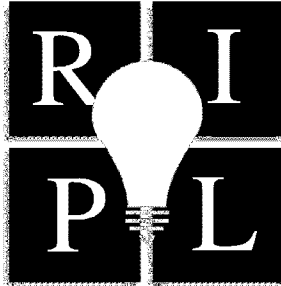


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



WILL YOUTUBE SAIL INTO THE DMCA'S SAFE HARBOR OR SINK FOR
INTERNET PIRACY?

MICHAEL DRISCOLL

ABSTRACT

Is YouTube, the popular video sharing website, a new revolution in information sharing or a profitable clearing-house for unauthorized distribution of copyrighted material? YouTube's critics claim that it falls within the latter category, in line with Napster and Grokster. This comment, however, determines that YouTube is fundamentally different from past infringers in that it complies with statutory provisions concerning the removal of copyrighted materials. Furthermore, YouTube's central server architecture distinguishes it from peer-to-peer file sharing websites. This comment concludes that any comparison to Napster or Grokster is superficial, and overlooks the potential benefits of YouTube to copyright owners and to society at large.

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WILL YOUTUBE SAIL INTO THE DMCA'S SAFE HARBOR OR SINK FOR INTERNET PIRACY?

MICHAEL DRISCOLL*

"A sorry agreement is better than a good suit in law."

English Proverb¹

INTRODUCTION

The year 2006 proved a banner year for YouTube, Inc. ("YouTube"), a well-known Internet video sharing service, so much so that Time Magazine credited YouTube for making "You" the Person of the Year.² Despite this seemingly positive development for such a young company, the possibility of massive copyright infringement litigation looms over YouTube's future.³

For months, YouTube was walking a virtual tightrope by obtaining licensing agreements with major copyright owners, yet increasingly gaining popularity through its endless video selection, both legal and otherwise.⁴ This successful balancing culminated in October 2006 when Google purchased YouTube for \$1.65 billion in Google stock.⁵ Despite the sale, some analysts believed YouTube was still, if not more, vulnerable to copyright infringement litigation following its acquisition by Google.⁶

The much-awaited suit finally came on March 13, 2007 when Viacom International, Inc. ("Viacom") sued YouTube in federal court in the Southern District of New York.⁷ This suit, however, was not the first infringement suit against

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¹ QUOTE IT COMPLETELY 963 (Eugene C. Gerhart ed. 1998).

² Lev Grossman, *Person of the Year: You*, TIME, Dec. 25, 2006, at 41. YouTube and other websites were influential in 2006 because they gave people "an opportunity to build a new kind of international understanding, not politician to politician, great man to great man, but citizen to citizen, person to person." *Id.*

³ See Matthew Karnitschnig & Kevin J. Delaney, *Media Titans Pressure YouTube Over Copyrights*, WALL ST. J., Oct. 14, 2006, at A3 (noting that despite YouTube's numerous partnership deals and compliance with the DMCA's "takedown" policy, YouTube is still vulnerable to copyright liability on the issue of whether YouTube financially benefits from the presence of popular copyrighted materials).

⁴ See Chris Gaither & Dawn C. Chmielewski, *Google Bets Big on Videos: The \$1.65 Billion Deal for Upstart YouTube Allows the Search Giant to Expand in a Hot Sector*, L.A. TIMES, Oct. 10, 2006, at A1.

⁵ Daniel Henninger, *What's YouTube? After \$1.65 Billion, It's Time to Learn*, WALL ST. J., Oct. 13, 2006, at A12.

⁶ See Karnitschnig, *supra* note 3.

⁷ Complaint, Viacom Int'l, Inc. v. YouTube, Inc., No. 07-CV2103, 2007 WL 775611, at *1 (S.D.N.Y. Mar. 13, 2007).

YouTube.⁸ Previously, an unlikely source, Robert Tur, an independent copyright holder and reporter, had sued YouTube on July 14, 2006 for copyright violations of his Los Angeles riots footage.⁹

How will YouTube fare against these lawsuits? This Comment attempts to answer this question. A cursory inspection reveals that YouTube's servers hold infringing materials.¹⁰ Nevertheless, YouTube's *modus operandi* is unlike failed examples of Internet innovations such as Napster or Grokster because it employs a different distribution model, is less accessible to infringement, and YouTube itself is more amiable to cooperation.¹¹ In addition, unlike Napster and Grokster, the advantages YouTube provides to copyright holders and the public far outweigh the disadvantages.

This Comment begins by providing a general overview of the parties, relevant legislation, and case law in Part I. Part II compares YouTube's model to past failed services and discusses the advantages and disadvantages of YouTube's model. Part III proposes that: 1) courts should use *Sony Corp. of America v. Universal City Studios* as a starting point to deciding YouTube's liability; 2) Congress should amend the Digital Millennium Copyright Act to end ambiguity; and 3) YouTube and copyright owners should further cooperate to form partnerships in order to avoid prolonged litigation.

I. BACKGROUND

This section provides a general overview of the issues presented later in this Comment. It begins with a brief description of YouTube and its business model.

⁸ See Complaint, Tur v. YouTube, Inc., No. CV06-4436, 2006 U.S. Dist. LEXIS 1627, at *1 (C.D. Cal. July 14, 2006).

⁹ Heather Green, *Whose Video is It Anyway?: YouTube's Runaway Success Has Opened a Pandora's Box of Copyright Issues*, BUS. WK., Aug. 7, 2006, at 38 [hereinafter Green, *Whose Video is It Anyway?*]. Green notes, "[q]uestions had been swirling for months about whether the upstart [YouTube], which now dishes up 100 million daily videos, was crossing copyright boundaries by letting members upload videos with little oversight. What was surprising was that it was an individual who fired the first shot . . ." *Id.*

¹⁰ Douglas Lichtman, *The Case Against YouTube: Technology Has to Have Room to Grow, but Bad Intent by Web Providers Must Be Punished*, L.A. TIMES, March 20, 2007, at 19.

