

Navigating the Safe Harbor Rule: The Need for a DMCA Compass

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COMMENTS

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INTRODUCTION

The Internet is an everyday part of life for many people—checking e-mails, doing research for work or school, getting directions, and more. In addition to these activities, which many people consider essential to their everyday lives, are other abilities of the Internet: acquiring music, reading newspapers, and watching videos. The Internet’s capability to give users easy access to mass media can provide many problems in the copyright arena. Along with the ability to share information on the Internet came the ability for mass copyright infringement.¹ Who was to be held liable?

Copyright law has evolved in order to accommodate the special issues arising due to the Internet. To prevent a chilling effect on technology from copyright infringement liability, the Safe Harbor Rule was enacted.² This rule prevents Internet service providers (ISPs)³ from being held liable for third party activity on the Internet. As long as the service providers follow several different rules, they will not be penalized for copyright infringement.⁴ Along with protecting the ISPs, the Safe Harbor Rule allows copyright holders to contact ISPs and have them take down unauthorized copyrighted material.⁵ This legislation provides a balance between the copyright owners and ISPs.

However, recent litigation brought the question of whether the Safe Harbor Rule is adequate for its intended purpose⁶—providing a balance between copyright owners and ISPs. Much of the technology causing

1. See David Kohler, *This Town Ain't Big Enough for the Both of Us—Or Is It? Reflections on Copyright, The First Amendment and Google's Use of Others' Content*, 2007 DUKE L. & TECH. REV. 5 (2007). See also Laura M. Holson, *Hollywood Asks YouTube: Friend or Foe?*, N.Y. TIMES, Jan.15, 2007, at C1; Steve Johnson, *YouTube's Dream May Get Clipped*, Editorial, CHI. TRIB., Sept. 22, 2006, § 5, at 1.

2. See S. REP. NO. 105-190, at 8 (1998). See also Digital Millennium Copyright Act (DMCA) of 1998, 17 U.S.C. § 512 (2006).

3. A service provider is defined as “a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).” 17 U.S.C. § 512(k)(1)(B).

4. 17 U.S.C. § 512(c)(i). The service provider must not have knowledge or awareness of the infringement, and upon obtaining the knowledge or awareness must quickly take down the infringing material. In addition, upon notification of the infringement, the service provider must remove or disable access to the information quickly. 17 U.S.C. § 512(c)(1). To be eligible for the safe harbor, the service provider must also make its policy of taking down infringing material known to the users. 17 U.S.C. § 512(i)(1)(A).

5. 17 U.S.C. § 512(h) (providing that a copyright owner may request that a subpoena be issued to the ISP).

6. Complaint, *Viacom Int'l, Inc. v. YouTube, Inc.*, 87 U.S.P.Q. 2d 1170 (S.D.N.Y. 2008) (No. 07-2103).

controversy, such as video sharing, did not exist at the time Congress enacted the Digital Millennium Copyright Act (DMCA).⁷ Without knowing what to expect to emerge on the Internet, Congress was not able to make provisions that sufficiently protect both the copyright holders and the ISPs.⁸ As ISPs once struggled with excessive copyright infringement liability,⁹ copyright holders now need more protection from the rampant copyright infringement occurring on the Internet.¹⁰ Congress should reform, or at the very least clarify, specific sections of the Safe Harbor Rule in order to obtain its initial purpose in making the Safe Harbor Rule—to provide a balance of responsibility between the copyright owners and ISPs.

Part I of this Comment will discuss the historical overview of copyrights. It will briefly skim over the basic entry of copyrights into the legal system, and then delve into more depth about the evolution of copyrights because of technological advances.

Part II of this Comment analyzes the current phenomenon of video sharing online. Specifically, I will look at the use and policies of YouTube and several other video sharing websites and how they affect copyrights.

In Part III, I discuss current litigation that may influence the liability of ISPs in connection with the Safe Harbor Rule of the DMCA. The cases discussed will be *Tur v. YouTube* and *Viacom v. YouTube*.

In Part IV, the potential effects of the cases discussed in Part III on the DMCA are analyzed, along with the potential issues the outcomes may create in connection to copyright protection.

Part V of the Comment discusses solutions to the issues video sharing technology has caused in connection with copyrights. Among the possible solutions are having both parties monitor the content on websites, implementation of semi-permanent red flags, and legislative clarifications to the DMCA.

Finally, a brief conclusion and overview of Parts I–V is located at the

7. *See id.*

8. *See* Lawrence Lessig, Editorial, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, § 4, at 12.

9. *See generally* Jim Harper, *Against ISP Liability*, 28 REGULATION, Spring 2005, at 30–33; Douglas Lichtman, *Holding Internet Service Providers Accountable*, 27 REGULATION, Winter 2004–2005, at 54–59.

10. *See* Matthew Helton, Note, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 1 (2006); Holson, *supra* note 1; Douglas Lichtman, Editorial, *The Case Against YouTube*, L.A. TIMES, Mar. 20, 2007, at A19.

end of this Comment.

