁰ The common law of torts traditionally recognized contributory liability where a person or business establishment directly contributes to another’s wrongful conduct.⁵¹ A finding of knowledge of the direct copyright infringement and a material contribution by the secondary infringer are both necessary to establish contributory infringement liability.⁵² Secondary infringement may take the form of inducing the direct infringers to violate copyright laws.⁵³ This can be evidenced by a business model designed to attract direct infringers or continuing to allow infringement when notified of the wrongful conduct.⁵⁴

¶17 Contributory infringement liability is especially relevant to social networking sites, which host millions of user-posted files that may directly infringe a copyright. Web sites may potentially receive daily notifications by countless numbers of copyright owners alleging their works are being infringed.⁵⁵ Such notifications could establish

(2) a direct financial benefit to the defendant, and the right and ability to supervise the infringers.” (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir.2004)).

⁴⁷ Lichtman & Landes, *supra* note 20, at 396 (“Unlike the Patent Act, the Copyright Act of 1976 does not explicitly recognize the possibility of indirect liability.”); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“The absence of such express language [creating secondary liability] in the copyright statute does not preclude the imposition of liability for [secondary] copyright infringements. . . .”).

⁴⁸ *Sony*, 464 U.S. at 435.

⁴⁹ Högberg, *supra* note 26, at 909 (“[S]econdary liability doctrines are well established in copyright law. . . .”); *see also* *Gershwin Publ’g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1161-62 (2d Cir. 1971) (“[I]t has long been held that one may be liable for copyright infringement even though he has not himself performed the protected composition.”); *Gross v. Van Dyk Gravure Co.*, 230 F. 412, 414 (2d Cir. 1916) (“Why all who unite in an infringement are not, under the statute, liable for damages sustained by plaintiff, we are unable to see. . . . [A]s all united in infringing, all are responsible for the damages resulting from infringement.”).

⁵⁰ *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁵¹ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (“Contributory infringement originates in tort law and stems from the notion that one who directly contributes to another’s infringement should be held accountable.”).

⁵² *Gershwin*, 443 F.2d at 1162.

⁵³ *See* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

⁵⁴ *Id.* at 925-26 (“The point [of StreamCast’s business model], of course, would be to attract users of a mind to infringe. . . .”).

⁵⁵ Scott Carlson, *New Company Besieges Colleges with Notices About Copyright Violations*, CHRONICLE OF HIGHER EDUCATION, Nov. 30, 2001, at A29, available at <http://chronicle.com/free/v48/i14/14a02901.htm> (The number of takedown notices sent per day has likely increased substantially since the DMCA took effect. As far back as 2001, Cornell University was reported to have received “up to 25 requests in the past two months, up from 15 or so in each of the previous years,” while “the University of Maryland at College Park, which never got more than 20 notices a year in the past, has received more than 100 since the semester’s start. . . .”); *See* WIPO, Batur Oktay & Greg Wrenn, A

“knowledge” on the part of the web site, thereby subjecting it to potential contributory infringement liability. They risk potential secondary copyright liability based on the theory of being facilitators of the direct infringement.⁵⁶

C. Vicarious Infringement Liability

¶18 Vicarious infringement has its origin in the common law,⁵⁷ found in the doctrine of respondeat superior.⁵⁸ It is established on the theory that the defendant had the right and ability to supervise the direct infringement and had a direct financial interest in the infringed copyrighted work.⁵⁹ “To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.”⁶⁰ Direct financial interest includes both present interest as well as a “future hope to monetize.”⁶¹

¶19 The early so-called “dance hall” cases placed vicarious copyright infringement liability on establishments where music was performed by an infringing band or orchestra even though the dance hall proprietor was not involved in the choice of infringing music played by the band but acquired a financial benefit from the performance.⁶² In one of these cases, *Shapiro, Bernstein & Co. v. H.L. Green Co.*, the court ruled that knowledge of the infringement is not necessary when a reasonable person should have known of its occurrence.⁶³

¶20 An ongoing relationship with a direct infringer makes it more likely that a party will be held liable for secondary copyright infringement.⁶⁴ In order to post a video on

Look Back at the Notice-Takedown Provisions of the U.S. Digital Millennium Copyright Act One Year After Enactment, Dec. 1, 1999, available at

http://www.wipo.int/documents/en/meetings/1999/osp/doc/osp_lia2.doc (“Adobe’s investigators send 40-90 take down notices per day.”); Seth Sutel, *Viacom Asks YouTube to Remove Over 100,000 Unauthorized Video Clips*, USATODAY.COM, Feb. 2, 2007, http://www.usatoday.com/tech/news/2007-02-02-viacom-youtube_x.htm (In early 2007 Viacom asked YouTube to take down more than 100,000 allegedly unauthorized clips); Miles Skorpen, *RIAA Targets Swarthmore*, THE DAILY GAZETTE (Swarthmore College, Swarthmore, PA), Aug. 31, 2007, <http://www.sccc.swarthmore.edu/org/daily/2007/08/31/riaa-targets-swarthmore/> (In August 2007, it was reported that Swarthmore College received “thousand [sic] of takedown notices... from companies across the world.”).

⁵⁶ See Högberg, *supra* note 26, at 909.

⁵⁷ *Grokster*, 545 U.S. at 930.

⁵⁸ See *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988) (“Under [the doctrine of] respondeat superior, an employer is vicariously liable for an employee’s tortious acts committed within the scope of employment.”).

⁵⁹ *Grokster*, 545 U.S. at 930 (“One... infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it....”).

⁶⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

⁶¹ 4 NIMMER ON COPYRIGHT § 12.04[A][1] (2005); see also *IO Group, Inc. v. Veoh Networks, Inc.*, 2007 WL 1113800, at *3 (N.D. Cal. April 13, 2007); *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 857 (C.D. Cal. 2006).

⁶² See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-99 (1931); see also *Dreamland Ball Room v. Shapiro Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).

⁶³ *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (“When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials — even in the absence of actual knowledge . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”); see *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement. . . .”).

⁶⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 437 (C.D. Cal. 1979) (noting that

YouTube, a user must sign up (and thereby agree to the YouTube terms of service),⁶⁵ which makes it more likely that YouTube will have an ongoing relationship with those who have uploaded content. Generally speaking, providers of services (including social networking sites) are more likely to have ongoing relationships with their customers than are vendors of products, such as a VCR.⁶⁶

¶21 This theory of secondary copyright liability should be especially worrisome to social networking sites. A financial interest is surely evident by the vast number of subscribers and advertising patrons. A social networking site, without knowledge of the direct copyright infringers, could be held liable based on a common law duty to supervise in a careful manner. A reasonable standard of supervision would work in favor of copyright holders because the vast number of posted videos should suggest that reasonable supervision would create awareness on the part of the web site of the direct infringement.

D. Inducement Rule: Grokster

¶22 In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,⁶⁷ the defendant, Grokster, distributed free software allowing peer-to-peer users to share files directly with each other without going through a central server. Most of the users shared copyrighted music and video files without the permission of the copyright owners. Metro-Goldwyn-Mayer Studios Inc. alleged that Grokster “knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act.”⁶⁸ Justice Souter, writing for the majority, framed the issue by stating: “The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product.”⁶⁹

¶23 This question will continue to be relevant to copyright infringement claims based on secondary contributory infringement brought against social networking sites. Consider that YouTube has created a network where both lawful and unlawful use is possible. The *Grokster* Court applied the rule on inducement of infringement by stating:

[E]vidence of active steps . . . taken to encourage direct infringement such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law’s reluctance to find liability

in cases where there is an ongoing relationship, the alleged secondary infringer is in a position to control the use of the copyrighted works by the primary infringer).

⁶⁵ YouTube, *Help Center: Do I Have to Sign Up to Upload Videos?*, <http://www.google.com/support/youtube/bin/answer.py?answer=55740&topic=10525> (“Since videos are attached to your profile, you must sign up as a member to upload videos.”).

⁶⁶ See *Aimster*, 334 F.3d at 648 (“[T]he provider of a service, unlike the seller of a product, has a continuing relation with its customers.”).

⁶⁷ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005).

⁶⁸ *Grokster*, 545 U.S. at 920-21; see also *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 727 n.11 (C.D. Cal. 2006) (“Google’s activities do not meet the ‘inducement’ test explained in *Grokster* because Google has not promoted the use of its search engine specifically to infringe copyrights . . . However, the Supreme Court in *Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles.”).

⁶⁹ *Grokster*, 545 U.S. at 918-19.

when a defendant merely sells a commercial product suitable for some lawful use.⁷⁰

¶24 In a claim against a social networking site, the plaintiff during discovery would question the nature of the business plan, its marketing strategy, and any e-mails or other correspondence that might reveal the company's intent to "encourage direct infringement." The *Grokster* Court was careful to point out that:

[M]ere knowledge of infringing potential or of actual infringing uses would not be enough . . . to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product up-dates support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.⁷¹

¶25 That rule as expressed by the Supreme Court is not especially helpful because if a copyright owner notified the website of an alleged infringement, one could argue that the social networking site by continuing to post the infringing content is engaging in "purposeful, culpable expression and conduct." What is meant by "purposeful, culpable expression and conduct" will continue to perplex counsel advising a network receiving alleged copyright violations.

¶26 For example, consider the famously popular iPod, and in particular the 80 gigabyte version which can hold up to 20,000 songs.⁷² The unit is available on Apple, Inc.'s web site for \$349.⁷³ However, at \$0.99 per song,⁷⁴ it would cost nearly \$20,000 to fill the iPod to capacity, which is more than fifty times the cost of the iPod itself. Given that iPods have enjoyed wide popularity among high school and college students (who may be reluctant or unable to spend \$20,000 on music) one might infer that Apple's business strategy and profits are based on the assumption or even intent that purchasers will use its product to store and play unauthorized copies of music.⁷⁵ Does that proposed business strategy constitute "purposeful, culpable expression and conduct?" Assume for the moment that iPod users do in fact illegally copy large amounts of copyrighted material to and from their iPods. If this is the case, should Apple be any less condemned than YouTube, simply because it is more difficult to identify the direct infringement offline than online?

⁷⁰ *Id.* at 936.

⁷¹ *Id.* at 937.

⁷² Apple Inc., <http://www.apple.com/ipod/ipod.html> (last visited Sept. 3, 2007).

⁷³ The Apple Store, <http://store.apple.com/1-800-MY-APPLE/WebObjects/AppleStore?family=iPod> (last visited Sept. 3, 2007).

⁷⁴ Apple iTunes Store, <http://www.apple.com/itunes/store/music.html> (last visited Sept. 3, 2007).

⁷⁵ See generally Tim Wu, *Does YouTube Really Have Legal Problems?*, SLATE, Oct. 26, 2006, <http://slate.com/id/2152264> (acknowledging Apple's deft maneuvering through the copyright labyrinth, at the same time that "its iPods make swapping music all the more part of being American").