¹¹ *Does YouTube Make Google a Big Target for Copyright Suits?*, WALL ST. J. ONLINE, available at http://online.wsj.com/public/article/SB116049721244288215-dh_XDre5B5O8j3fQQ2eaVvj6sxxg_20061109.html?mod=tff_main_tff_top, (last visited April 3, 2007). This online article features remarks from Harvard Law professor John Palfrey and University of Texas at Dallas economics professor Stan Liebowitz. *Id.* Professor Palfrey writes, "YouTube is far different from Napster or Grokster The thrust of the business is not to encourage anyone to violate copyright, but rather to create works that they then can distribute online." *Id.* But see Tur, 2006 U.S. Dist. LEXIS 1627, at *5-6. Tur states:

YouTube.com is not merely *Grokster redux*. For unlike the peer-to-peer file sharing systems at issue in the *Grokster* case, YouTube provides the computer servers and "world-class data centers" which allow users to upload video clips directly to YouTube's servers YouTube's business model allows it to have actual knowledge of what particular copyrightable files are being distributed, played and copied through its service.

Id.

Next, it examines the specific copyright provisions of the Digital Millennium Copyright Act (“DMCA”). This section concludes with relevant copyright infringement case law.

A. YouTube, Inc.

YouTube, a free video sharing website, ranks number one worldwide in video and movie website visitors with twice the number of viewers as the next ranked site.¹² To understand the magnitude of this accomplishment, consider that the founders created the company in a garage on a maxed out credit card.¹³ Furthermore, YouTube did not become publicly available until late 2005.¹⁴ Since its inception, its servers hold approximately 100 million videos with another sixty-five thousand uploaded daily.¹⁵ This represents a sixty percent market share of Internet shared videos.¹⁶ Thirty-eight million people visited YouTube in December 2006, and its numbers continue to grow.¹⁷

The reasons behind YouTube’s tremendous popularity are probably due to several factors. First, YouTube’s site is completely free.¹⁸ Second, the site is easy to use.¹⁹ Third, its servers hold videos that are in high demand, including infringing videos.²⁰ Estimates of YouTube’s infringing content ranges from thirty to ninety

¹² *YouTube Goes Commercial, Sort of*, PC MAGAZINE, Aug. 22, 2006; see also Jessica Mintz, *Google’s Tiny Tweak May Not Be So Minor: Home Page Replaces Link to Shopping Site Froogle to Focus on Video*, GRAND RAPIDS PRESS, Aug. 16, 2006, at D6. Compared to video sharing rivals, YouTube is far ahead in regards to viewership. Mintz, *supra*. Mintz reports, “[i]n July [2006], about 30.5 million people visited YouTube, compared with 9.3 million to Google Video, and 5.3 million to Yahoo, Inc.’s Yahoo Video” *Id.*; see also David Greising & Eric Benderoff, *Google, YouTube Looking to Link?: Some Say Deal Makes Sense: Firms Silent*, CHI. TRIB., Oct. 7, 2006, at C1. The authors’ graphic shows that, in September 2006, YouTube held a forty-six percent market share while MySpace and Google held twenty-one percent and eleven percent, respectively. Greising, *supra*.

¹³ Dave Larson, *From Trailers to TV Shows, from Virals to Vlogs, YouTube Has It All*, DAYTON DAILY NEWS, Sept. 16, 2006, at D10. Larson reports:

YouTube was founded in February 2005 by Chad Hurley and Steve Chen, who worked together at eBay’s PayPal electronic-payment unit They maxed out Chen’s credit card on business expenses before securing a reported \$3.5 million in financing in November 2005, when YouTube made its official debut.

Id.

¹⁴ *Id.*

¹⁵ Anthony S. Volpe, *YouTube, Viral Videos and Copyright Infringement on the Internet*, LEGAL INTELLIGENCER, Sept. 6, 2006.

¹⁶ *Id.*

¹⁷ *The Rapid Rise of YouTube*, WASH. POST, Feb. 5, 2007 (noting YouTube’s increase in unique visitors from 3.1 million in December 2005 to thirty-eight million in December 2006).

¹⁸ Larson, *supra* note 13.

¹⁹ Steve Johnson, *YouTube’s Dream May Get Clipped*, CHI. TRIB., Sept. 22, 2006, at C1 (“By making it easy for people to upload their own videos and search and play others’, the site has unleashed demand that nobody else quite understood existed.”); see also Megan H. Chan, *Newsday*, Aug. 17, 2006, at B6 (“YouTube’s simple interface makes it easy for anyone . . . to make a film and upload for the watchings of the Web.”).