I. HISTORICAL OVERVIEW OF COPYRIGHTS

Historically, copyright law has evolved, and continues to evolve, with the changing demands of the field. Copyright originated in Venice at the end of the fifteenth century, where the government granted people exclusive rights for printing particular books;¹¹ England started using copyrights around 1556 with a royal decree;¹² and the United States enacted copyright laws shortly after gaining its independence.¹³ Initially, the states enacted laws independently, but as conflicts between varying laws across state lines arose, the federal government enacted the first national copyright laws in 1790.¹⁴ These copyright laws have evolved over time to what they are today and have adapted to different copyright situations throughout history.¹⁵

A. *Early Evolution Due to Modern Technology*

Much of copyright law has evolved and been further defined through various case law. An early modern technology case was *Sony v. Universal City Studios*.¹⁶ In that case, the plaintiff brought an action against Sony alleging contributory infringement of its copyrights because Sony's Betamax allowed users to record television shows on video tapes.¹⁷ Betamax was the first video recording device, and it caused great concern among the television industry.¹⁸ The Court focused on the public interest in having access to items used in contributory infringement.¹⁹ Specifically, the Court found that the sale of items that may aid contributory infringement does not constitute contributory infringement if the items are "capable of substantial

11. See ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 368 (4th ed. 2006).

12. *Id.*

13. *Id.* at 369.

14. *Id.* at 369–70.

15. See *id.* at 370–72. The major changes to copyright law throughout history were the 1909 Act, 1976 Act and Related Reforms, Berne Convention Accession, and reforms during the digital age, such as the DMCA. *Id.*

16. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

17. *Id.* at 420.

18. Sony had advertisements about the capability to time shift with Betamax, which caused the film industry to question possible copyright infringement. See Sony Global—Sony History, <http://www.sony.net/Fun/SH/1-31/h1.html> (last visited Nov. 18, 2008).

19. *Sony*, 464 U.S. at 440–41.

noninfringing uses.”²⁰ The Court also concluded that if a product does not have a “demonstrable effect” on the market (or potential market) for the copyright owner, it does not need to be prohibited in the market to protect the incentives to create new works.²¹ The *Sony* decision further defined what was needed to prove contributory infringement in copyright law by stating that any possible substantial noninfringing use is a valid defense.²²

In addition, in *Matthew Bender v. West Publishing Co.*, the Second Circuit Court of Appeals concluded that CD-ROMs containing information found in print are not necessarily infringing on copyrights.²³ In that case, Matthew Bender produced CD-ROMs for legal authority.²⁴ Among the information on these CD-ROMs was case law found on Westlaw and citations to look up the cases on Westlaw.²⁵ The display on the computer screen for the case also contained identical page numbers to West’s books.²⁶ The court held that the contested information, which was the organization of the cases and use of the page numbers, was not copyrightable information.²⁷ Furthermore, the court upheld the *Sony* decision by refusing to find contributory infringement because of the noninfringing uses of the CD-ROMs.²⁸ In doing so, the court explained that the purpose of the Supreme Court’s holding in *Sony* was to prevent copyright holders from controlling distribution of various products that may incidentally infringe their copyright.²⁹ This holding further clarified what is copyrightable and what copyrights qualify for the *Sony* treatment.

B. Entrance of the Digital Millennium Copyright Act

In 1998, Congress amended the Copyright Act with the DMCA.³⁰ Congress did this in response to the emergence of issues involving the Internet and copyright infringement liability, specifically involving

20. *Id.* at 442.

21. *Id.* at 450.

22. *See id.* at 447–456.

23. *Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 693, 708 (2d Cir. 1998).

24. *Id.* at 697.

25. *Id.*

26. *Id.*

27. *Id.* at 701.

28. *Id.* at 707.

29. *Id.*

30. 17 U.S.C. § 512.

ISPs.³¹ The DMCA was established in order to ensure the continued growth of the Internet by protecting the ISPs.³² Overall, the DMCA was a balance between protecting copyright owners and ISPs.³³

A DMCA section of significant importance is § 512(c), which applies to ISPs that provide storage at the direction of a user.³⁴ The provision does not make a service provider liable for monetary relief due to copyright infringement as long as the service provider follows several restrictions.³⁵ First, the ISP must not have actual knowledge of infringing material.³⁶ This requirement also applies to an awareness of circumstances that the infringement is apparent.³⁷ Essentially, general knowledge about the infringement instead of specific knowledge is enough to disqualify a service provider. Second, the ISP must not receive direct financial benefit from the copyright infringement occurring on the site.³⁸ An example of direct financial benefits would be advertising revenue from people visiting a specific site in order to see the copyrighted material. This revenue would be directly attributable to the infringement of another's copyright and would disqualify the ISP from DMCA protection. Finally, the ISP must respond quickly to any notifications of copyright infringements stored on the site—the ISP must remove or disable access to the material that was infringing the copyright.³⁹

The final requirement imposed on ISPs to obtain protection under the DMCA is what ultimately balanced the copyright owners' interests against the ISPs' interests. Copyright owners no longer have to take legal action to protect their copyrights, but instead have to fill out a form and send it to the ISPs with details about the copyright infringements occurring at specific locations, along with other information specified in the DMCA.⁴⁰ Although the form requires much detail, it is faster than legal action would be against the ISP.

31. See S. REP. NO. 105-190, at 5–6.

32. *Id.* at 8.

33. For more information on the DMCA and its history, see the 1998 Senate Judiciary Committee Report. *Id.*

34. See 17 U.S.C. § 512(c).

35. 17 U.S.C. § 512(c)(1).