IV. THE “SAFE HARBOR” OF SECTION 512 OF THE DMCA

¶27 In enacting the Digital Millennium Copyright Act of 1998, Congress sought to protect the rights of copyright holders while allowing internet service providers to operate and innovate without the fear of unlimited liability.⁷⁶ Thus, a series of safe harbors was established so that, by complying with the requirements of the DMCA, companies providing certain internet-based services could be assured that they would not have to pay damages for copyright infringement. The safe harbors protect “service providers” who are engaged in various online activities, including the provision of “transitory digital network communications,” “system caching,” and “information location tools,” or who control or operate a system or network where material is stored “at the direction of a user.”⁷⁷ Moreover, the legislative history of this section makes clear that “qualifying service providers” will be relieved of liability not only for vicarious and contributory infringement, but also for direct copyright infringement.⁷⁸

¶28 The subsection of the DMCA that most directly applies to social networking sites is § 512(c), which creates a safe harbor from liability for service providers for “information residing on [a service provider’s] systems or networks at the direction of users,” provided certain conditions are met.⁷⁹ These conditions address (1) the service provider’s knowledge of the infringing material, (2) the financial benefit to the service provider that is derived from the infringing material, (3) the service provider’s response in removing infringing material when notified thereof,⁸⁰ (4) the service provider’s implementation of a policy whereby users who repeatedly engage in copyright infringement may have their account access disabled, and (5) the implementation of “standard technical measures” that allow copyright owners to identify copyrighted works.⁸¹ Conditions (4) and (5) have been described by courts as “threshold conditions.”⁸² In addition, an entity must as a threshold matter qualify as a “service provider.”⁸³

A. *Threshold Requirements of Section 512 Safe Harbor Protection*

¶29 As a threshold matter, an entity seeking to take refuge in any of the § 512 safe harbors must meet the threshold conditions of qualifying as a service provider,

⁷⁶ See Mike Scott, *Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 99, 99-100 (2005-2006); see also *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“Congress hoped to provide ‘greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.’” (quoting S. REP. NO. 105-190, at 20 (1998))).

⁷⁷ 17 U.S.C. § 512 (2006).

⁷⁸ S. REP. NO. 105-190, at 40 (1998) (“The limitations in subsections (a) through (d) [of § 512] protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.”); *Id.* at 43 (“Subsection (c) limits the liability of qualifying service providers for claims of direct, vicarious and contributory infringement”); see also *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (“As to direct infringement, liability is ruled out [under the DMCA] for passive, automatic acts engaged in through a technological process initiated by another.”).

⁷⁹ 17 U.S.C. § 512(c) (2006).

⁸⁰ 17 U.S.C. § 512(c)(1) (2006).

⁸¹ 17 U.S.C. § 512(i) (2006).

⁸² *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1099 (W.D. Wash. 2004).

⁸³ 17 U.S.C. § 512 (2006).

reasonably implementing a termination policy, and accommodating standard technical measures.

1. Are Social Networking Sites “Service Providers”?

¶30 Only those entities that qualify as “service providers” are entitled to the benefit of the § 512 safe harbors.⁸⁴ Thus, whether YouTube is considered a service provider is a critical threshold matter. Section 512 provides two different definitions for the term “service provider.” The first definition applies to § 512(a), addressing “transitory digital network communications,” and defines a “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁸⁵ The hosting of a web site does not fall within this definition, whereas providing connectivity for such a web site does fall within the definition.⁸⁶ The second definition is broader,⁸⁷ and includes all entities captured by the first definition, plus “provider[s] of online services or network access, or the operator of facilities therefore.”⁸⁸

¶31 Fortunately, this oblique statutory language has been clarified somewhat by the legislative history and by case law, which have made it clear that the definition of “service provider” is very broad.⁸⁹ The Senate Report accompanying the DMCA noted that “services such as providing Internet access, e-mail, chat room and web page hosting services” were specifically contemplated by the legislature as being covered by the broader definition of “service provider.”⁹⁰ Courts have consistently applied a broad definition to the term “service provider” to bring within the definition a wide range of entities, including, Aimster,⁹¹ eBay,⁹² and Amazon.⁹³ Even Napster may have fallen within the purview of § 512.⁹⁴

⁸⁴ *Corbis*, 351 F. Supp. 2d at 1099 (“At the outset, a party seeking safe harbor must, in fact, be a ‘service provider’ as that term is defined under the DMCA.”). Entities not qualifying under a § 512 safe harbor may still avoid liability, but must do so under the traditional copyright scheme (for example, by successfully asserting fair use). 17 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.”).

⁸⁵ 17 U.S.C. § 512(k)(1)(A) (2006).

⁸⁶ S. REP. NO. 105-190, at 54 (1998) (“For example, hosting a World Wide Web site does not fall within the subsection (j)(1)(A) definition; providing connectivity for a world wide web site does fall within that definition.”).

⁸⁷ *See id.* (“This definition [contained in § 512(k)(1)(B)] is broader than the [definition contained in § 512(k)(1)(A)] . . .”).

⁸⁸ 17 U.S.C. § 512(k)(1)(B) (2006).

⁸⁹ *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) (noting that the DMCA defines “service provider” broadly).

⁹⁰ *See* S. REP. NO. 105-190, at 54 (noting that these activities are covered under the [broader] § 512(k)(1)(B) definition).

⁹¹ *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (“[T]he definition of Internet service provider [contained in § 512(k)(1)(B)] is broad . . . and Aimster fits it.”).

⁹² *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (“eBay clearly meets the DMCA’s broad definition of online ‘service provider.’”).

⁹³ *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1100 (W.D. Wash. 2004) (concluding that there is “no doubt that Amazon fits within the definition [of a “service provider” in the context of the § 512(c) safe harbor]. . . . Amazon operates web sites, provides retail and third party selling services to Internet users, and maintains computers to govern access to its web sites. These activities fall squarely

¶32 Subsection (c) of § 512 protects service providers from liability 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 . . . the service provider.”⁹⁵ The Senate Report accompanying the Digital Millennium Copyright Act provides several illuminating examples of specific activities which would be covered under this subsection: “Examples [of activities protected under § 512(c)] include providing server space for a user’s web site, for a chat room, *or other forum* in which material may be posted at the direction of users.”⁹⁶ While none of these situations addresses music or video files per se, the class of entities which could conceivably “provide[] server space” is broad. Moreover, the following page of the legislative history specifically provides the example of “online site[s] offering audio or video” in the context of § 512(c).⁹⁷ Given these specific examples and the broad definition of “service provider,” it is not surprising that legal scholars have concluded that YouTube is an intended beneficiary of the § 512(c) safe harbor,⁹⁸ though it must still be determined whether its activities are sufficient to meet all of the safe harbor’s requirements.

2. Termination Policy

¶33 Second, a service provider may only avail itself of the § 512 safe harbors if the service provider has “adopted and reasonably implemented, and inform[ed] subscribers of . . . a policy that provides for the termination . . . of . . . account holders . . . who are

within the broad scope of the § 512(k)(1)(B) definition of ‘service provider.’”). The online retailer Amazon was accused of copyright infringement based on its “zShops” platform, an online forum hosted by Amazon where third party vendors sell products directly to online customers. *Id.* at 1094. In selling their products, zShops vendors could choose to include a product image either by creating a link to an image stored on the vendor’s computer or by uploading an image to an Amazon server. *Id.* Amazon did not preview or supervise the uploading or linking of the images. *Id.*

⁹⁴ A&M Records, Inc. v. Napster, 2000 WL 573136, at *3 (N.D. Cal. May 12, 2000) (assuming, but explicitly declining to hold, that Napster was a service provider under § 512(k)(1)(A)). *See also* 17 U.S.C. § 512(k)(1)(B) (2006) (broadly defining ‘service provider’ as “a provider of online services”); Scott, *supra* note 76, at 140-41 (“The definition of [online service providers (OSP)] included in section 512(k)(1)(B) is broadly stated, and has been so interpreted by courts. The definition has been satisfied not just by conventional OSPs like AOL, but also by . . . payment processing services, age verification services, and a publisher of online real estate advertisements.”) (internal citations omitted).

⁹⁵ 17 U.S.C. § 512(c) (2006).

⁹⁶ S. REP. NO. 105-190, at 43 (1998) (emphasis added).

⁹⁷ *Id.* at 44 (“For example, the activity at an online site offering audio or video may be unauthorized public performance of a musical composition, a sound recording, or an audio-visual work, rather than (or in addition to) the creation of an unauthorized copy of any of these works.”). This is not the only reference to online music contained in the legislative history. *See id.* at 46 (“Thus, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary for a compliant notification to list every musical composition or sound recording that has been or could be infringed at that site, so long as a representative list of those compositions or recordings is provided so that the service provider can understand the nature and scope of the infringement being claimed.”); *id.* at 48 (referring to “sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display.”).

⁹⁸ *See, e.g.,* Zittrain, *supra* note 30, at 266 (“Section 512(c) was directed at OSPs . . . such as . . . today’s YouTube or MySpace.”); Choi, *supra* note 39, at 407 (“[YouTube and other OSPs] are exempted from secondary liability under section 512(c) of the Digital Millennium Copyright Act . . . as long as they comply expeditiously in removing infringing material upon notification.”); Wu, *supra* note 75 (“Section 512(c) . . . applies to . . . yes, YouTube.”).

repeat [copyright] infringers.”⁹⁹ Under the Ninth Circuit’s formulation of this subsection, whether a service provider has satisfied the termination policy standard requires a three-pronged inquiry: The service provider must have (1) adopted such a policy, (2) informed users of the policy; and (3) reasonably implemented the policy.¹⁰⁰ YouTube’s policy is available to users on its web site, and tracks the statutory language fairly closely.¹⁰¹ Thus, the first two prongs of the test seem to be satisfied. Whether the policy has been reasonably implemented is a more difficult question, and case law is sparse.¹⁰² A modicum of insight can be gleaned from *Perfect 10, Inc. v. CCBill, LLC*, where it was noted in dicta that a service provider’s failure to adequately record the contact information of entities associated with alleged infringement may constitute a failure to reasonably implement a termination policy.¹⁰³ This conclusion is based on the simple logic that if no adequate record of infringers is maintained, it will be difficult to terminate such infringers.

¶34 Similarly, the Ninth Circuit in *Ellison v. Robertson* suggested another way to run afoul of the reasonable implementation standard.¹⁰⁴ The court noted that AOL had changed the e-mail address at which it received copyright infringement notifications, but had neither provided notification of the change nor arranged for e-mail forwarding from the old account.¹⁰⁵ Thus, copyright infringement notifications sent by copyright owners would have “fall[en] into a vacuum,” making it difficult for AOL to become aware of potential infringements and terminate accounts where appropriate.¹⁰⁶

¶35 In an even more egregious example of failure to comply with the implementation standard, the service provider in *Aimster* could not implement its termination policy because it had deliberately prevented itself from becoming aware of specific infringing activity. By encrypting the communications between users, Aimster was unable to determine who exchanged files, what files were exchanged, or when the files were exchanged.¹⁰⁷ The court had no tolerance for such maneuvering: “[A]dopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an ‘implementation’ as required by [the DMCA].”¹⁰⁸

¶36 In light of *Ellison*, *Aimster*, and *CCBill*, service providers are presumably taking greater care to avoid such obvious blunders. Nevertheless, stumbling blocks may still arise. For example, even if a service provider terminates a user’s account, there may be little to prevent that account holder from signing up for a new account. This is a

⁹⁹ 17 U.S.C. § 512(i)(1) (2006).