²⁰ See Sam Gustin, *YouTube’s Got a Fat Idea of Itself*, N.Y. POST, Sept. 21, 2006, at 40 (discussing that a “vast majority of content viewed on YouTube violates copyright law — 90 percent by one estimate . . .”).

percent of the content on its servers; however, the official number is highly disputed.²¹ For example, even Tur's complaint concedes that a "substantial" number of YouTube users are not infringing.²²

YouTube receives revenue by offering various types of advertising space.²³ Thus, the more visitors YouTube attracts, the more revenue received from advertisers.²⁴ Despite the large number of visitors, this business model has failed to generate substantial revenue because of high operating costs.²⁵

Due to YouTube's coveted position in the video sharing world and its expected profitable future and growth, Google purchased YouTube in October 2006 for \$1.65 billion in stock.²⁶ On the same day, YouTube announced that it struck partnership deals with media giants CBS, Universal Music Group, and Sony BMI.²⁷ Previously, YouTube achieved similar success when NBC and Warner Music Group announced partnership agreements with YouTube.²⁸ In return for licensing their content, the media giants receive a percentage of advertising revenue generated by their copyrighted material.²⁹

YouTube's sale to Google and its partnerships with many media giants, the potential litigants in future copyright cases, alleviated many infringement concerns, at least for the time being.³⁰ These successes can be credited to pressure from Google

²¹ See *id.* But see Laura M. Holson, *Hollywood Asks YouTube: Friend or Foe?*, N.Y. TIMES, Jan. 15, 2007, at C1 (noting that "academics and media executives estimate [unauthorized content on YouTube to be] anywhere from 30 percent to 70 percent.").

²² Complaint, *Tur v. YouTube, Inc.*, No. CV06-4436, 2006 U.S. Dist. LEXIS 1627, at *6-7 (C.D. Cal. July 14, 2006) (stating that "substantial use of YouTube's website was and is made by users uploading their own homemade videos . . .").

²³ Gustin, *supra* note 20. Gustin writes, "YouTube's stated business model is to 'pursue advertising' . . ." *Id.*

²⁴ *Id.*

²⁵ Heather Green, *YouTube: Waiting for the Payoff: the Video-Sharing Web Site is a Runaway Success—Everywhere but on the Bottom Line*, BUS. WK., Sept. 18, 2006, at 56 [hereinafter Green, *YouTube*]. Green reports:

[YouTube's] business so far amounts to a whole lot of expenses, not much revenue, and no profits. YouTube took on the job of creating the business model for a new medium where anyone can post any video . . . YouTube spends a tidy, and growing, sum to stream its short clips. Current estimates range from \$900,000 to \$1.5 million per month. Much of that goes for computer servers and transmission bandwidth . . . its legal costs could balloon if lawsuits start piling up.

Id.; see also Chan, *supra* note 19 (noting that YouTube's bandwidth expenses cost one million dollars a month).

²⁶ See Gaither, *supra* note 4.

²⁷ See *id.*; see also LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 162 (Penguin Press) (2004) [hereinafter LESSIG, *FREE CULTURE*] (noting that Universal, Warner, and Sony represent three of the five major recording labels, which represent 84.8% of the U.S. recording market).

²⁸ See Kevin J. Delaney & Ethan Smith, *YouTube Model is Compromise over Copyrights*, WALL ST. J., Sept. 19, 2006, at B1 [hereinafter Delaney, *YouTube Model*].

²⁹ Alex Veiga, *YouTube May Benefit from Tech Upgrade; but Copyright Guard Could Hurt Content*, CHI. TRIB., Oct. 15, 2006, at C12.

³⁰ See Gaither, *supra* note 4 ("The deals clear the way for music videos, television news, sports clips and entertainment programs to be distributed free on YouTube in exchange for a share of whatever advertising revenue may follow.").

and YouTube investors to reduce possible infringement lawsuits by complying with copyright law.³¹

Recently, however, some media giants, even those with partnership deals with YouTube, have announced plans to start their own video sharing websites.³² NBC Universal and News Corporation, both involved in a joint venture, claim that advertising revenue is the motive for the new site.³³ Nevertheless, some claim that the proposed new site is directly related to media giant's displeasure with the infringement on YouTube.³⁴

B. The Lawsuits

Of course, the most tell-tale sign of dissatisfaction is the presence of lawsuits. To date, YouTube is the subject of two Internet copyright suits, both in their nascent stages. The first suit was initiated by Robert Tur, a vigorous protector of his copyrighted video.³⁵ Tur sued YouTube in the U.S. District Court for Central California in July 2006.³⁶ Tur alleges video copyright infringement of his L.A. riots footage because of its availability on YouTube.³⁷ Tur's move was a surprise since many of the major media giants were expected to strike first.³⁸

Viacom, the owner of MTV, Nickelodeon, and Comedy Central, did finally strike on March 13, 2007 when it sued YouTube in the U.S. District Court for the Southern District of New York.³⁹ In total, Viacom is suing YouTube, and its owner Google, for one billion dollars, nearly the amount that Google paid to purchase YouTube.⁴⁰

³¹ *Id.* YouTube's recent partnerships were likely "a precondition of a deal with Google." *Id.*; see also Gustin, *supra* note 20 (noting that YouTube's financial backer, Sequoia, pressured YouTube to work toward legitimizing the website and changing the perception of copyright infringement and illegality).

³² See Richard Siklos, *News Corp. and NBC in Web Deal*, N.Y. TIMES, March 23, 2007, at C1.

³³ *Id.* (quoting Jeff Zucker, CEO of NBC Universal, "[w]hat [the new site] is doing is taking advantage of the huge marketplace, both on the advertising side and consumer side, for this kind of material.").

³⁴ See *id.* ("News Corporation and NBC Universal . . . have had complex and increasingly tense relationships with Google, which owns YouTube. The media companies' copyrighted material . . . show up on YouTube without the media companies' permission.").

³⁵ Todd R. Brown, *YouTube Hit with Lawsuit*, SAN MATEO COUNTY TIMES, July 20, 2006 ("Tur has been dogged in protecting his L.A. riots footage . . .").

³⁶ Complaint, *Tur v. YouTube, Inc.*, No. CV06-4436, 2006 U.S. Dist. LEXIS 1627, at *1 (C.D. Cal. July 14, 2006).