36. 17 U.S.C. § 512(c)(1)(A)(i).

37. 17 U.S.C. § 512(c)(1)(A)(ii).

38. 17 U.S.C. § 512(c)(1)(B).

39. 17 U.S.C. § 512(c)(1)(C).

40. See 17 U.S.C. § 512(h).

C. *Evolution After the Digital Millennium Copyright Act*

After the enactment of the DMCA, cases that interpreted the meaning of the law followed. A prime example of technology providing a stage for new issues is *A&M Records v. Napster*, which occurred when music file sharing was a new phenomenon.⁴¹ In *Napster*, the Ninth Circuit held that the plaintiff was liable for contributory copyright infringement because Napster had actual knowledge of direct infringement on its site.⁴² The court held that it did not matter if there were some noninfringing uses of the technology and website because of Napster's actual knowledge of the infringement.⁴³ The DMCA was briefly discussed in *Napster*, but the court did not come to any concrete decisions about the DMCA.⁴⁴ Although it was not discussed, Napster would not have qualified for protection under the DMCA primarily because of its actual knowledge of copyright infringement through its program.⁴⁵ If an ISP has actual knowledge and fails to remove or disable the use of that file, the ISP can no longer use the safe harbor.⁴⁶

Factually similar to *Napster* is *MGM Studios v. Grokster*, which was initiated by MGM because Grokster and Streamcast's peer-to-peer software allowed people to exchange copyrighted material over the Internet.⁴⁷ *Grokster* made it to the United States Supreme Court, where the Court analyzed the factual situation behind the two allegedly infringing companies.⁴⁸ As the programs were peer-to-peer, neither company stored copyrighted materials in its database; but instead, the materials traveled directly from user to user.⁴⁹ However, the companies specifically advertised as replacing Napster and aiding in sharing music and video files.⁵⁰ While Grokster and Streamcast's only physical act was distributing the program to users, they profited through inducement of third parties to infringe copyrights.⁵¹ The Court held *Grokster* to be different from *Sony* because *Sony* was mainly about distributing a

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

42. *Id.* at 1020–21.

43. *Id.* at 1021.

44. *Id.* at 1025.

45. See 17 U.S.C. § 512(c)(1)(A)(i).

46. See 17 U.S.C. § 512(c)(1)(C).

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

48. *Id.*

49. *Id.* at 922.

50. *Id.* at 924–25.

51. *Id.* at 926.

product with lawful and unlawful uses.⁵² The Court determined the main difference was that *Sony* had substantial lawful uses, which prevented secondary liability.⁵³ *Grokster*, however, involved a program that did not have substantial lawful uses but instead substantial unlawful uses, which the Court held weighed in favor of MGM.⁵⁴ Therefore, the ultimate standard developed in *Grokster* was that there needed to be substantial lawful uses, instead of any lawful use, in order to protect a company from contributory infringement.

In addition, *Perfect 10 v. Google* further developed the law of contributory infringement on the Internet.⁵⁵ Perfect 10 claimed Google was liable for contributory infringement because it provided thumbnail copies of Perfect 10's pictures linking to third party websites with full size infringing pictures.⁵⁶ The district court did not find Google liable because there was no actual or constructive knowledge of the copyright infringement as the advertising program used did not allow Google to monitor its partners.⁵⁷ Furthermore, there was no material contribution because the thumbnail links were tools aiding in finding websites, many of which were lawful.⁵⁸

On appeal, the Ninth Circuit found error in the reasoning of the district court's conclusion that there was no contributory infringement because the district court failed to consider whether Google knew of infringing activity and failed to take action.⁵⁹ The court held that it was important to analyze the protection Google may receive under the DMCA.⁶⁰ In doing so, it was essential to determine factually if Google followed the proper procedures to qualify for the safe harbor protection.⁶¹ The necessity for factual determination about whether Google knew of infringing work and failed to take action led the court to remand the case to the district court.⁶² If the defendant knew about infringing work and did nothing about it, then the ISP would be liable

52. *Id.* at 933.

53. *Id.*

54. *Id.* at 933–34.

55. *See Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006). *See also Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

56. *Perfect 10*, 416 F. Supp. 2d at 837.

57. *Id.* at 856.

58. *Id.*

59. *Perfect 10*, 487 F.3d at 729.

60. *Id.* at 732.

61. *Id.*

62. *Id.* at 733–34.

for contributory infringement. *Perfect 10* emphasizes the importance of the DMCA and what protection it could provide if the ISP follows the rules outlined in the provision.

II. VIDEO SHARING PHENOMENON

Video sharing is rampant on the Internet today. From “Star Wars Kid” to “Leave Britney Alone!,” people cannot seem to get enough of online videos.⁶³ Clips posted on YouTube are making headlines and are a major point of discussion for people of all ages.⁶⁴ Missing a major event, like Miss South Carolina Teen answering a question completely wrong during the Miss Teen USA pageant,⁶⁵ no longer matters because it can be found online the next day. YouTube is not the only website providing such a service. Since the emergence of video sharing online in 2004,⁶⁶ there has been a surge of video websites that provide people the ability to post videos online.