¹⁰⁰ *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004); *see also Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1100 (W.D. Wash. 2004).

¹⁰¹ YouTube, Terms of Use ¶ 7, <http://www.youtube.com/t/terms> (last visited Aug. 31, 2007) (“YouTube will terminate a User’s access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.”).

¹⁰² *See Zittrain, supra* note 30, at 277 (describing 512(i)’s termination policy as “curiously untested”).

¹⁰³ *Perfect 10, Inc v CCBill*, 481 F.3d 751, 759 (9th Cir. 2007).

¹⁰⁴ *Ellison*, 357 F.3d at 1080.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Also important to the *Ellison* case was the district court finding that AOL had in any event never terminated anyone under the policy. *Ellison v. Robertson*, 189 F.Supp.2d 1051, 1066 (C.D. Cal. 2002) *rev’d in part*, 357 F.3d at 1080.

¹⁰⁷ *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 641 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003).

¹⁰⁸ *Id.*

particular concern at free sites such as YouTube, where the barriers to creating new accounts may be especially low. Currently, a user account at YouTube may be created in seconds by entering an email address and other basic information.¹⁰⁹ YouTube does not appear to verify any of the information, other than the e-mail address (though by registering, users must agree to YouTube's Terms of Use and Privacy Policy).¹¹⁰ Thus, even if YouTube diligently terminates the accounts of repeat offenders, which it claims to do "automatically,"¹¹¹ the policy may be largely ineffective.¹¹² Nevertheless, the statute does not require that service providers "effectively" terminate the accounts of repeat offenders, but that they "reasonably" do so. So long as a service provider diligently responds to infringement notices and consistently terminates the accounts of repeat infringers, this should in most cases constitute reasonable implementation.¹¹³

¶37 The analysis of whether methods exist to prevent infringers from re-registration, and whether such methods outweigh their costs, involve complicated technical and policy questions better addressed by Congress. Congress could, for example, require service providers to implement "standard technical measures" to prevent users from re-registering, just as is currently required in the context of identifying copyrighted works.¹¹⁴ It has not done so, however, so to require service providers to not only terminate the accounts of repeat infringers but also prevent them from reregistering goes beyond what is required under the statute, thus treading too closely to the safe harbor and creating uncertainty.

3. Standard Technical Measures

¶38 In its complaint, Viacom states that "YouTube . . . has decided to shift the burden entirely onto copyright owners to monitor the YouTube site . . . to detect infringing videos and send notice to YouTube demanding that it 'take down' the infringing works."¹¹⁵ However, Congress, not YouTube, has placed this burden on copyright

¹⁰⁹ YouTube, Create Your YouTube Account, <http://www.youtube.com/signup> (last visited Aug. 31, 2007).

¹¹⁰ *Id.*

¹¹¹ YouTube, Help Center: What Are You Doing to Prevent Unauthorized Copyrighted Content from Appearing in YouTube?, <http://www.google.com/support/youtube/bin/answer.py?answer=55773&topic=10554> (last visited Nov. 16, 2007) ("User accounts of repeat infringers are automatically terminated."); see *Does YouTube Make Google a Big Target For Copyright Suits?*, WALL ST. J. ONLINE, Oct. 11, 2006, http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxxg_%2020061109.html?mod=tff_main_tff_top ("YouTube says it removes any videos with infringing content when notified and is rolling out a new system to automatically detect such material.").

¹¹² On the other hand, it may be that even the simple hurdle of re-registration is sufficient to dissuade many users from engaging in infringing activity, or that experiencing account termination is in itself a shaming wake-up call and as such, an adequate deterrent. Without more information, it would be premature to conclude that the ability to re-register by itself excludes a service provider from the protections of the safe harbor.

¹¹³ Current case law does not require more. See *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (collecting cases and holding "that a service provider 'implements' a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.").

¹¹⁴ *Cf.* 17 U.S.C. § 512(i)(1)(B) (2006).

¹¹⁵ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 6.

holders.¹¹⁶ The DMCA does not require active monitoring or “policing” of a service provider’s web site to come within safe harbor protection.¹¹⁷

¶139 Although safe harbor eligibility is not predicated on active monitoring by service providers to detect infringing activity,¹¹⁸ service providers must “accommodate[], and . . . not interfere with standard technical measures” in order to fall within the section’s protections.¹¹⁹ Section 512(i) defines “standard technical measures” somewhat recursively as “technical measures that copyright owners use to identify or to protect copyrighted works.”¹²⁰ This requirement apparently stems from Congress’ belief that the key to combating online copyright infringement lies in technology.¹²¹ Beyond these general statements, what constitutes a standard technical measure has not been developed by the case law. It has been suggested that digital watermarks or copyright management systems might fall under this definition.¹²² However, the statute specifies that standard technical measures include only those measures that “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”¹²³ No “industry consensus” has yet resulted from a “multi-industry standards process.”¹²⁴ So, although it is likely that watermarks and copyright management systems will *one day* fall into the category of standard technical measures, they do not do so today.

¶140 Nevertheless, Viacom attempts to circumvent this difficulty by eschewing the term “standard technical measures” in favor of “reasonable measures,”¹²⁵ “available copyright protection measures,”¹²⁶ or simply “measures.”¹²⁷ The complaint alleges that YouTube “prevents copyright owners from finding on the YouTube site all of the infringing works from which YouTube profits,” and “has deliberately withheld the application of available

¹¹⁶ See *CCBill*, 488 F.3d at 1113 (“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.”).

¹¹⁷ See 17 U.S.C. § 512(m) (2006) (“Nothing in this section shall be construed to condition [safe harbor eligibility] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity . . .”). Note that this contrasts with the common law rule, which in some cases requires exercising the right to police in order to avoid vicarious liability. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹¹⁸ 17 U.S.C. § 512(m).

¹¹⁹ 17 U.S.C. § 512(i)(1)(B) (2006). See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1176-77 (C.D. Cal. 2002) (noting that active monitoring is not required “except to the extent consistent with a standard technical measure” (quoting H.R. REP. 105-551(II), at 53)).

¹²⁰ 17 U.S.C. § 512(i)(2) (2006).

¹²¹ S. REP. NO. 105-190, at 52 (1998) (“[T]echnology is likely to be the solution to many of the issues facing copyright owners . . . in this digital age.”).

¹²² See Raphael A. Gutierrez, *Save the Slip for the Service Providers: Courts Should Not Give Short Shrift to the Safe Harbors of the Digital Millennium Copyright Act*, 36 U.S.F. L. REV. 907, 915 (2002) (“Examples of such technical measures include digital watermarks or copyright management systems.”).

¹²³ 17 U.S.C. § 512(i)(2) (2006).

¹²⁴ See *Perfect 10*, 213 F. Supp. 2d at 1174 n.18 (“[Because the industry has not even begun to discuss solutions,] [i]t thus appears to be an open question if any conduct or policy could interfere with ‘standard technical measures.’”); David Ludwig, *Shooting the Messenger: ISP Liability for Contributory Copyright Infringement*, 2006 B.C. INTEL. PROP. & TECH. F. 110701, at n.48 (noting that no cases have had the occasion to further define the term “standard technical measures”).

¹²⁵ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶¶ 40, 45.

¹²⁶ *Id.* ¶ 7.

¹²⁷ *Id.* ¶ 28.

copyright protection measures.”¹²⁸ Specifically, Viacom alleges that YouTube’s practice of limiting the number of results returned for a given search to 1000 clips prevents copyright holders from identifying all of the infringing files available on the network.¹²⁹ In addition, YouTube has created a feature that allows users to privately share videos.¹³⁰ Because only those designated as “friends” by a user can view videos uploaded by that user, Viacom complains that copyright holders are unable find infringing videos shared using this feature.¹³¹

¶41 Although these allegations may be correct, they have no bearing on whether YouTube has accommodated or interfered with “standard technical measures” but rather, whether it has accommodated or interfered with “available measures,” or at least, “measures.” Conflating “measures” with “standard technical measures” would deny effect to the statutory language in § 512(i)(2)(A) and thus violate a cardinal principal of statutory construction.¹³² Even were that not the case, the definition of “standard technical measures” also excludes measures that “impose substantial costs on service providers or substantial burdens on their systems or networks.”¹³³ YouTube may be able to show, for example, that limiting search results to 1000 hits saves substantial costs by reducing the necessary computing capacity, or that the practice substantially improves network performance by reducing the amount of time it takes to display search results to users.

¶42 The allegations regarding the “friends” feature raise public policy concerns, and courts should be chary of adopting their logic. A substantial benefit accrues to the public from the ability to share files privately. For example, although many people enjoy posting personal photographs, travel diaries, and other messages on publicly available websites or blogs, many others prefer to transmit such communications privately through e-mail or other means. Similarly, many YouTube users may prefer for legitimate reasons to share audiovisual content privately. Unfortunately, traditional methods of private video sharing are cumbersome and slow, such as creating videotapes and mailing them to intended recipients. Sending video by e-mail attachment is faster, but file-size may prevent effective transmission. Other methods such as FTP require technical knowledge not possessed by much of the general public. YouTube’s “friends” feature allows ordinary people to quickly, easily, and privately exchange video files, thus providing a significant social benefit.¹³⁴

¹²⁸ *Id.* ¶¶ 3, 7.

¹²⁹ *Id.* ¶ 43.

¹³⁰ YouTube, Help Center: Why Can’t My Friends See My Private Video?, <http://www.google.com/support/youtube/bin/answer.py?answer=77272> (last visited Nov. 16, 2007) (“Private videos and playlists can be viewed only by you and the people you’ve added to designated contact lists.”).

¹³¹ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 43.

¹³² *See, e.g.,* Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981) (“A basic principle of statutory construction is that ‘a statute should not be construed in such a way as to render certain provisions superfluous or insignificant.’” (quoting Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976))).

¹³³ 17 U.S.C. § 512(i)(2)(C) (2006).

¹³⁴ *See In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (“[P]rivacy is a social benefit”); *cf.* Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (concluding that “the added social welfare from [music] file sharing is likely to be quite high”).