³⁷ *Id.* at *10-11.

³⁸ Green, *Whose Video is It Anyway?*, *supra* note 9.

³⁹ Complaint, *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07-CV2103, 2007 WL 775611, at *1 (S.D.N.Y. Mar. 13, 2007).

⁴⁰ Miguel Helft & Geraldine Fabrikant, *Viacom Sues Google over Video Clips on Its Sharing Web Site*, N.Y. TIMES, Mar. 14, 2007, at C1.

C. The Digital Millennium Copyright Act

Congress's power to create copyright law is firmly established in Article I, Section 8 of the U.S. Constitution.⁴¹ The limited protection afforded authors is to provide an incentive to create new works that will benefit the public.⁴² In 1998, Congress exercised this power when it amended the Copyright Act with the DMCA.⁴³ The DMCA sought to encourage the growth of the Internet by protecting Internet service providers ("ISPs") from expensive litigation.⁴⁴ In effect, the DMCA is designed as a balance between protecting the rights of copyright holders and promoting Internet development.⁴⁵ This balance comes in the form of "safe harbor" provisions that protect ISPs from monetary damages and limited injunctive relief if the ISP's activities fall within certain statutory boundaries.⁴⁶ Although the statute establishes the safe harbors, it also retains the traditional protections afforded copyright holders for their protected works.⁴⁷

An ISP entity wishing safe harbor under the DMCA must fall into one of four protected safe harbor categories:⁴⁸ conduit;⁴⁹ system caching;⁵⁰ system storage;⁵¹ and

⁴¹ U.S. CONST. art. I, § 8, cl. 8.

⁴² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

⁴³ 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, 907–08 (2002).

⁴⁴ S. Rep. No. 105–190, at 8 (1998) [hereinafter Senate Judiciary Committee Report]. The Report notes that the DMCA was "designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age." *Id.* at 1–2.

⁴⁵ *See id.* at 8. The report on the DMCA suggests that Congress' failure to establish a balance would cause a scenario where "copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy" while "service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet." *Id.*

⁴⁶ *See id.* at 19. The DMCA enjoyed broad support from industry groups, technology companies, as well as from individual copyright holders. *Id.* at 9. This support is evidenced by the unanimous 18-0 committee vote approving the statute for a Senate floor vote. *Id.*

⁴⁷ *Id.* at 19; *see also* 17 U.S.C. § 102(a)(6) (2006).

⁴⁸ Gutierrez, *supra* note 43, at 909; *see also* 17 U.S.C. § 512(k). The statute provides two definitions of service providers. *Id.* at § 512(k)(l). The first category narrowly 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." *Id.* at § 512(k)(l)(A). Under a more broad definition, a service provider is an entity that provides "online services or network access." *Id.* at § 512(k)(1)(B).

⁴⁹ *Id.* at § 512(a). A service provider falls under the conduit safe harbor when its business entails "transmitting, routing, or providing connections for . . . or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections . . ." *Id.*; *see also* Gutierrez, *supra* note 43, at 917–18 ("An entity attempting to claim the protection of [the conduit] safe harbor must meet the narrow definition of service provider . . .").

⁵⁰ 17 U.S.C. § 512(b). System caching is the "intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider . . ." *Id.*

⁵¹ *Id.* at § 512(c). System storage is the "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . ." *Id.*

information location tools.⁵² The system storage safe harbor, which is most analogous to YouTube's structure and thus most appropriate for this Comment, will be analyzed further.

The system storage safe harbor exempts a service provider from liability for the "infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . ."⁵³ An entity must not violate any of the following to be considered under the DMCA protection.⁵⁴

First, a storage service provider must lack "actual knowledge" of the infringement.⁵⁵ Even when the service provider lacks actual knowledge, the provider must ensure that infringement was not "apparent."⁵⁶ An apparent infringement is a "red flag," exposing the provider to liability.⁵⁷ Whether a red flag exists is determined objectively although the subjective knowledge of the facts may be relevant.⁵⁸ When infringement is discovered, the provider must act "expeditiously to remove, or disable access to, the material."⁵⁹

Second, for safe harbor protection, the ISP cannot receive a financial benefit as a result of the infringement.⁶⁰ The legislative history recommends that "courts should take a common-sense, fact-based approach, not formalistic one" when determining whether a financial benefit resulted.⁶¹

Third, a storage service provider, upon proper notice, must take measures to remove and block infringing material for safe harbor protection.⁶² The copyright holder, when desiring removal of infringing material, must notify the provider's

⁵² *Id.* at § 512(d). An information tool service provider is involved in "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link . . ." *Id.*

⁵³ *Id.* at § 512(c)(1).

⁵⁴ *Id.*

⁵⁵ *Id.* at § 512(c)(1)(A)(i).

⁵⁶ *Id.* at § 512(c)(1)(A)(ii).

⁵⁷ Gutierrez, *supra* note 43, at 926.

⁵⁸ Senate Judiciary Committee Report, *supra* note 44, at 44. The report states:

[I]f the service provider becomes aware of a "red flag" from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The "red flag" test has both a subjective and an objective element. In determining whether the service provider was aware of a "red flag," the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a "red flag" — in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances — an objective standard should be used.

Id.

⁵⁹ 17 U.S.C. § 512(c)(1)(A)(iii).

⁶⁰ Senate Judiciary Committee Report, *supra* note 44, at 44 ("In general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service.")