A. YouTube

YouTube was founded in February 2005, opened a preview to the public of its services in May, and officially launched in December 2005.⁶⁷ In December, YouTube was already serving more than three million videos and uploading 8,000 videos on a typical day.⁶⁸ This number has continued to expand over the time YouTube has operated, with around 100 million videos viewed per day in 2006.⁶⁹ In November 2006, Google purchased YouTube for \$1.65 billion.⁷⁰ YouTube has also created many

63. See Video: YouTube—Star Wars Kid, <http://www.youtube.com/watch?v=HPPj6viIBmU> (last visited Nov. 18, 2008); Video: YouTube—Leave Britney Alone! (Chris Crocker), <http://www.youtube.com/watch?v=kHmvkRoEowc> (last visited Nov. 18, 2008).

64. For example, a gang challenged the police in a YouTube video. The video received more than 4,000 hits before it was removed. This made Fox news. FOXNews.com, Gang Member Challenges Police on YouTube Video, Jan. 16, 2008, <http://www.foxnews.com/story/0,2933,323269,00.html> (last visited Nov. 18, 2008).

65. See Video: YouTube—Miss Teen USA 2007—South Carolina answers a question, <http://www.youtube.com/watch?v=lj3iNxZ8Dww> (last visited Nov. 18, 2008).

66. See About Vimeo, <http://vimeo.com/about> (last visited Nov. 18, 2008) (providing that Vimeo, a website for sharing videos, was founded in 2004).

67. YouTube—Company History, <http://www.youtube.com/t/about> (last visited Nov. 18, 2008).

68. YouTube—Press Releases, YouTube Opens Internet Press Releases to the Masses, http://www.youtube.com/press_room_entry?entry=OcN9xXYar1g (last visited Nov. 18, 2008).

69. Johnson, *supra* note 1.

70. Matthew Karnitschnig & Kevin J. Delaney, *Media Titans Pressure YouTube Over Copyrights*, WALL ST. J., Oct. 14, 2006, at A3.

partnerships with companies for use of their content on the Internet. Some of the companies include these: CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA, and The Sundance Channel.⁷¹

YouTube has an extensive policy for its terms of use, as well as a community policy. Use of the website causes the terms of use to apply automatically to the user.⁷² The terms of use have several sections discussing copyrighted videos. Section 6(D) states that users agree not to submit copyrighted material onto YouTube unless the user is the owner of the copyright or has permission from the copyright owner.⁷³ Section 7 specifically states that YouTube can terminate a user's access if the user is a repeat infringer of the terms of use.⁷⁴ YouTube goes further in detail about how it retains the right to monitor submissions and remove them if the videos are against the YouTube policy, such as copyright infringement or obscene material.⁷⁵ The terms of use also discuss the DMCA in section 8, giving users information about how to report copyright infringement, the takedown procedure, and counter-notices.⁷⁶

The community policy also provides important information to the user about copyright, stating specifically that users should "respect copyright[s]."⁷⁷ It stresses not posting videos that are someone else's property.⁷⁸ The community policy also guides the user to look at the YouTube copyright tips for more information.⁷⁹ This leaves the user with only a basic understanding of copyrighted material and what videos posted may be infringing.

While YouTube has these policies, they are not strongly enforced. Just reading the terms of use and community policy makes it seem that YouTube is very strict about not using copyrighted material on the website; however, it is very easy to find multiple versions of your favorite show on YouTube. You can even find movies on YouTube,

71. See YouTube—Company History, *supra* note 67.

72. YouTube—Terms of Use, § 1(A), <http://youtube.com/t/terms> (last visited Nov. 18, 2008). This means that it is not necessary for users to read the terms of use, which is problematic in and of itself. See *id.*

73. *Id.* § 6(D).

74. *Id.* § 7(A).

75. See *id.* § 7(B).

76. *Id.* § 8.

77. YouTube—Community Guidelines, http://youtube.com/t/community_guidelines (last visited Nov. 18, 2008).

78. *Id.*

79. *Id.*

although the movie would come in parts as YouTube has a limit to the length of a video clip.⁸⁰ Either the users do not understand YouTube's policy or choose to ignore it. Whichever it may be, the rampant use of infringement in video sharing is causing many problems in the copyright industry.

B. Other Video Sharing Websites

YouTube, while the most popular video sharing website, is not the only online option for sharing videos. In fact, there is an overabundance of possible websites that people can access in order to watch or upload videos. While all these websites have policies that state people should not upload copyright infringing material, a common theme among all of the websites mentioned in this paper, except for one,⁸¹ is that they do not monitor the content of the videos. Without monitoring the website, it remains up to the copyright owners to catch the infringement and then notify the service provider of the infringement. Because of the extensive options for video sharing websites, this is a daunting task. Below are short excerpts of website options for video sharing and their general policies regarding copyright infringement. These are by no means exhaustive of what is available for video sharing.