¶43 Moreover, the “friends” feature can be distinguished from *Aimster*’s network design, which the *Aimster* court viewed as part of scheme to encourage copyright infringement.¹³⁵ Recall that *Aimster* included an encryption feature as part of its free software that allowed users to exchange music files privately.¹³⁶ Denouncing this tactic, the court noted *Aimster*’s “ostrich-like refusal to discover the extent to which its system was being used to infringe copyright”¹³⁷ and pointed out that “*Aimster* [had] failed to show that its service [was] ever used for any purpose other than to infringe . . . copyrights.”¹³⁸ Clearly, encryption solely for the purpose of illegal file sharing can hardly be justified on the basis of social benefit. In contrast, if YouTube can show that a meaningful number of users legitimately use the “friends” feature to keep private content private rather than to evade copyright infringement detection, the *YouTube* court should look favorably upon the feature.

B. Additional Requirements of Section 512(c) Safe Harbor Protection

1. Knowledge

¶44 Viacom alleges that “YouTube . . . knowingly reproduces and publicly performs the copyrighted works uploaded to its site.”¹³⁹ Viacom will seek to demonstrate that YouTube does not deserve the protections of the safe harbors established by the DMCA, since the protections are available only to the extent that the service providers are “innocent.”¹⁴⁰ A service provider is not innocent (and will not be able to take refuge in the safe harbor of § 512(c)) if it has “actual knowledge that the material . . . on the . . . network is infringing.”¹⁴¹ Even in the absence of actual knowledge of infringement, a service provider will not be immune from liability if it is “aware of facts or circumstances from which infringing activity is apparent.”¹⁴² However, the standard for determining whether a service provider has such apparent knowledge is an elevated one: A service provider will only be deemed to have apparent knowledge if that service provider “deliberately proceeded in the face of blatant factors of which it was aware.”¹⁴³

Examples of such blatant infringement may include statements from the vendor that a product is bootlegged or pirated, chat rooms hosted by the service provider

¹³⁵ *Id.* at 655 (“Far from doing anything to discourage repeat infringers of the plaintiffs’ copyrights, *Aimster* invited them to do so, showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful distribution of copyrighted materials disabled itself from doing anything to prevent infringement.”).

¹³⁶ *Id.* at 646; *see supra* Part IV(A)(2).

¹³⁷ *Id.* at 655.

¹³⁸ *Id.* at 653.

¹³⁹ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 4.

¹⁴⁰ *See* *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (“[The immunity provided by the DMCA], however, is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement.”).

¹⁴¹ 17 U.S.C. § 512(c)(1)(A)(i) (2006).

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

¹⁴³ *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1108 (W.D. Wash. 2004) (quoting *MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT*, § 12B.04[A][1], at 12B-49 (Matthew Bender & Co. 1995); “[A]pparent knowledge requires evidence that a service provider ‘turned a blind eye to “red flags” of obvious infringement.’” *Id.* at 1108 (quoting H.R. REP. NO. 105-551, pt. 2, at 57.).

in which users discuss how the service can be used to circumvent copyright laws, or the offering of hundreds of audio files in a single day for peer to peer copying.¹⁴⁴

¶45 At the other extreme, the Senate Report provides some illuminating commentary with respect to the knowledge standard and activity that falls clearly outside the safe harbor of § 512(d)¹⁴⁵:

The important intended objective of this [apparent knowledge] standard is to exclude sophisticated “pirate” directories—which refer Internet users to other selected Internet sites where pirate software, books, *movies*, and *music* can be downloaded or transmitted—from the safe harbor. Such pirate directories refer Internet users to sites that are obviously infringing because they typically use words such as “pirate,” “bootleg,” or slang terms in their uniform resource locator (URL) and header information to make their illegal purpose obvious to the pirate directories and other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate.¹⁴⁶

It is apparent from the quoted text that Congress specifically contemplated sites illegally offering copyrighted audiovisual and musical works for download, and sought to exclude from the safe harbor service providers that create directories linking to such sites. The activities described in the quoted passage stand in sharp contrast to the activities of YouTube. Although user-posted copyrighted material is available on YouTube, YouTube has not assembled and provided users with a directory list of “obviously infringing” sites. Unlike pirate sites which may have the word “pirate” or “bootleg” in the URL or on the site itself, thus clearly indicating that the works are almost certainly both copyrighted and unauthorized, the YouTube site contains videos that may or may not violate the copyrights of others.

¶46 The determination of whether or not a particular video infringes a copyright is a challenging one. First, soundtracks or other content contained within amateur YouTube videos may be authorized by the copyright holders. At least four musical rights organizations — Universal Music Group, Warner Music, BMG, and the British society MCPS-PRS Alliance — have signed deals with YouTube that authorize the use of at least some of their songs in user-generated YouTube videos.¹⁴⁷ Second, even professional

¹⁴⁴ *Id.* at 1105 (internal citations omitted).

¹⁴⁵ Although this commentary is directly applicable to providers of “information location tools” under section 512(d), this section is *in pari materia* to § 512(c) and so may serve to illuminate the meaning of that section as well. See *United States v. Rexam*, 474 F.3d 597, 602 (9th Cir. 2007) (“[T]he canon *in pari materia* . . . provides that similar statutes are to be interpreted in a similar manner unless legislative history or purpose suggests material differences.”); *Horn v. S. Union Co.*, 927 A.2d 292, 294-95 (R.I. 2007) (“It is an especially well-settled principle of statutory construction that when . . . faced with statutory provisions that are in *in pari materia*, we construe them in a manner that attempts to harmonize them and that is consistent with their general objective scope.”).

¹⁴⁶ S. REP. NO. 105-190, at 48 (1998) (emphasis added).

¹⁴⁷ See Sanders & Alpert, *supra* note 18, at 11 (Warner Music); Laura M. Holson, *Hollywood Asks YouTube: Friend or Foe?*, N.Y. TIMES, Jan. 15, 2007, available at <http://www.nytimes.com/2007/01/15/technology/15youtube.html> (Universal Music Group); *YouTube*

music videos or prime-time content such as clips from CBS's hit television series "Survivor" may in fact be authorized for YouTube viewing by the copyright owner.¹⁴⁸ Third, even where content is unauthorized, its use may not be illegal. The determination of whether a particular video infringes a copyright involves a sophisticated legal analysis where reasonable people may differ on the application of originality,¹⁴⁹ fair use¹⁵⁰ (including transformative use¹⁵¹), and public domain.¹⁵² For instance, a video clip of a wedding may be "original" but extensive filming of the stained glass windows in the church could be a copyright infringement or fair use. A significant issue with the fair use defense is the fact-sensitive aspect of its application. A political parody may borrow copyrighted music and be transformative enough to constitute fair use.¹⁵³ Hence, each

Strikes Content Deals, USATODAY.COM, Oct. 9, 2006, http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm (BMG); Associated Press, *YouTube Signs Licensing Deal with British Composers' Group*, INT'L HERALD TRIB., Aug. 30, 2007, available at <http://www.iht.com/articles/2007/08/30/business/youtube.php> (reporting a deal between YouTube and a British rights society that allows more than ten million songs to be used legally on the British version of the YouTube site).

¹⁴⁸ *YouTube Strikes Content Deals*, USATODAY.COM, Oct. 9, 2006, http://www.usatoday.com/tech/news/2006-10-09-youtube-deals_x.htm.

¹⁴⁹ For the work to be "original" it must be "independently created by the author" and possess "some minimal degree of creativity." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁵⁰ 17 U.S.C. § 107 (2006). The statutory factors for the fair use test are "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work." *Id.* See generally Stanford Law School, Ctr. for Internet and Society, *The Fair Use Project*, <http://cyberlaw.stanford.edu/taxonomy/term/374> (defining "fair use").

¹⁵¹ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) ("The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990))) (bracketed language in original); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552-553 (1985) ("[F]air use analysis must always be tailored to the individual case. The nature of the interest at stake is highly relevant to whether a given use is fair.") (internal citations omitted). For an application of the fair use doctrine, see *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), in which the court held that a Google user's search that displayed thumbnail images of a copyrighted work (owned by adult entertainment company, Perfect 10) was fair use under the Copyright Act because of the transformative nature of Google's search engine. The Ninth Circuit instructed the lower court to find contributory liability on internet service providers in instances where there is proof of actual knowledge of specific instances of infringement, and to consider the effect of the service provider defense under § 512 of the DMCA. The court stated, "We conclude that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances." *Id.* at 723.

¹⁵² In general, stating that a work is "in the public domain" means that the "work . . . belongs to the public as a whole." MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* 1 § 1.05 (1997). Works that were never copyrighted are in the public domain and include facts, unoriginal works and works of the U.S. government. In addition, formerly copyrighted works whose terms of copyright protection have expired are also said to be in the public domain. Currently, works produced or published on or before December 31, 1922 are in the public domain due to copyright term expiration. See Scott J. Burnham, *Copyright in Library-Held Materials: A Decision Tree for Librarians*, 96 LAW LIBR. J. 425, 434 (2004) ("Because the second term of a work created in 1922 ended in 1997 and was not saved by the Sonny Bono Act, it is in the public domain. The second term of a work created in 1923 ended in 1998, so it was saved by the Act and its expiration date was extended to 2018. Therefore . . . works created before 1922 are now in the public domain . . .").

¹⁵³ See, e.g., Video, *George Bush and Tony Blair — My Endless Love* (2007), available at <http://www.youtube.com/watch?v=rNpoS6jOty4>.

alleged instance of infringement must be independently analyzed by legal counsel. One can readily appreciate the daunting magnitude of this task for the larger social networking sites such as YouTube, where tens of thousands of new files are posted daily.¹⁵⁴ Congress appreciated this difficulty and sought to avoid it by clearly explaining that the termination policy requirement was not intended to “undermine the knowledge standard . . . by suggesting that a provider must . . . make difficult judgments as to whether conduct is or is not infringing.”¹⁵⁵

¶147 Thus, although it is widely believed that a substantial amount of the content on YouTube is infringing,¹⁵⁶ the nature of social networking sites like YouTube contrasts sharply with that of the “pirate sites” targeted by Congress. A large amount of YouTube’s content either does not infringe or may not infringe. Some has been licensed from copyright owners or their representatives, some constitutes parody or is otherwise a fair use of copyrighted works, and some includes homemade videos where the YouTube user is herself the copyright holder.

2. Take Down Requirements

¶148 Strictly applied, the actual and apparent knowledge provisions would preclude immunity if a copyright holder notified the service provider of infringing material residing on its network, or if the service provider otherwise came to be aware of the infringing material. Such a strict application of the statute would inevitably lead to the imposition of liability even for well-intentioned service providers. For example, service providers proactively choosing to locate and remove infringing content would lose the protection of the statute the moment they uncovered it, since at that moment they would have “actual knowledge” of the infringing material. The DMCA therefore allows service providers to remain within the safe harbor, even after becoming aware of infringing material contained on the network, so long as the service provider “acts expeditiously to remove, or disable access to, the material.”¹⁵⁷ Once the site has been duly notified of the alleged copyright infringement, generally by a DMCA-compliant cease and desist letter

¹⁵⁴ YouTube users currently upload more than 65,000 new videos daily. Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, WALL ST. J., Sept. 19, 2006, available at http://online.wsj.com/public/article/SB115862128600366836-pJip_NHyQ7j0b44svDZ2kgHCYfs_20070918.html.