⁶¹ *Id.*

⁶² 17 U.S.C. § 512(c)(1)(C).

designated agent by written communication.⁶³ Nothing in the statute requires notice from the copyright holder before initiating litigation.⁶⁴ Similarly, a provider is not required to remove infringing material even after receiving notice.⁶⁵ The consequences for non-compliance are potentially very expensive as the provider loses its safe harbor and is exposed to full infringement liability.⁶⁶

Finally, the DMCA also requires “[a]laccommodation of technology” from the service provider for safe harbor status.⁶⁷ Specifically, it requires the service provider to implement a policy that removes repeat offenders.⁶⁸ In addition, it requires that the provider “accommodates . . . standard technical measures” to protect copyrights.⁶⁹ This is defined as a technical measure that is adopted by a “broad consensus of copyright owners and service providers,” is available on reasonable terms, and does not impose “substantial costs on [the] service provider.”⁷⁰

When a defendant does not fall under the definition of an ISP or within the protection of a safe harbor, the owner of the copyright may sue for damages.⁷¹ The DMCA empowers courts to issue injunctions and award traditional damages including actual damages, lost profits, and attorney fees.⁷² Where infringement was committed willingly, the court may award statutory damages of \$150,000 per infringement.⁷³

D. Case Law Relating to Copyright Infringement

Ambiguity exists as to how courts will deal with YouTube because some provisions of the DMCA have not been tested in court.⁷⁴ The following well-publicized cases may shed light on the way courts will interpret Internet copyright infringement in the case of YouTube under the DMCA.

⁶³ *Id.* at § 512(c)(2). For the service provider to receive safe harbor, the company must appoint a designated agent and publish the agent’s name, address, phone number and electronic mail address. *Id.*

⁶⁴ Senate Judiciary Committee Report, *supra* note 44, at 45 (“[C]opyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.”).

⁶⁵ *Id.* (“Section 512 does not require use of the notice and take-down procedure.”).

⁶⁶ *Id.*

⁶⁷ 17 U.S.C. at § 512(i)(1).

⁶⁸ *Id.* at § 512(i)(1)(A); *see also* Senate Judiciary Committee Report, *supra* note 44, at 52. The legislative history suggests that this is an easy standard to meet because it does not require the provider to “investigate possible infringements, monitor its services, or make difficult judgments as to whether conduct is or is not infringing.” Senate Judiciary Committee Report, *supra*. Instead, the provider must simply implement a termination policy and remove those who “flagrantly abuse . . . intellectual property.” *Id.*

⁶⁹ *Id.* at § 512(i)(1)(B).

⁷⁰ *Id.* at § 512(i)(2)(A)–(C); Senate Judiciary Committee Report, *supra* note 44, at 52 (noting that adopting the technical measures combating copyright infringement must be in a “open, fair, voluntary, multi-industry standards process” similar to the manner used to protect DVDs against infringement).

⁷¹ *See* Senate Judiciary Committee Report, *supra* note 44, at 41.

⁷² 17 U.S.C. §§ 502–05.

⁷³ *Id.* at § 504(c)(2).

⁷⁴ Wendy N. Davis, *Downloading a File of Copyright Woes*, 93 A.B.A. J. 10, 10 (2007).

In *Sony Corp. of America v. Universal City Studios*, copyright owners sued the manufacturer of Betamax video recording equipment under the theory of contributory infringement.⁷⁵ The copyright owners alleged that Sony was liable for copyright infringement by Betamax consumers.⁷⁶ The Ninth Circuit Court of Appeals reversed the District Court's finding and held that Sony was liable for contributory infringement.⁷⁷ The U.S. Supreme Court then reversed the Court of Appeals because it found that Betamax equipment was capable of substantial non-infringing uses.⁷⁸ The fact that the plaintiffs could not establish that consumers recording television programs caused any financial harm led the Court to find that Sony was not liable for contributory infringement.⁷⁹

In *A&M Records, Inc. v. Napster, Inc.*, many groups within the recording industry sued a popular website for Internet copyright infringement.⁸⁰ The Ninth Circuit found sufficient evidence of the notorious peer-to-peer ("P2P") file sharing service's vicarious liability, among other theories, to continue the case at trial in the District Court.⁸¹ Vicarious liability may be imposed when the defendant has the right and ability to supervise an infringing activity, and receives a direct financial benefit from the infringing activity.⁸² The court determined that Napster had the ability to prevent infringing conduct or activities using available technology and that Napster received more revenue based on the number of its users.⁸³ This combination demonstrated sufficient evidence of vicarious liability.⁸⁴

In a more recent case, *MGM Studios, Inc. v. Grokster, Ltd.*, the U.S. Supreme Court vacated and remanded a Ninth Circuit decision that held two P2P file sharing providers, Grokster and StreamCast, liable for infringement of copyrighted material by its users.⁸⁵ The Court established an "inducement rule," which assigns liability to service providers for the actions of third parties if the service provider promoted the illegal use of the work.⁸⁶

The Court found three factors significant in its decision that Grokster and StreamCast intentionally promoted copyright infringement.⁸⁷ First, the Court noted that the two companies intended to fill the void left in the wake of Napster's downfall.⁸⁸ Next, the Court stated that the defendants failed to mitigate the presence of infringing materials through the development of filtering tools.⁸⁹ Finally,

⁷⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

⁷⁶ *Id.*

⁷⁷ *Id.* at 420.

⁷⁸ *Id.* at 456.

⁷⁹ *Id.*

⁸⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010–11 (9th Cir. 2001).

⁸¹ *Id.* at 1027.

⁸² *Id.* at 1022.

⁸³ *Id.* at 1023, 1027.

⁸⁴ *Id.* at 1024.

⁸⁵ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

⁸⁶ *Id.* at 936–37 ("[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties.").