Brightcove is an interactive website that allows the user to easily edit the design of the screen for videos uploaded in the program.⁸² The company's focus tends to be geared more toward helping other companies, but anyone can use the program after registration.⁸³ Brightcove offers a set up much like YouTube through a link called "Brightcove TV." The user agrees to the terms of use for this website by using the website.⁸⁴ Among the policies listed by Brightcove are that it does not monitor the videos, and that it abides by the DMCA takedown procedure.⁸⁵ Brightcove also posts information on how to contact the company about copyright infringement.⁸⁶

80. YouTube—Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527> (last visited Nov. 18, 2008).

81. See *infra* note 100 and accompanying text.

82. See Brightcove, <http://www.brightcove.com> (last visited Nov. 18, 2008).

83. See *id.*

84. See Brightcove Service Terms and Conditions § 5, <http://accounts.brightcove.com/getterms.cfm> (last visited Nov. 18, 2008).

85. *Id.*

86. *Id.*

Another option for online video sharing is Crackle. Crackle is a website in collaboration with Sony Pictures Entertainment that showcases videos from well-known and undiscovered artists.⁸⁷ This website functions by the users picking “channels” which guide the selection of videos the user views.⁸⁸ Users also agree to the terms of use by using the website.⁸⁹ Crackle does not allow users to download videos found on the website, and it follows the DMCA by taking down reported information.⁹⁰ Crackle, however, does not monitor the content and relies on the user’s honesty in posting noninfringing works.⁹¹

Ourmedia is a video sharing website that focuses on social causes and provides forums for people to talk about current events.⁹² While this is a global forum, it follows the copyright laws of the United States because its servers are located in the United States.⁹³ Ourmedia does not have a clear policy for its use, and when it mentions the use of copyrighted material on its website it is very vague.⁹⁴ There is not even a clear answer as to whether posting a clip from a television show would be copyright infringement.⁹⁵ Instead, Ourmedia mentions more about fair use than the potential dangers of copyright infringement.⁹⁶

Revver is a way people can earn income through sharing videos online. Revver gives the user an option to earn revenue from other users viewing their videos through the sale of advertising attached to each video.⁹⁷ For each viewing, the user can get up to fifty percent of the revenue received from advertising.⁹⁸ A user agrees to the terms of use for the website through use,⁹⁹ and Revver’s employees check each of the videos submitted by users for copyright infringement.¹⁰⁰ As with all

87. See Crackle, <http://crackle.com> (last visited Nov. 18, 2008).

88. See About Crackle, <http://crackle.com/about/> (last visited Nov. 18, 2008).

89. Crackle Terms of Service, <http://crackle.com/tos/> (last visited Nov. 18, 2008).

90. *Id.* § 6.

91. *Id.* § 11.

92. Ourmedia, <http://ourmedia.org/> (last visited Nov. 18, 2008).

93. Ourmedia—Legal FAQ, <http://ourmedia.org/mission/faq/legal-faq> (last visited Nov. 18, 2008).

94. See *id.*

95. See *id.*

96. See Ourmedia—Fair use, <http://ourmedia.org/rules/fair-use> (last visited Nov. 18, 2008).

97. About Revver, <http://revver.com/about/> (last visited Nov. 18, 2008).

98. See Revver Member Agreement § 8(a), <http://revver.com/go/tou/> (last visited Nov. 18, 2008).

99. See *id.*

100. See Revver—Copyright Information, <http://revver.com/go/copyright/> (last visited Nov. 18, 2008).

the websites, Revver has a policy of not allowing copyright infringement;¹⁰¹ however, it does a much better job protecting copyrights than the other websites because it personally monitors the submitted videos.

Finally, Vimeo is the oldest of the video sharing websites, beginning late in 2004.¹⁰² Like most other websites, the user agrees to the terms of use by using the website,¹⁰³ and one of the terms of use is that the user cannot upload copyrighted material (infringe a copyright) onto the website.¹⁰⁴ Furthermore, Vimeo specifically mentions the takedown procedure for infringing material and how the copyright owner can contact Vimeo for notification.¹⁰⁵ Also, Vimeo allows the users to download the videos onto their personal computers, and Vimeo retains the right not to monitor the content of the videos.¹⁰⁶

III. CURRENT LITIGATION

Currently, several different cases are pending against YouTube because of copyright infringement occurring on the website.¹⁰⁷ One case is from a somewhat smaller news video company while the other is from a large corporation.¹⁰⁸ The outcome of these cases may very well determine what will happen to video technology online. If the plaintiffs prevail, it may lead to an insurgence of lawsuits against YouTube and other video websites. However, if YouTube prevails, it may cause video websites to continue to push the limits of technology and its effects on copyrighted materials.

The smaller and less publicized of the two recent cases is *Tur v. YouTube*.¹⁰⁹ Robert Tur is the owner of the Los Angeles News Service.¹¹⁰ The complaint stemmed from Tur discovering several of his videos prominently displayed on YouTube.¹¹¹ One such video, "Beating

101. *See id.*

102. *See* About Vimeo, *supra* note 66.

103. Vimeo Terms of Service, <http://vimeo.com/terms> (last visited Nov. 18, 2008).

104. *Id.*

105. *Id.*

106. *See id.*

107. *See* Complaint, *Tur v. YouTube, Inc.*, 2007 U.S. Dist. LEXIS 96517 (C.D. Cal. 2007) (No. 06-4436); Complaint, *Viacom*, *supra* note 6.

108. *See* Complaint, *Tur*, *supra* note 107; Complaint, *Viacom*, *supra* note 6.

109. Complaint, *Tur*, *supra* note 107.

110. *Id.* ¶ 4, at 2.