¹⁵⁵ S. REP. NO. 105-190, at 52 (1998).

¹⁵⁶ See, e.g., Sam Gustin, *YouTube’s Got a Fat Idea of Itself*, N.Y. POST, Sept. 21, 2006, at 40 (averring that the “vast majority of content viewed on YouTube violates copyright law — 90 percent by one estimate”); Holson, *supra* note 147 (“[A]cademics and media executives estimate [unauthorized content on YouTube to] be anywhere from 30 percent to 70 percent.”). But see *YouTube Deletes 30,000 Files After a Copyright Complaint*, N.Y. TIMES, Oct. 21, 2006, at C4 (“Most videos posted on YouTube are homemade.”).

¹⁵⁷ 17 U.S.C. § 512(c)(1)(A)(iii) (2006); see also 17 U.S.C. § 512(c)(1)(C) (2006). Parallel “take-down” provisions are provided in other subsections of the DMCA including § 512(d)(1)(C) & (d)(3) (Information Location Tools). An analogous provision is provided in § 512(b)(2)(B) (System Caching), by which an entity engaged in system caching, in order to remain within the safe harbor, must comply with rules for refreshing “or other updating of material when specified by the person making the material available online.” To understand this provision, imagine that a web site providing infringing material is ordered by a court to remove that material. A third party entity engaged in system caching of that web site would still retain the infringing material in its cache, vitiating the effectiveness of the court’s order. A requirement that the entity engaged in system caching update its cache helps to ensure that the infringing material is effectively rendered unavailable.

identifying the copyright owner's works that have been infringed, the site has an obligation to "expeditiously . . . remove, or disable access to the material that is claimed to be infringing"¹⁵⁸ or risk losing the safe harbor protection of § 512.¹⁵⁹ The take down notification must be in writing and must (1) be signed by the copyright owner or her agent, (2) identify the copyrighted work(s) claimed to have been infringed, (3) identify the material that is claimed to be infringing (4) include contact information for the complaining party, (5) include a statement that the complaining party has a good faith belief that use of the material has not been authorized, and (6) include a statement that the information contained in the notice is accurate and that the complaining party has the right to assert the copyright. Notices which are not "substantially" compliant are ineffective.¹⁶⁰ However, as long as the notice identifies the infringing works and the infringing works and provides contact information (elements (2), (3), and (4), above), the party receiving notice is obligated to attempt to contact the complaining party to request the missing information.¹⁶¹

¶49 YouTube claims that it immediately complies with such requests¹⁶² and has received considerable press for its compliance with some of the larger take-down requests.¹⁶³ Although copyright owners may be unhappy with the effectiveness of their takedown requests,¹⁶⁴ it appears that YouTube is largely within the bounds of this portion of the safe harbor.

¹⁵⁸ 17 U.S.C. § 512(c)(1)(C) (2006).

¹⁵⁹ Note that the site is not obligated to remove or disable access to the allegedly infringing material. If it fails to do so, however, its liability will be determined under general principles of copyright law without the benefit of the § 512 safe harbors. See S. REP. NO. 105-190, at 45 ("[T]he 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 section 512(c).").

¹⁶⁰ 17 U.S.C. § 512(c)(3)(B)(i) (2006).

¹⁶¹ 17 U.S.C. § 512(c)(3)(B)(ii) (2006).

¹⁶² *Does YouTube Make Google a Big Target For Copyright Suits?*, WALL ST. J. ONLINE, Oct. 11, 2006, http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxxg_%2020061109.html ("YouTube says it removes any videos with infringing content when notified . . ."); *For YouTube, a System to Halt Copyright-Infringing Videos*, N.Y. TIMES, July 28, 2007, at C6, available at <http://www.nytimes.com/2007/07/28/business/28google.html>; *YouTube Deletes 30,000 Files After a Copyright Complaint*, N.Y. TIMES, Oct. 21, 2006, at C4 (noting that YouTube "quickly complied with the request to remove the copyright materials" by a group of Japanese entertainment companies). A lawyer for YouTube has informed U.S. District Judge Louis L. Stanton that it is working "very intensely and cooperating with the major content companies" on video recognition technology that would allow owners of videos to provide a digital fingerprint that would allow YouTube to remove the video within a minute or so. *YouTube to Use Copyright Checker in Fall*, CHINA VIEW.CN, July 30, 2007, http://news.xinhuanet.com/english/2007-07/30/content_6449924.htm. This may be relevant to the injunctive relief issue at the *Viacom v. YouTube* trial but not necessarily to the issue of damages for past copyright violations.

¹⁶³ Noam Cohen, *YouTube is Purging Copyrighted Clips*, N.Y. TIMES, Oct. 30, 2006, at C8, available at <http://www.nytimes.com/2006/10/30/technology/30youtube.html> (noting YouTube's compliance with take-down requests from Comedy Central as well as its removal of 30,000 clips one week earlier); *YouTube Deletes 30,000 Files After a Copyright Complaint*, N.Y. TIMES, Oct. 21, 2006, at C4, available at <http://www.nytimes.com/2006/10/21/technology/21youtube.html> (noting YouTube's quick compliance with a the take-down request of a Japanese entertainment group). Moreover, YouTube has apparently complied with the take-down provisions from the very beginning of its corporate existence in 2005. See Dawn C. Chmielewski, *Studios Not Sure Whether Web Video Innovator Is Friend or Foe*, L.A. TIMES, Apr. 10, 2006, at C1 ("By all accounts, it [YouTube] acts like a responsible corporate citizen when asked to remove copyrighted works.").

¹⁶⁴ See Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 41.

3. Financial Benefit

¶150 Even if a service provider has no knowledge of the infringing material (or, upon learning of the infringement, acts expeditiously to remove the material), safe harbor protection is nevertheless unavailable if the service provider (1) has the right and ability to control the illegal activity and (2) receives a “financial benefit directly attributable to the infringing activity.”¹⁶⁵

¶151 The right and ability to control the illegal activity refers to more than just the right and ability to remove material after the fact, but “presupposes some antecedent ability to limit or filter copyrighted material.”¹⁶⁶ Thus, it has been held that Amazon did not have the right and ability to control third party vendor sales taking place via Amazon’s online marketplace, where Amazon was never in possession of the products, did not preview the products prior to their listing, and “did not otherwise involve itself in the sale[s].”¹⁶⁷ In contrast, the right and ability to control has been found where a provider of online age verification services “refused to allow sites to use its system until they compl[ie]d with its [requirements with respect to site layout, appearance, and content.]”¹⁶⁸ Postings to YouTube are extensively automated, with little or no involvement from the service provider. It is true that those wishing to upload videos to YouTube must first register, but registration is a quick and simple process that does not appear to contain any mechanism for screening out would-be registrants.¹⁶⁹ Nor is there a process for filtering infringing or otherwise inappropriate videos as they are uploaded,¹⁷⁰ although YouTube has been promising content-screening technology since 2006.¹⁷¹ Given that YouTube prescreens neither registrants nor videos, YouTube’s circumstances seem closer to those of Amazon.

¹⁶⁵ 17 U.S.C. § 512(c)(1)(B) (2006). Outside of the § 512 safe harbor, courts have differed with respect to the requirement that the financial benefit be direct. *See, e.g.,* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 306-09 (2d Cir. 1963); Polygram Int’l Publishing, Inc. v. Nevada/TIG, Inc. 855 F.Supp. 1314, 1326 (D. Mass. 1994) (explaining that vicarious liability is permitted where the financial benefit is either direct or indirect).

¹⁶⁶ Tur v. YouTube, No. CV064436, 2007 WL 1893635, at *3 (C.D. Cal. June 20, 2007). *See also* Corbis Corp. v. Amazon.com, Inc., 351 F.Supp.2d 1090, 1100 (W.D. Wash. 2004) (“Courts have routinely held that the right and ability to control infringing activity, ‘as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its system.’” (quoting Perfect 10, Inc. v. CCBill, LLC, 340 F.Supp.2d 1077, 1098 (C.D.Cal.2004))).

¹⁶⁷ Corbis, 351 F.Supp.2d at 1110.

¹⁶⁸ Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002).

¹⁶⁹ *See supra* Part IV (A)(2).

¹⁷⁰ YouTube uploads are limited to ten minutes and 100 megabytes, however. YouTube, Help Center: How Long/Large Can My Video Be?, <http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527> (“All videos uploaded to YouTube have a 100MB file size limit. The longer the video is, the more compression will be required to fit it into that size. For that reason, most videos on YouTube are under five minutes long and there is a 10-minute length limit for all videos.”).

¹⁷¹ Alex Viega, *Anti-Piracy System Could Hurt YouTube*, SFGATE.COM, Oct. 12, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/10/12/financial/f133411D49.DTL>; *see also* Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, WALL ST. J., Sept. 19, 2006, available at http://online.wsj.com/public/article/SB115862128600366836-pJip_NHyQ7j0b44svDZ2kgHCYfs_20070918.html (“YouTube is rolling out technology designed to automatically spot copyrighted material that users upload without the permission of media companies, and then to share ad revenue with those companies.”).

¶52

Although there is no bright-line rule to determine whether or not a benefit received by the service provider is “direct,” some general guidance has evolved from the case law and legislative history. If users pay a fixed fee, regardless of illegal activity, a finding of direct benefit is less likely.¹⁷² Commentary from the Senate Report buttresses this rule:

[R]eceiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a ‘financial benefit directly attributable to the infringing activity.’ Nor is subparagraph (B) [of § 512(c)(1)] intended to cover fees based on the length of the message (per number of bytes, for example) or by connect time.¹⁷³

YouTube’s services are provided to users for free; YouTube instead generates revenue from advertisers whose advertisements are displayed alongside user videos. Each time an infringing video is played, YouTube generates revenue from the associated advertisement. Thus, in a literal sense, some portion of YouTube’s revenues is directly attributable to infringing activity. Stopping the analysis at this point and finding a direct financial benefit leads to a perverse result: if YouTube charges its users a periodic fee to use its services, whether they upload infringing videos or not, it would not receive a direct financial benefit under the Senate Report’s formulation; however, if revenue is generated from advertising, with exactly the same users posting exactly the same videos, a direct financial benefit would be found. This interpretation imposes artificial constraints on a service provider’s revenue generation model without producing any concomitant benefits in copyright violation reduction.