⁸⁷ *Id.* at 939.

⁸⁸ *Id.* ("[E]ach company showed itself to be aiming to satisfy a known source of demand for copyright infringement . . .").

⁸⁹ *Id.* (noting that the lack of filtering tools "underscores Grokster's and StreamCast's intentional facilitation of their users' infringement").

the fact that Grokster and StreamCast received advertising revenue based on the number of users who purchased and used the software was an important point for the Court.⁹⁰ While no one single factor demonstrated intent to induce infringement, the factors taken together showed an “unmistakable” unlawful objective.⁹¹

The *Grokster* case has been criticized as an over-expansion of power by courts to the detriment of Congress.⁹² It is viewed as a reversal of a long-held policy of deference to Congress on creating new forms of liability for copyright infringement.⁹³ The next section shows that applying *Grokster* to the cases against YouTube is not appropriate given the numerous differences between the websites.

II. ANALYSIS

A close look at YouTube's business characteristics shows that YouTube is *sui generis*—a thing of its own.⁹⁴ This fact is central to the question of YouTube's liability.⁹⁵ This section explains why simply applying *Grokster* to YouTube is inappropriate. Part A defines the YouTube model. Next, part B compares YouTube with similar, but failed, Internet models. Finally, part C discusses the advantages and disadvantages associated with YouTube.

A. What is the YouTube Model?

Three characteristics embody the YouTube model: 1) efforts toward compliance with the DMCA;⁹⁶ 2) partnerships with major media giants;⁹⁷ and 3) large numbers of visitors with a potential for profitable relationships.⁹⁸ These elements form the basis of the YouTube model discussed throughout this Comment.

⁹⁰ *Id.* at 939–40.

⁹¹ *Id.* at 940.

⁹² Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, March 18, 2007 [hereinafter Lessig, *Copyright Chaos*].

⁹³ *Id.*

⁹⁴ BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

⁹⁵ *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11 (“The business model that YouTube features is a far cry from any of the early music file-sharing businesses. That difference in business model should make a big difference in terms of the copyright risk calculus.”).

⁹⁶ *Id.*

YouTube has been a model citizen . . . they've gone out of their way to license content from big content owners, they've been working on fingerprinting solutions to help content owners track their copyrighted materials, and they've sought to make it easy . . . for submitting a complaint about copyright violations.

Id.

⁹⁷ See Gaither, *supra* note 4.

⁹⁸ See *YouTube Goes Commercial, Sort of*, *supra* note 12.

B. Comparison with Past Models

Analysis of past Internet infringing sites shows that YouTube is fundamentally different.⁹⁹ This fact differentiates YouTube with regard to the possibility of liability for copyright infringement based on past cases.¹⁰⁰ The following section compares YouTube with Napster and Grokster, both failed models and past Internet infringing sites.

1. YouTube Works to Remove Infringing Material

Napster and Grokster, prior to their respective demises, skirted copyright law.¹⁰¹ For Napster, it is estimated that eighty-seven percent of its content was without copyright permission.¹⁰² Similarly, it is estimated that ninety percent of Grokster's content infringed copyright.¹⁰³

On the other hand, YouTube's focus on partnership and licensing deals suggests its desire to work with copyright owners.¹⁰⁴ YouTube founder Chad Hurley defends YouTube's position, "[w]e're not the next Napster because we're not renegades trying to fight the system We're working aggressively with the content community to remove it."¹⁰⁵

YouTube's conduct suggests that it likely falls within the DMCA. Courts are likely to classify YouTube as a system storage service provider because its users upload videos onto YouTube servers.¹⁰⁶ As a storage provider, YouTube may be liable for infringement if it has knowledge of infringement or the infringement was apparent under § 512(c)(1)(A).¹⁰⁷ YouTube's conduct suggests that it meets this requirement because it removes infringing videos when notified.¹⁰⁸

Further, YouTube posts warnings against infringement to users who upload videos in accordance with § 512(i).¹⁰⁹ YouTube indisputably holds copyrighted

⁹⁹ See *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11 ("Google should be able to avail itself of the DMCA's broad safe harbor for copyright infringement under U.S. law.")

¹⁰⁰ *Id.*

¹⁰¹ See William Sloan Coats et al, *Pre- and Post-Grokster Copyright Infringement Liability for Secondary and Tertiary Parties*, at 323, 338 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course, Handbook Ser. No. 8821, 2006), available at WL, 877 PLI/Pat 323.

¹⁰² *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 903 (N.D. Cal. 2000).

¹⁰³ Coats, *supra* note 101, at 338.

¹⁰⁴ *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11.

¹⁰⁵ Dawn C. Chmielewski, *Studios Not Sure If YouTube Site is Friend or Foe*, CHI. TRIB., Apr. 16, 2006, at C10.

¹⁰⁶ See 17 U.S.C. § 512(k)(1)(B). Under the broad definition of a service provider, YouTube provides "online services or network access . . ." *Id.*

¹⁰⁷ See Gutierrez, *supra* note 55, at 926.

¹⁰⁸ See, e.g., Noam Cohen, *YouTube is Purging Copyrighted Clips*, N.Y. TIMES, Oct. 30, 2006, at C8 (discussing YouTube's removal of unauthorized Comedy Central videos clips following a request by Comedy Central); *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).