111. *Id.* ¶ 12, at 4.

of Reginald Denny,” was infringed over 5,500 times.¹¹² Tur’s claims for relief included statutory damages amounting to \$150,000 for each work infringed, an injunction, equitable relief, and attorneys’ fees.¹¹³ Although the complaint was filed on July 14, 2006,¹¹⁴ the case has not made much progress. YouTube petitioned the court for summary judgment against the claims of Tur, but the court denied the petition.¹¹⁵ On October 19, 2007, the court granted Tur’s motion to voluntarily dismiss the complaint without prejudice.¹¹⁶ It is unclear whether the parties will settle outside of court or if Tur will pursue the lawsuit against YouTube.

The lawsuit getting much attention from the media is *Viacom v. YouTube*.¹¹⁷ Viacom claims to be “one of the world’s leading creators of programming and content across all media platforms.”¹¹⁸ It is affiliated with several different companies including Comedy Partners, Country Music Television, Black Entertainment Television, and Paramount Pictures Corporation.¹¹⁹ The television channels that Viacom manages are MTV, Nickelodeon, VH1, Comedy Central, Logo, MTV2, MTV Tres, Nick at Nite, Noggin, TV Land, CMT, mtvU, and BET.¹²⁰ Viacom also has several different agreements with online companies to distribute its media and offers streaming video clips on its own websites.¹²¹

In an extensive complaint, Viacom discussed its turmoil with the way YouTube uses its website to infringe on copyrights. Viacom’s frustration with the situation came through in its discussion of YouTube’s use of new technology to “willfully infringe copyrights on a huge scale”¹²² and to prevent copyright owners from finding infringing

112. *Id.*

113. *Id.* ¶¶ 27–30, at 10.

114. *Id.* at 1.

115. Tur v. YouTube, Inc., No.06-4436, 2007 U.S. Dist. LEXIS 50254, at *1 (C.D. Cal. June 20, 2007), *dismissed without prejudice*, 2007 U.S. Dist. LEXIS 96517 (C.D. Cal. Oct. 19, 2007).

116. *Id.*

117. Complaint, *Viacom*, *supra* note 6.

118. *Id.* ¶ 15, at 6.

119. *Id.* ¶¶ 16–19, at 6–7.

120. *Id.* ¶ 20, at 7.

121. *Id.* ¶¶ 21–22, at 7–8. Viacom has licensed some of its channels to iTunes and Joost. Not all of Viacom’s channels are licensed to these companies, so there remain more opportunities for Viacom to license its copyrights to companies. *See id.*

122. *Id.* ¶ 2, at 2.

videos because of hidden video features.¹²³ Viacom's complaint listed six claims of relief against YouTube—direct infringement through public performance, direct infringement through public display, direct infringement through reproduction, inducement of copyright infringement, contributory infringement, and vicarious infringement.¹²⁴ Viacom requested that the court grant a permanent injunction, statutory damages, and costs (such as attorneys' fees).¹²⁵ This complaint was filed March 13, 2007 in the Southern District of New York.¹²⁶

A decision in favor of the plaintiffs in these two cases would cause a major shift of power between copyright holders and ISPs. Currently, the ISPs do not have to do any monitoring of the material on their websites for copyright infringement.¹²⁷ However, a court holding YouTube liable for copyright infringement in either of these cases would open up the possibility for ISPs to be liable in instances where they did not monitor the information. A finding of liability may also open the door for many more lawsuits against YouTube and similar video sharing websites, such as those listed above.

A decision in favor of the defendant, YouTube, in these two cases would shift the power even further on the side of the ISPs. As Viacom is stretching the limits in claims against an ISP, a finding in favor of YouTube most likely will thwart future lawsuits against video sharing websites. In turn, video sharing websites will begin to focus more on partnering with companies for use of a variety of media on their websites. This would allow companies like YouTube to keep making profits off of the media that copyright owners would not otherwise have licensed except that there was no better alternative.

These two cases are very important to the future of copyright law and the relationship between ISPs and copyright owners. As long as the parties do not settle, there should be some very important questions answered by the courts.

IV. THE COLLIDE OF VIDEO SHARING TECHNOLOGY AND THE DMCA

The lawsuits that Tur and Viacom brought against YouTube shed light on a very important issue: Is the current DMCA sufficient? By legal standards, this is a very young law because it first became official

123. *Id.* ¶ 8, at 4.

124. *Id.* ¶¶ 46–89, at 18–26.

125. *Id.* ¶ 89, at 26.

126. *Id.* at 1.

127. *See* 17 U.S.C. § 512(m)(1).

in 1998. However, in technological terms this is a very old law. It seems like current technology becomes obsolete several months after the public begins using it because of constant improvements. As there is no way to continuously change the law, especially as fast as technology evolves, it is essential to establish laws that are flexible in interpretation but that also achieve the desired intent of the legislature and parties involved. After all, one purpose of the law is to provide justice for the parties. Because online video sharing technology emerged after the DMCA,¹²⁸ copyright problems that could not have been foreseen are occurring. These problems, in turn, are causing the legislative purpose behind the DMCA to be unfulfilled.¹²⁹

Online video sharing has allowed a mass of Internet users to post and watch videos online, with YouTube being the most used website for such activity.¹³⁰ Along with this ability came a massive increase in copyright infringement online due to the infringing videos posted by users.¹³¹ Some users may not know any better, and still others may feel they have the right to post whatever they own regardless of copyright. As copyright owners began to monitor video sharing websites, the takedown requests began pouring in. However, after the requested videos were taken down, another user replaced the same file.¹³² For example, although a request to take down the “Real World” makes the ISP remove that file, a user could replace it with another file of the “Real World” the next day. The ISP does not have to continue monitoring for a replacement of the file, even if it is posted within minutes of the original being taken down.