¶53

If the analysis is carried a bit further, however, the appropriateness of Congress’ formulation becomes apparent. A business model based on flat user fees gives the service provider little or no incentive to condone infringement. In contrast, a revenue model based on advertisement gives a service provider every reason to condone infringement, at least if the service provider believes that continued infringement will attract more users and thereby increase its advertising revenue.¹⁷⁴ This is likely the rationale behind the rule that if “infringing activity constitutes a draw for subscribers” a direct financial benefit is more likely to be found.¹⁷⁵

¹⁷² *Religious Tech. Ctr. v. Netcom On-line Commc’n Serv., Inc.*, 907 F.Supp. 1361, 1376 (N.D. Cal. 1995) (“[W]here a defendant rents space or services on a fixed rental fee that does not depend on the nature of the activity of the lessee, courts usually find no vicarious liability because there is no direct financial benefit from the infringement.”).

¹⁷³ S. REP. NO. 105-190, at 44-45 (1998). The Senate Report went on to caution that the direct financial benefit “would however, include any such fees where the value of the service lies in providing access to infringing material.” *Id.* at 45.

¹⁷⁴ This is consistent with the rule that a landlord generally is liable for the infringements of the tenant if the rental rate is based on a proportion of the tenant’s sales, but not if the rental rate is fixed. *See, e.g.*, *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306-07 (2d Cir. 1963).

¹⁷⁵ *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). An earlier formulation of the same rule can be found in *Religious Tech. Ctr.*, 907 F.Supp. at 1377, where the court implied that if infringing activity “enhances the value of . . . services” or “attracts new subscribers,” a finding of direct financial benefit is more likely. *See also* *Arista Records, Inc. v. MP3Board*, No. 00 CIV. 4660, 2002 WL 1997918, at *11 (S.D.N.Y. Aug. 29, 2002) (“Infringement which increases a defendant’s user base or otherwise acts as a draw for customers constitutes a direct financial interest.”).

¶154 In 2004, the Ninth Circuit’s significant and questionable statement that the “draw” need not even be “substantial”¹⁷⁶ established a precedent that is now being followed by other courts.¹⁷⁷ This is a troubling development. Illegal uses of a technology will very frequently draw *some* users to that technology.¹⁷⁸ If a copyright owner were to visit YouTube, MySpace, Facebook — or almost any site where users are able to post music, photos, or video files — and discovered illegal material on that web site, the copyright owner would be able to tautologically argue that the infringing activity had drawn those users who are viewing or otherwise using or consuming the infringing material. This would effectively condemn an entire category of business model, regardless of the extent to which those sites cooperate with copyright owners or seek in good faith to prevent infringement.

¶155 In YouTube’s case, the question of whether the draw must be substantial is largely academic. Commentators seem to agree that the amount of infringing material on YouTube is in any case substantial (and, by some accounts, overwhelming),¹⁷⁹ and that the infringing material has contributed significantly to YouTube’s rapid rise from start-up to multibillion dollar company.¹⁸⁰ Thus, even if the draw did need to be substantial, YouTube would still probably run afoul of this portion of the rule. Not surprisingly, Viacom repeatedly asserts in its complaint that the infringing material available on YouTube draws traffic to the YouTube site.¹⁸¹ While infringing activity on YouTube no doubt draws users — probably a substantial number of them — to the site, this alone will not prevent taking refuge in the safe harbor. It must still be proven that YouTube had the right and ability to control the illegal activity, a difficult showing to make, as discussed above.

V. LIABILITY IN THE ABSENCE OF SAFE HARBOR PROTECTION

¶156 The DMCA did not create a new standard for online copyright infringement. Instead, as the Fourth Circuit has noted, it “merely added a second step to assessing infringement liability for Internet service providers, after it is determined whether they are infringers in the first place under the preexisting Copyright Act.”¹⁸² As a practical

¹⁷⁶ *Ellison*, 357 F.3d at 1079 (“The essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of *how substantial* the benefit is in proportion to a defendant’s overall profits.”).

¹⁷⁷ See, e.g., *Parker v. Google*, No. 06-3074, 2007 WL 1989660, at *4 (3d Cir. July 10, 2007) (quoting *Ellison*, 357 F.3d at 1079, with approval); *IO Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926, 2007 WL 1113800, at *3 (N.D. Cal. Apr. 13, 2007).

¹⁷⁸ See *Yen*, *supra* note 30, at 829 (“[T]he possibility of infringement generally increases demand for the technology and the provider’s profits.”).

¹⁷⁹ See Gustin, *supra* note 156; Holson, *supra* note 147.

¹⁸⁰ See Chmielewski, *supra* note 163, at C1 (“YouTube clearly benefits from the occasional copyright slip”; YouTube “traffic shot up 85%” after airing of a copyrighted clip); Gordon Kelly, *YouTube to Auto-Block Copyrighted Content*, TRUSTEDREVIEWS.COM, Aug. 1, 2007, <http://www.trustedreviews.com/multimedia/news/2007/08/01/YouTube-To-Auto-Block-Copyrighted-Content/p1> (“If we’re honest one of the biggest perks of YouTube is being able to watch a sneaky music video here or episode of our favourite show there . . .”).

¹⁸¹ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶¶ 5, 33, 34, 37, 39, 43, & 85.

¹⁸² *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004). See 17 U.S.C. § 512(l) (2006) (“The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not

matter, most courts faced with the question have chosen to first evaluate the defendant's ability to fit within the DMCA's safe harbors.¹⁸³ If the defendant is eligible for safe harbor protection, the inquiry ends and the defendant is subject only to the remedies specified in § 512(j); if not, the complicated determinations of secondary and direct liability must be made. It is not difficult to understand why courts prefer to make a safe harbor determination before going down the muddled path of secondary liability.

¶57 As previously discussed, safe harbor protection may be unavailable for a variety of reasons. Only "service providers" are eligible for § 512 safe harbor protection, which protection can be lost, for example, if the service provider fails to remove infringing material under § 512(c)(1)(C), fails to reasonably implement a termination policy under § 512(i)(1)(A), or receives a direct financial benefit while having the right and ability to control infringing activity.¹⁸⁴ If safe harbor protection is unavailable, a court must then conduct a traditional copyright infringement analysis.

A. Direct Infringement or Fair Use?

¶58 Before there can be secondary liability, there must be primary liability based on a direct infringement.¹⁸⁵ Direct infringement, in turn, will not be found if the use made does not fall within the scope of the copyright holder's exclusive rights,¹⁸⁶ nor if the defense of fair use applies.¹⁸⁷

¶59 Fair use is a statutory right given to the public to use a copyrighted work for limited purposes such as research or criticism during the work's protected period of the author's life, plus seventy years.¹⁸⁸ The copyright holder's exclusive rights, such as the right of reproduction, are therefore not absolute but are subject to the significant exceptions

bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense."); S. REP. NO. 105-190, at 19 (1998) ("Rather than embarking upon a wholesale clarification of [certain copyright] doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers.").

¹⁸³ See, e.g., *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1087-88 (C.D. Cal. 2001).

¹⁸⁴ Because only "service providers" are eligible for § 512 safe harbor protection, companies providing technology that could be delivered as a free-standing product or service (software, for example) may instead opt to develop a business model more conducive to "service provider" status. The "service provider" requirement is thus not business-model neutral, suggesting that it may hinder the optimal development of certain technologies by inducing companies to offer in an online format what might be more effectively provided as a stand-alone product or service.

¹⁸⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 434 (C.D. Cal. 1979) ("To prevail, [plaintiffs] have the burden of proving that users of the Betamax have infringed their copyrights and that [the manufacturer of the Betamax] should be held responsible for that infringement."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) ("Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party."); Lichtman & Landes, *supra* note 20, at 403 n.27 (2003) ("[I]ndirect liability traditionally requires that the copyright holder first prove a specific act of infringement.").

¹⁸⁶ 17 U.S.C. § 106 (2006).

¹⁸⁷ 17 U.S.C. § 107 (2006).

¹⁸⁸ *Id.* See also *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 n.22 (11th Cir. 1996) ("Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused — this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.").

embodied within the fair use doctrine.¹⁸⁹ No bright-line rule exists to determine whether a given use is “fair.” Instead, the Copyright Act enumerates four factors to be considered in making a fair use determination:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work [including whether it is primarily creative or primarily factual];
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁹⁰

Although they are all important considerations, the fourth factor, proof that the use would not diminish the actual or potential value of the copyrighted work, is given considerable weight and has been described as “the most important and indeed the central fair use factor,”¹⁹¹ though the Supreme Court has since emphasized that all four factors must be “explored . . . and weighed together.”¹⁹² Moreover, the technological environment and particular technological innovations can and should be considered when making a fair use determination.¹⁹³

¶60 Among the exclusive rights claimed by Viacom to be infringed is the right to publicly perform the work.¹⁹⁴ However, in the vast majority of cases, videos posted by users to YouTube have extremely limited viewership, casting doubt on whether the use would constitute “public performance.”¹⁹⁵ Nevertheless, by uploading works to the YouTube site, users are causing the work to be reproduced, which is also among a copyright holder’s exclusive rights,¹⁹⁶ so fair use must still be considered. While an exhaustive fair use analysis of the myriad types of videos available on YouTube is beyond the scope of this paper, a few points are worth mentioning. Some use of copyrighted content on YouTube is clearly illegal, such as breaking up the entire film “8 Mile” into twelve nine-minute segments and posting each of them on YouTube.¹⁹⁷ Even where only a small portion of a copyrighted work is uploaded, this does not necessarily render the use fair.¹⁹⁸

¹⁸⁹ 17 U.S.C. §§ 106, 107 (2006).

¹⁹⁰ Although four factors are described in § 107, other factors may also be considered by the court as appropriate. *DSC Commc’ns Corp. v. DGI Techs., Inc.*, 898 F. Supp. 1183, 1188 (N.D. Tex. 1995).

¹⁹¹ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992).

¹⁹² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994); *but see* *Blanch v. Koons*, 467 F.3d 244, 258 n.8 (2d Cir. 2006) (describing the *Campbell* decision as a “retreat[] from [the Supreme Court’s] earlier cases suggesting that the fourth statutory factor is the most important element of fair use.”).

¹⁹³ *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (“The legislative history of section 107 suggests that courts should adapt the fair use exception to accommodate new technological innovations.”).

¹⁹⁴ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 47.

¹⁹⁵ *Does YouTube Make Google a Big Target For Copyright Suits?* October 11, 2006, available at http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxxg_%2020061109.html (“[M]ost items on YouTube have an audience close to zero.”).

¹⁹⁶ 17 U.S.C. § 106(1) (2006).

¹⁹⁷ *See* Holson, *supra* note 147.

¹⁹⁸ *Sanders & Alpert*, *supra* note 18, at 8 (citing *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991)).