¹⁰⁹ See YouTube Community Guidelines, http://youtube.com/t/community_guidelines (last visited April 5, 2007). YouTube's site warns users, "[r]espect copyright. Only upload videos that you

material without the owner's permission, although the actual number is unknown.¹¹⁰ Nevertheless, some owners are either aware of their material on YouTube or actually uploaded it themselves and see the benefits of the material's use on YouTube.¹¹¹

In addition, YouTube is developing "fingerprinting" software that compares known copyrighted works in a database with the video being uploaded by a user.¹¹² Although the details are scarce, the software may allow the media companies to directly choose whether to accept or reject a video.¹¹³ This is potentially much faster than the current takedown procedures under the DMCA.¹¹⁴ While YouTube is working to curtail infringement through this software, it will only be available to major media groups and not independent copyright holders, like Robert Tur, until an undetermined future date.¹¹⁵

Recently, delays in launching this software have endangered YouTube's current licensing agreements.¹¹⁶ Viacom, prior to the suit, officially requested the removal of 100,000 videos on YouTube after the video provider failed to deliver the filtering software on time.¹¹⁷ YouTube complied with the removal request before the suit.¹¹⁸ The fact that this software is in development suggests that it is not a "standard technical measure" required under § 512(i) and thus supports YouTube's position.¹¹⁹ In addition, the fact that the software is a unilateral effort by YouTube, and not a multi-industry standard, supports the notion that YouTube is under no duty to implement it and is thus within the safe harbor.¹²⁰

2. YouTube is Technologically Distinguishable from Napster and Grokster

Both Napster and Grokster did not actually hold files on their servers, although both sites differed on their setups.¹²¹ Instead, the now defunct companies used a P2P

made or that you have obtained the rights to use. This means don't upload videos you didn't make, or use content in your videos that someone else owns the copyright to . . . without their permission." *Id.*

¹¹⁰ See Holson, *supra* note 21.

¹¹¹ See, e.g., Evgeny Morozov, *Borat Also Tricked Web*, NEWARK STAR-LEDGER, Nov. 19, 2006, at 1 (discussing the use of YouTube by 20th Century Fox to promote the film "Borat").

¹¹² Veiga, *supra* note 29.

¹¹³ *Id.*

¹¹⁴ See Delaney, *YouTube Model*, *supra* note 28 (reporting that under YouTube's proposed system, "media companies will have a way to have their content removed without resorting to separately sending takedown letters . . .").

¹¹⁵ See *id.* ("YouTube in the future will explore options for sharing online ad revenue with smaller, or amateur creators, Mr. Hurley said. But 'right now we're building tools for record labels, TV networks and movie studios.'").

¹¹⁶ See Geraldine Fabrikant and Saul Hansell, *Viacom Tells YouTube: Hands off*, N.Y. TIMES, Feb. 3, 2007, at C1 (reporting that YouTube's inability to filter unauthorized content caused Viacom to request the removal of 100,000 videos).

¹¹⁷ *Viacom Wants Its Clips Removed from YouTube*, CHI. TRIB., Feb. 3, 2007, at 1.

¹¹⁸ *Id.*

¹¹⁹ See 17 U.S.C. § 512(i)(1)(B).

¹²⁰ *Id.* at § 512(i)(2)(A).

¹²¹ See Coats, *supra* note 101, at 334, 338. Regarding Napster, "music files were downloaded directly from other Napster users and never passed through Napster's servers." *Id.* at 334. Grokster had "no indices of infringing files [were] maintained on the servers . . ." *Id.* at 338.

setup, which linked users to each other's computers.¹²² In contrast, YouTube uses a vastly different technology structure.¹²³ When a user uploads a video for public viewing, the file is located on YouTube's servers.¹²⁴

In addition, Napster and Grokster, using file-sharing P2P software, allowed the transfer of files from one computer to another.¹²⁵ These services did not put restraints on the type or size of the file.¹²⁶ Thus, full length movies could easily be transferred.¹²⁷ Once the user downloaded the file, the file was forever out of the control of the copyright holder whether or not it consented to the initial transfer of the file.¹²⁸ Copyright holders could not benefit from any direct advertising because the user was not required to return to the site to play the file.¹²⁹ Instead, the user could use the file indiscriminately through an MP3 player during any activity without viewing advertisements.¹³⁰ In addition, the damage of the shared file could not be mitigated because the user could distribute it freely.¹³¹

In contrast, YouTube's videos are available only on its website.¹³² Videos are not downloadable or transferable to other computers or peripheral devices.¹³³ YouTube prohibits viewing full length movies on its site.¹³⁴ Specifically, it limits uploaded videos to ten minutes in length, although, some users have uploaded full movies into nine minute increments.¹³⁵ The user must watch the video clip on YouTube's site, in front of YouTube's banner advertising.¹³⁶ Thus, the copyright holder, if it consents, may benefit from advertising revenue.¹³⁷ Furthermore, the damage of an infringing

¹²² *Id.* at 337–38.

¹²³ See YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=55749&topic=10509> (last visited April 6, 2007) (“YouTube is an online video streaming service that allows anyone to view and share videos that have been uploaded by our members.”).

¹²⁴ See *id.*

¹²⁵ See Coats, *supra* note 101, at 334, 338.

¹²⁶ See Daniel B. Wood, *The YouTube World Opens an Untamed Frontier for Copyright Law*, CHRISTIAN SCI. MONITOR, Dec. 18, 2006, at 1 (quoting David Axtell, an intellectual property attorney, “[d]uring Napster’s heyday, people were making their own digital copies and using them on their own.”).

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=56100&topic=10517> (last visited April 5, 2007) (“[C]urrently you can’t download our videos to your computer. YouTube’s video player is designed to be used within your browser as an Internet experience.”).

¹³³ See Wood, *supra* note 126 (quoting David Axtell, “The very big difference between today’s YouTube and the music-sharing of MP3 files several years ago is that you have to watch and you can’t — absent the knowledge of advanced hackers — copy it for your own use.”).