Continual posting of copyright infringing videos is wreaking havoc on copyright owners’ ability to control the use of their copyrights. One essential right of copyright holders is the ability to control the distribution and display of copyrighted material.¹³³ In the past, other technology has produced problems with regulation of copyrighted

128. The safe harbor in the DMCA came out in 1998, while the first recorded online video sharing technology came out in 2004. *See supra* notes 66, 102 and accompanying text.

129. The reason the legislative intent is not being fulfilled is because the DMCA safe harbor rule was meant to be a balance between protecting copyright owners and encouraging technological advances. *See S. REP. NO. 105-190*, at 46 (1998). It is no longer a balance, with the majority of the work loading down the copyright holders. *See infra* text accompanying notes 130–136.

130. *See* Holson, *supra* note 1.

131. *See* Kohler, *supra* note 1.

132. *See* Holson, *supra* note 1.

133. *See* MERGES ET AL., *supra* note 11 at 373.

material.¹³⁴ However, the Internet brought with it the wide-scale ability to distribute copyrighted material.¹³⁵ It would be easy for millions of people to infringe on a single copyrighted work at the same time. In attempting to prevent such a wide-scale distribution of their works, copyright owners often monitor the websites that allow users to post and watch videos.

The major website that copyright owners focus on when monitoring copyrighted works is YouTube.¹³⁶ When doing so, copyright owners are faced with several problems. First, YouTube only displays the first 1,000 videos that are similar to the search term the user types into the website.¹³⁷ At first, this does not seem like a big deal as limiting the returns makes the website faster and helps the user find what he or she is actually looking for. However, if there are more than 1,000 videos that infringe a specific show, such as “Beavis and Butthead,” the copyright holder may not be able to find all those videos to report them. Second, YouTube allows users to privately share videos with a small group of people, which prevents a copyright holder from finding those videos.¹³⁸ Therefore, if someone made a home video with Celine Dion’s music in the background, Celine Dion and Sony BMG, her record company, would never be able to find and regulate the use of the song. Finally, the cost of monitoring YouTube, along with other websites, is prohibitive on copyright owners. For example, Viacom reported hiring a company for over \$100,000 a month just to find infringing videos.¹³⁹ This is over \$1 million spent on protecting copyrights per year on the Internet alone—and there are more venues copyright owners must monitor.

Currently, copyright owners do not have much of a case for the copyright infringement occurring on websites such as YouTube. As long as the video sharing websites abide by the rules laid out in the

134. Bootleg videos and music have been around for many years. In fact, the first recorded bootleg music of Bob Dylan songs dating from 1961 occurred more than thirty years ago. See *Bootlegs, An Insight Into the Shady Side of Music Collecting*, <http://www.moremusic.co.uk/links/features/bootleg.htm> (last visited Nov. 18, 2008). This method of copyright infringement remains problematic.

135. Google was aware of this ability. It set aside \$200 million for possible copyright infringement lawsuits against YouTube. See Holson, *supra* note 1.

136. See Holson, *supra* note 1.

137. See Complaint, *Viacom*, *supra* note 6, ¶ 43, at 16.

138. See ¶ 43, at 16–17.

139. See Nick Gonzalez, *The Future of Copyright Protection is Here and It Costs \$11 an Hour*, TECHCRUNCH, Aug. 8, 2007, <http://www.techcrunch.com/2007/08/08/the-future-of-copyright-protection-is-here-and-it-costs-11-an-hour/> (last visited Nov. 18, 2008).

DMCA,¹⁴⁰ the websites are not liable for the infringement. This leaves the copyright owners the option of pursuing legal action against the users of the video sharing websites. However, it is very difficult, if not impossible, to track down the users of the websites because they do not have to submit all their personal information. This tedious process often leads to settlements for much less than what the copyright owner deserves for the simple reason that users of the video sharing websites do not have deep pockets like many ISPs, such as YouTube.

The only decent option for copyright owners today is the copyright infringement notification process.¹⁴¹ The requirements for a submission to the website host for copyright take-downs is somewhat confusing, and forgetting some information can result in the website host not needing to take down the alleged copyright infringement.¹⁴² The sheer volume of work that a copyright owner must put into monitoring websites on the Internet and filling out detailed reports to send to the websites puts a heavy burden on the copyright owner. The legislative intent behind the DMCA was not to put the entire burden on the copyright owner, but was to strike a balance between the rights of a copyright owner and the importance of allowing technology to expand without a constant fear of lawsuits.¹⁴³ While the law is taking pressure off of people producing new technology, it is shifting the majority of the pressure onto copyright owners with a significant increase in work needed to protect copyrights, especially videos and music. The shifting in pressure to copyright owners does not embrace the original legislative intent of the DMCA and signals a need for some type of modification.