¶61

Although many uses of copyrighted content will not be fair uses, in general the doctrine of fair use should be liberally applied in the context of social networking sites. For example, it is currently the case that “[a] broadcast of a sports clip with music during network news requires payment of performance royalties — even if the music is barely audible over the routine and sports commentary.”¹⁹⁹ Courts should be cautious in extending this rule to the social networking or video sharing environment. If a proud parent wants to post a video on YouTube of her child performing a dance routine to copyrighted music, so that distant friends and family (or even anyone in the world who so wishes) may view it, this should, in most cases, be considered a fair use of the copyrighted background music so long as the posting would not likely affect the potential market for the work.²⁰⁰ This might be the case, for example, if the music in the video is of such quality that few users would consider it a substitute for the original work or if it would be practically impossible for users to search for and locate the musical work. There is an obvious benefit to facilitating the sharing of such works, and where such sharing does not cause economic injury to the copyright holder, it should be allowed as a fair use.²⁰¹ This is “consistent with the First Amendment policy of providing the fullest possible access to information”²⁰² Finally, even if such economically harmless uses of copyrighted works do not constitute fair use by the end-user, they should weigh against a finding of secondary liability.²⁰³

¶62

The effect on the market value of the posted copyrighted material is a critical factor under the fair use doctrine. The copyright owner/plaintiff would have to rebut the fair

¹⁹⁹ *Id.* (citing *Coleman v. ESPN*, 764 F. Supp. 290 (S.D.N.Y. 1991)).

²⁰⁰ *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *Kelly v. ArribaSoft Corp.*, 336 F.3d 811, 821-22 (9th Cir. 2003) (noting that Arriba’s use of thumbnail images would not harm the copyright holder’s ability to sell the full-sized images, and concluding that such use was fair use); *Religious Tech. Ctr. v. Netcom On-line Commc’n Serv., Inc.*, 907 F.Supp. 1361, 1379 (N.D. Cal. 1995) (“Netcom’s use, though commercial, also benefits the public in allowing for the functioning of the Internet and the dissemination of other creative works, a goal of the Copyright Act.”); *see also Does YouTube Make Google a Big Target For Copyright Suits?*

October 11, 2006, available at http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxxg_%2020061109.html (quoting Harvard law professor John Palfrey: “My hope would be that YouTube users are given wide latitude [in using others’ sound recordings in the users’ videos], so long as the market for the work was not adversely affected”).

²⁰¹ This argument presupposes that the use of the music during the child’s initial performance was in accordance with copyright law, either by paying the appropriate licensing fee or through fair use. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F. Supp. 429, 454 (C.D. Cal. 1979) (finding fair use where there was “no accompanying reduction in the market for [the] original work.”). Of course, if those posting videos to YouTube are sharing in YouTube advertising revenues, such for-profit activity would militate against a finding of fair use. *See Rick Aristotle Munarriz, Show Me the Money, YouTube*, Jul. 19, 2007, <http://www.fool.com/investing/general/2007/07/19/show-me-the-money-youtube.aspx> (“YouTube [] introduce[d] revenue-sharing for the site’s most popular contributors two months ago.”).

²⁰² *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F.Supp. 429, 454 (C.D. Cal. 1979).

²⁰³ S. REP. NO. 105-190, at 52 (1998) (“The [Senate] Committee [on the Judiciary] recognizes that there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial. In addition, the Committee does not intend [to] suggest[] that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.”); *see generally* David Nimmer, *An Odyssey Through Copyright’s Vicarious Defenses*, 73 N.Y.U. L. REV. 162 (1998) (noting that courts have not taken a consistent approach to whether an end-user’s fair use defense benefits an alleged secondary infringer, or whether the secondary infringer’s fair use defense must be analyzed separately).

use defense that the market of its music or video would not be jeopardized by its unauthorized use. This becomes especially difficult when the work has been transformed and has taken on a new meaning as in a parody or political satire that uses copyrighted material. Even the posting of a copyrighted sporting event for a limited period would probably not dissuade people from attending games.²⁰⁴ Indeed, it may even create a larger market.

¶63 In any event, YouTube's stated policy is to promptly remove videos containing soundtracks owned by a record label where permission has not been granted.²⁰⁵ If strictly applied, this policy would leave no room for fair use postings of copyrighted content. YouTube thus has a stated policy that is legally conservative and tends to err on the side of greater copyright protection. In particular, YouTube takes this conservative position with respect to so-called "mash-ups," where a user integrates various works by splicing them together.²⁰⁶ While such works would likely be classified as derivative works and thus subject to the exclusive rights of copyright holders,²⁰⁷ some mash-ups may be strong candidates for a fair use defense.²⁰⁸

¶64 Finally, Viacom contends that YouTube *itself* is directly infringing copyrights by publicly performing, displaying, and reproducing its copyrighted works.²⁰⁹ This argument has been addressed and rejected by several courts, and is not likely to succeed.²¹⁰

B. The Grokster Business Model and Secondary Liability

¶65 Grokster distributed free software that allows users to engage in peer-to-peer file sharing without the need for a central server.²¹¹ The software could be used to exchange any type of digital file, but the court found that the prominent use of the software was to

²⁰⁴ Cf. Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, Feb. 2007 (concluding that "file sharing has no statistically significant effect on purchases of the average album in our sample.").

²⁰⁵ YouTube, Copyright Tips, http://www.youtube.com/t/howto_copyright ("For example, if you use an audio track of a sound recording owned by a record label without that record label's permission, your video is infringing the copyrights of others, and we will take it down as soon as we become aware of it.").

²⁰⁶ *Id.* ("It doesn't matter if you created a video made of short clips of copyrighted content — even though you edited it together, the content is still copyrighted [and will be taken down].").

²⁰⁷ See 17 U.S.C. § 107(2) (2006).

²⁰⁸ See, e.g., YouTube, *George Bush and Tony Blair — My Endless Love*, *supra* note 153.

²⁰⁹ Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 6, ¶ 23, 47, 53 & 59.

²¹⁰ See *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) ("[A]n ISP who owns an electronic facility that responds automatically to users' input is not a direct infringer."); *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001) ("As to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another."); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1168 (C.D. Cal. 2002) ("[D]efendants must *actively* engage in one of the activities recognized in the Copyright Act."); *Religious Tech. Ctr. v. Netcom On-line Comm'n Serv., Inc.*, 907 F.Supp. 1361, 1369 (N.D. Cal. 1995) ("Plaintiff's theory [that BBS operator directly infringed copyrights] would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability."); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1118 (W.D. Wash. 2004); *Marobie-FL, Inc. v. Nat'l Assoc. of Fire Equip. Distributors & Nw. Nexus, Inc.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997) (discussing *Netcom* with approval). In addition, The Communications Decency Act suggests a similar result by analogy. 47 U.S.C. § 230(c)(1) (2006) ("[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

²¹¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005).

share copyrighted music and video files.²¹² In fact, 90 percent of the files available for download were copyrighted,²¹³ though it was not clear how often copyrighted versus uncopyrighted content was actually downloaded.²¹⁴ Grokster apparently made no effort to filter copyrighted material from users' downloads or disable access of those who used Grokster to download copyrighted materials.²¹⁵

¶166 The Supreme Court decided the case on a contributory liability theory and thus did not reach the issue of whether Grokster might be liable on a vicarious liability theory.²¹⁶ Recall that under a vicarious liability theory, profit and ability to control are the important considerations; whereas under a contributory theory, it is the intent to induce another to commit copyright infringement that controls the analysis. The Court found Grokster liable under a contributory liability theory because it intentionally encouraged others to commit acts of infringement.²¹⁷ Grokster had distributed an electronic newsletter "containing links to articles promoting its software's ability to access popular copyrighted music"²¹⁸ and helped users locate and play copyrighted materials.²¹⁹

C. The YouTube Business Model and Secondary Liability

¶167 YouTube has avoided many of the mistakes of Grokster, Aimster, and others that led to the imposition of secondary liability. Aimster's user tutorial gave "as its *only* examples of file sharing the sharing of copyrighted music."²²⁰ YouTube, in contrast, in a video tutorial providing instruction to users on how to upload videos, uses the example of a video entitled "No Donkey, No Fun," which does not appear to be copyrighted.²²¹ The video tutorial further warns that "[u]nless you recorded it or it belongs to you, it's not allowed on the site."²²² In *Grokster*, the Court found evidence of illegal intent in the name "Grokster" because it was an "apparent derivative of Napster" and thus served to show that Grokster was attempting to attract former Napster users who were seeking a new venue to illegally download copyrighted works.²²³ In contrast, the name "*YouTube*" implies that the content is intended to be user-generated, not the copyrighted material of third parties.²²⁴ It is widely recognized that, despite the availability of copyrighted

²¹² *Id.* at 920.

²¹³ *Id.* at 922.

²¹⁴ *Id.* at 923.

²¹⁵ *Id.* at 926.

²¹⁶ *Grokster*, 545 U.S. at 931.

²¹⁷ *Id.* at 941 ("Here, [the] evidence . . . shows a purpose to cause and profit from third-party acts of copyright infringement.").

²¹⁸ *Id.* at 938. Similarly, in *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003), the court noted that Aimster had "invited [repeat infringers] to [engage in infringement], showed them how they could do so with ease using its system, and by teaching its users how to encrypt their unlawful distribution of copyrighted materials disabled itself from doing anything to prevent infringement."

²¹⁹ *Grokster*, 545 U.S. at 938.

²²⁰ *Aimster*, 334 F.3d at 651 (emphasis in original).

²²¹ YouTube, *Help Center: How Do I Upload a Video?*, <http://www.google.com/support/youtube/bin/answer.py?answer=57924&topic=10525> (last visited Sept. 3, 2007).

²²² *Id.* See also Chmielewski, *supra* note 163, at C1 ("Unlike Internet file-swapping services such as Napster and Kazaa, YouTube doesn't tout itself as a place to steal other people's stuff.").

²²³ *Grokster*, 545 U.S. at 925.

²²⁴ In the lexicon of trademark law, the name "YouTube" is suggestive (rather than descriptive, arbitrary, or fanciful), in that it suggests that "You" (i.e., users) can post videos on the "Tube" (a slang word for

material on its site, YouTube is a venue for sharing video generally, rather than for sharing copyrighted material in particular.²²⁵ Indeed, the company was apparently born of the frustration its founders experienced in trying to share video taken at a dinner party with friends, not out of a malevolent desire to exploit the copyrights of others.²²⁶

¶68

YouTube easily meets the *Sony* rule that where a product is capable of substantial non-infringing uses, its provider may avoid contributory infringement liability.²²⁷ Unlike previous peer-to-peer companies that have been litigated out of existence, YouTube can point to a large and growing volume of actual (rather than merely theoretical) non-infringing uses. Individual users, of course, have posted a large volume of home-made videos on YouTube,²²⁸ and while the amount of user-created content on social networking sites is difficult to measure precisely, it is clearly substantial.²²⁹ Major

television). This meaning is corroborated by YouTube's tag line: "Broadcast Yourself."

²²⁵ See Wu, *supra* note 75 ("Right or wrong, we seem to accept the benign vision of YouTube as an entity which, unlike Napster, was basically born as a place to showcase stupid human tricks."). *Does YouTube Make Google a Big Target For Copyright Suits?*, WALL ST. J. ONLINE, October 11, 2006, http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxs_g_2020061109.html (quoting Harvard law professor John Palfrey: "The core idea of YouTube is that a user creates a work on their own and then shares it online.").

²²⁶ Chris Gaither & Dawn C. Chmielewski, *Google Bets Big on Videos*, L.A. TIMES, Oct. 10, 2006, at A1; *but see* John Cloud, *The YouTube Gurus*, TIME, Dec. 17, 2006, at 66, *available at* <http://www.time.com/time/magazine/article/0,9171,1570795,00.html> (noting disagreement as to whether the dinner party story is an accurate account of YouTube's origins).

²²⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 442 (C.D. Cal. 1979). Although the *Sony* rule applied to providers of products, the reasoning applies analogously to providers of services. *See generally* Jiarui Liu, *Why is Betamax an Anachronism in the Digital Age? Erosion of the Sony Doctrine and Indirect Copyright Liability of Internet Technologies*, 7 VAND. J. ENT. L. & PRAC. 343, 347-48 (2005) (noting the conceptual difficulties with limiting the *Sony* rule to product manufacture or distribution to the exclusion of services).

²²⁸ See Heather Green, *Whose Video Is It, Anyway?*, BUS. WEEK ONLINE, Aug. 7, 2006, at 38, *available at* http://www.businessweek.com/magazine/content/06_32/b3996051.htm ("A growing group of creative types is furiously producing clips, video blogs, and animated shorts with the hopes of making money through advertising or selling DVDs.").

²²⁹ A search of YouTube by the authors using the phrase "dance recital" revealed 2,820 videos, many of which appeared to be amateur videos of children's dance recitals (frequently accompanied by music). A search using the phrase "winter concert" turned up 3,040 videos, with titles such as "North Penn High School 2006 Winter Concert Hallelujah Chorus." A search of "first birthday party" returned 1,740 videos. Time Magazine found that the word "grandmother" produced 1,800 hits. John Cloud, *The YouTube Gurus*, TIME, Dec. 17, 2006, at 66, *available at* <http://www.time.com/time/magazine/article/0,9171,1570795,00.html>. Time magazine also discovered more than 780 videos resulting from a YouTube search of the term "police brutality." James Poniewozik, *The Beast with a Billion Eyes*, TIME, Dec. 25, 2006, at 63. More generally, it has been noted that YouTube's "top draws have been clips of pets reacting, babies laughing, and folks dancing and lampooning what major media heads think we should consider entertaining." Rick Aristotle Munarriz, *Good Luck Killing YouTube*, Dec. 11, 2006, THE MOTLEY FOOL, <http://www.fool.com/investing/high-growth/2006/12/11/good-luck-killing-youtube.aspx>; *see also* Gaither & Chmielewski, *supra* note 226, at A1 (noting YouTube's "amateur videos that include light saber fights and karaoke sessions"). YouTube's founder explains that "content includes home-made footage of all sorts, from stand-up routines to video diaries, delivery-room footage, amateur musical performances, and eyewitness footage from Hurricane Katrina and the Iraq War." *Tur v. YouTube*, 2007 WL 1893635, at *1 n.1 (C.D. Cal. June 20, 2007). A word of caution is in order, however. As Justice Ginsburg noted in her concurring opinion in *Grokster*, "[e]ven if the absolute number of noninfringing files copied . . . is large, it does not follow that the products are therefore put to substantial noninfringing uses The number of noninfringing copies may be . . . dwarfed by[] the huge total volume of files shared." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 947 (2005) (Ginsburg, J., concurring). Thus, Viacom will surely attempt to demonstrate that although the number of non-infringing files on YouTube is substantial, liability for YouTube is still appropriate because this number is dwarfed by the number of infringing files. Moreover, even if the

studios — from Twentieth Century Fox to Universal to Warner Brothers — are intentionally using YouTube to promote their content.²³⁰ Millions of songs, as well as other content, have been licensed for legitimate use on the YouTube site.²³¹

¶69

Moreover, there is a strong public policy argument that favors the continued development of YouTube and similar platforms. YouTube's facilitation of video content sharing constitutes a tremendous present public benefit,²³² allowing those with minimal technological savvy to easily exchange works that may be educational,²³³ newsworthy,²³⁴ or simply have deep personal meaning.²³⁵ Given the ultimate aim of copyright "to stimulate artistic creativity for the general public good,"²³⁶ copyright law must allow breathing room for technologies that dramatically increase the ease with which works can be accessed and exchanged.²³⁷ Nor are theorized potential benefits in short supply. For example, it has been suggested that YouTube's approach to video sharing may one day be incorporated into online dispute resolution platforms.²³⁸ Another commentator has noted that short sitcom pilots could be aired on YouTube prior to investing in a full-length television series, allowing YouTube viewers to weigh in on whom to cast in

fraction of non-infringing *files* is large, the fraction of non-infringing *downloads* may be smaller.

²³⁰ See, e.g., Evgeny Morozov, *Borat Also Tricked Web*, NEWARK STAR-LEDGER, Nov. 19, 2006, at 1 (discussing the use of YouTube by Twentieth Century Fox to promote the film "Borat"); Holson, *supra* note 147 (noting Universal's use of sites like YouTube to promote its films); Heather Green, *YouTube: Waiting for the Payoff*, BUSINESS WEEK, Sept. 18, 2006, at 56, available at http://www.businessweek.com/magazine/content/06_38/b4001074.htm? (noting Warner Bros. promotion of a Paris Hilton CD via YouTube); Chmielewski, *supra* note 163, at C1 ("British satellite television service BSkyB's ad agency posted a live-action re-enactment of the opening of 'The Simpsons' . . . to accompany the start of the new season. And the Chicago band OK Go posted a backyard video of itself doing a dance routine to the new single 'A Million Ways,' spurring legions of fans to post their own renditions of the contagiously goofy performance."); Noam Cohen, *YouTube is Purging Copyrighted Clips*, N.Y. TIMES, Oct. 30, 2006, at C4, available at <http://www.nytimes.com/2006/10/30/technology/30youtube.html> ("Comedy Central stars in the past have used YouTube . . . to interact with their audience."); see generally Gaither & Chmielewski, *supra* note 226, at A1 (quoting Boston venture capitalist Dennis Miller: "The most clever players in Hollywood' are seeding YouTube with promotional video . . .").

²³¹ See Gaither & Chmielewski, *supra* note 226, at A1 (noting that YouTube has revenue sharing deals with CBS, Universal, and BMG); *YouTube Signs Licensing Deal with British Composers' Group*, *supra* note 39.

²³² See Allen K. Yu, *Enhancing Legal Aid Access Through An Open Source Commons Model*, 20 HARV. J.L. & TECH. 373, 382 (2007) (commending YouTube for conferring upon the public "two important goods: a video content library and a search index"); Michael Driscoll, *Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy*, 6 J. MARSHALL REV. INTEL. PROP. L. 550, 566 (2007) (praising YouTube for "provid[ing] an alternate forum . . . [for] educating and influencing the public").

²³³ See, e.g., Lawrence Lessig, *Google Book Search: the Argument*, LESSIG.COM, Jan. 14, 2006, http://lessig.org/blog/2006/01/google_book_search_the_argumen.html (containing an embedded YouTube video addressing the copyright issues involved with the Google book search project).

²³⁴ See, e.g., James Poniewozik, *The Beast with a Billion Eyes*, TIME, Dec. 25, 2006 at 63. See Moises Naim, *The YouTube Effect*, FOREIGN POLICY, Jan. 1, 2007, at 104 (noting the effectiveness of YouTube in "expos[ing] human rights abuses," and its potency as a tool for social change).

²³⁵ For example, videos of weddings, births, soccer games, commencement speeches, and family reunions.

²³⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 480 F.Supp. 429, 432 (C.D. Cal. 1979).

²³⁷ See S. REP. NO. 105-190, at 8 (1998) ("[The DMCA] will also make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius."). "Our dependence on interconnected computers only grows as a means to communicate, manage our personal and business affairs and obtain the goods and services we want." *Id.* at 65.

²³⁸ Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary*, 38 U. TOL. L. REV. 317, 319 n.8 (2006).

leading television dramas, and breathing new life into moribund programs.²³⁹ More generally, allowing YouTube to continue could deliver tremendous long-term benefits as new uses of the technology emerge — with benefits that inure to consumers and copyright holders alike.²⁴⁰

VI. CONCLUSION

¶70

Who would argue that society would be better off without the VCR or the photocopier machine? A goal of copyright law is to promote the wide public availability of copyrighted works, and web sites such as YouTube clearly promote such wide public availability. At the same time, the idea that a company valued at over \$1 billion can continue its business model while copyright holders watch their copyrights being impetuously violated and scramble to submit unending take-down notices, may make some level-headed judges sit askance at the bench. Yet this is the balance of interests that has been struck by Congress; and while no legislation can ever perfectly satisfy two masters, the safe harbors of the DMCA seem very nearly optimal. So long as a company is diligent in taking down offending material, terminating repeat offenders, and accommodating standard technical measures, all the while conducting a business that is otherwise legitimate, it has done its part and should be allowed to concentrate its efforts on further innovation in the comforting knowledge that it is safe from copyright infringement liability. Whether YouTube has effectively and timely accommodated standard technical measures and the extent to which it has induced direct infringement are ultimately factual determinations to be made in court. Whatever the outcome of these factual issues, the result should not be another tombstone in the peer-to-peer graveyard. To shut down YouTube would be a grave error that would have adverse consequences across the social networking landscape, needlessly chopping with an axe what should be more delicately pruned with shears.

¶71

As the contours of the safe harbor have not yet been brought into focus, social networking sites should constantly review with counsel the emerging cases addressing DMCA compliance, and scrupulously adhere to the DMCA's strictures. To guard against liability in the event that DMCA protection is found to be unavailable, companies should also consider their activities in the context of current copyright liability doctrines. This may not be an easy task. Exactly what the *Grokster* court meant by ruling that secondary copyright liability is based on the network "promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement"²⁴¹ is not quite clear. Online business models, corporate strategies, and advertisements should be carefully reviewed to negate any semblance of "promoting infringement." While service providers are busy remaining on the legitimate side of the copyright law, courts

²³⁹ Chris Taylor, *Google's Copyright Fix*, BUSINESS 2.0, Dec. 11, 2006, http://money.cnn.com/2006/12/08/magazines/business2/youtube_piracy.biz2/.

²⁴⁰ See generally R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 877, 889-90 (2005) ("The example of the VCR suggests that tolerating some amount of infringement in the short term may be important in driving consumer adoption of a technology that, in the long term and with widespread deployment, will be put to much wider noninfringing uses that provide copyright owners with enormous markets.").

²⁴¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005).

must be equally attentive to the incentives they are creating as they progressively define the nuanced requirements of the DMCA. The significant value of online social networking demands that decisions be carefully structured to require responsible behavior on the part of service providers while assuring the continued existence of this cultural phenomenon.