V. SOLUTIONS

With the copyright owners' options being so limited and causing such a strain on the industry, it is important for the legislature to re-examine the DMCA and either amend it or add clarifications to the current law. One thing is for sure: Something needs to change to help prevent such widespread copyright infringement.

A. Both Parties Monitor Content

One option to help prevent widespread copyright infringement is to require the websites to monitor their content. As not all companies are

140. See 17 U.S.C. § 512(c)(1)(A)–(C).

141. See 17 U.S.C. § 512(h).

142. See 17 U.S.C. § 512(c)(3)(B).

143. See S. REP. NO. 105-190, at 8.

as big as YouTube, it would be up to the legislature to decide what would be the best approach for monitoring. Some options include implementing software programs that automatically search for copyrighted works,¹⁴⁴ monitoring search terms used on the website in correlation with words used to describe copyrighted works, and employing individuals to search websites for infringing work. A requirement to monitor websites would help to balance the effort in protecting copyrights while allowing the expansion of technology without the fear of lawsuits. The requirement to do some kind of monitoring is not new to this field. In fact, YouTube currently does a variety of monitoring for its website.¹⁴⁵ YouTube makes sure that none of the videos posted have any type of pornography, but it also has new technology to aid it in finding copyrighted works and deleting them from websites.¹⁴⁶ The implementations of monitoring beyond what is required by the DMCA demonstrates that such monitoring is not out of the question for video sharing websites or similar websites that are prone to copyright infringement. The next step in protecting copyright owners is for the legislature to add a monitoring requirement to the DMCA in order for the website to be eligible for the safe harbor.

B. Implement Semi-Permanent Red Flags

Another option for protecting copyrights is an implementation of a semi-permanent red flag. Once a copyright owner contacts the website with information about an infringing work, the basic content continues to be monitored over time to prevent the same infringing work from being posted within a short amount of time. Some companies, such as Microsoft and MySpace, have already implemented technology that is able to search for previously infringing works.¹⁴⁷ This aids the copyright owners tremendously because they do not have to check the websites continuously to ensure that content already reported does not reappear on the website the following week, or even the following day. As

144. In fact, YouTube has recently implemented a program that searches for copyrighted works. See *Viacom CEO: YouTube Fingerprinting Too Little, Too Late*, 8 WASH. INTERNET DAILY 202 (Oct. 19, 2007).

145. See YouTube—Community Guidelines, *supra* note 77. While not required, many copyright owners expect websites, and ISPs, to monitor their own content. Of the video sharing websites mentioned in this Comment, only YouTube and Revver actively monitor their websites. See *id.*; Revver—Copyright Information, *supra* note 99.

146. See YouTube—YouTube Video Identification Beta, http://www.youtube.com/t/video_id_about (last visited Nov. 18, 2008).

147. See *Neutrality Rules Would Cripple Media Industry, Says Viacom CEO*, 8 WASH. INTERNET DAILY 191 (Oct. 3, 2007).

putting the burden on an ISP to continue to monitor the previously reported act forever would overburden the ISP, it would be best to implement a set time limit, such as one month, where the company must monitor its website for the reported infringing work. Such an implementation would alleviate the pressure on the copyright owners and balance the responsibilities between the copyright owners and ISPs.

C. Clarifications

At a minimum, the legislature should clarify several terms to prevent unnecessary litigation about the definitions of terms and how they apply to the plaintiff and defendant.¹⁴⁸ First, new technology has brought systems such as YouTube that do not clearly fit into any of the categories listed in 35 U.S.C. § 512; the best-fit being § 512(c). To prevent any further confusion or debate, the legislature should add into the definitions that ISPs include websites where users upload documents to share with each other. Second, the use of the term red flag has never been clearly defined, and it is unclear exactly how much information must be evident before it is considered a red flag.¹⁴⁹ Arguably, most video sharing websites, especially YouTube, have red flags because everybody “knows” that there is infringing material on the website. Once the general public knows that certain information that infringes a copyright is on a website, is that enough to qualify for a red flag? This should be enough, as the ISP would then have to make a conscious effort to be ignorant of the infringing work. However, with the lack of a decision and no clear idea of when case law may appear that aids in the definition, legislation should, at a minimum, further define what fits into § 512(c) and what is a red flag.

CONCLUSION

Overall, the current state of the DMCA is not sufficient. As the history of copyright law demonstrates, along with the evolution through case law, copyright law is always evolving to accommodate for technological advances. While the DMCA’s purpose was to accommodate technological advances, instead, it is ruining the value of the copyright. To protect copyright owners while also protecting

148. For a similar argument, see Michael Driscoll, *Will YouTube Sail into the DMCA’s Safe Harbor or Sink for Internet Piracy?*, 6 J. MARSHALL REV. INTELL. PROP. L. 550, 568 (2007).

149. The best guidance given about red flags is that, in determining if it was a red flag, the court will use a subjective and objective test. See S. REP. NO. 105-190, at 44.

technological advances, the legislature must change some elements of the DMCA. The best change would require both parties to monitor copyrighted material. However, two other options are a monitoring period for reported copyright infringements and a clarification of several terms found within the DMCA. If the legislature were to do any of these, it would greatly aid copyright owners and help the DMCA fulfill its original purpose of a balance of responsibilities.

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