¹³⁴ YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=55743&topic=10527> (last visited April 6, 2007) (stating “there is a 10-minute length limit for all videos” on YouTube).

¹³⁵ *Id.*; Holson, *supra* note 21 (reporting that some YouTube users circumvent YouTube’s safeguards by slicing a movie into nine minute segments and uploading each segment onto YouTube).

¹³⁶ See YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=56100&topic=10517> (last visited April 6, 2007).

¹³⁷ Gaither, *supra* note 4.

video is mitigated because the file cannot be transferred to other computers through YouTube.¹³⁸

Asserting that YouTube is responsible for an individual user's actions is a somewhat attenuated claim when one considers that YouTube has 100 million videos on its servers with an additional sixty-five thousand uploaded daily.¹³⁹ These numbers provide a glimpse of the manpower required to sift through the videos to find materials suspected of infringement. To make matters more difficult, in the case of independent or small content owners, how would YouTube know whether the video had obtained permission to be distributed before being uploaded? YouTube also claims that it is against approving clips because it would have a negative effect on the spontaneity and community feel of YouTube.¹⁴⁰

C. Advantages of the YouTube Model

YouTube's presence provides benefits to copyright holders and the public. Arguably, these facts should be considered by courts when considering YouTube's liability. The following section discusses these policy arguments.

1. The Copyright Holders May Save Money and Increase Revenue

Avoiding litigation may save copyright holders substantial amounts of money intended for potentially fruitless lawsuits.¹⁴¹ Past efforts by the recording industry to curtail Internet infringement, through litigation, have reaped no significant social or private benefits.¹⁴² While Napster and Grokster subsequently stopped infringement, the vacuum left by these popular sites simply spawned other infringing sites.¹⁴³ The progeny of these infringing sites, in turn, created systems that differed slightly from the infringing sites in order to fall outside the application of past cases.¹⁴⁴ Still worse, in the case of Napster, it was unable to compensate the recording industry for its past infringement.¹⁴⁵

In addition, copyright holders may save money by uploading programs on YouTube and thereby avoiding costly advertising.¹⁴⁶ Recently, 20th Century Fox used YouTube for free advertising to increase publicity for the much-awaited movie,

¹³⁸ See YouTube Help Center, <http://www.google.com/support/youtube/bin/answer.py?answer=56100&topic=10517> (last visited April 6, 2007).

¹³⁹ See Volpe, *supra* note 15.

¹⁴⁰ John Cloud, *The YouTube Gurus*, TIME, Dec. 25, 2006, at 74.

¹⁴¹ See Coats, *supra* note 101, at 327 (noting that litigation by major media groups against these infringing Internet networks "have not been extremely successful to this point").

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 337 ("Following the Napster decision, a number of new peer-to-peer file-sharing services have appeared. These new services employ slightly different technology than Napster, with the major distinguishing factor being that the new services do not maintain a central index of available files on their own servers.")

¹⁴⁵ *Id.* at 327.

¹⁴⁶ See, e.g., Morozov, *supra* note 111.

Borat.¹⁴⁷ This media campaign on YouTube is credited with the movie's success at the box office.¹⁴⁸ The following section discusses the direct and indirect benefits of YouTube's model.

a. Direct Benefits to Copyright Holders

YouTube may increase revenue for copyright holders if the copyright holders form an agreement with YouTube. Under proposed schemes, a copyright holder may receive a portion of advertisement revenue for YouTube's use of the copyrighted material.¹⁴⁹ This prospect has been a significant draw to the major media companies, Viacom excluded.¹⁵⁰

Moreover, YouTube may provide a benefit by reaching demographic groups that prove difficult to interest through traditional advertising and programming.¹⁵¹ This fact explains Warner's decision to work with YouTube.¹⁵² Warner's executive, Alex Zubulliga, described the reasoning, "[YouTube] is a phenomenon which kids have embraced which is only going to continue to grow We're much better innovating and embracing this than trying to stop it."¹⁵³

b. The YouTube Effect: Indirect Benefits to Copyright Holders

Copyright holders may also profit indirectly from exposure on YouTube through the YouTube Effect, the incidental benefit that owners receive for material on YouTube with or without permission.¹⁵⁴ NBC is a beneficiary of this phenomenon and an apt example of the YouTube Effect's evolution and acceptance.¹⁵⁵

In early 2006, the *Saturday Night Live* skit "Lazy Sunday" was uploaded onto YouTube without NBC's permission.¹⁵⁶ The video created a major buzz on YouTube when it received six million views before NBC requested its removal.¹⁵⁷ This

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Gaither, *supra* note 4 (discussing YouTube's deals with Universal Music Group, Song BMG, and CBS in sharing advertising revenue generated by the copyrighted materials).

¹⁵⁰ *See id.*; *see* Helft, *supra* note 40.

¹⁵¹ *See* Sara Kehaulani Goo, *Google Gambles on Web Video: Firm to Pay \$1.65 Billion for Popular, Unprofitable YouTube*, Oct. 10, 2006, at A01.

¹⁵² *See* Kevin J. Delaney & Ethan Smith, *YouTube, Warner Music to Share Revenue in Advertising Agreement*, WALL ST. J., Sept. 18, 2006, at A12 [hereinafter Delaney, *YouTube, Warner to Share Revenue*].

¹⁵³ *Id.*

¹⁵⁴ *See* Moises Naim, *The YouTube Effect: How a Technology for Teenagers Became a Force for Political and Economic Change*, FOREIGN POL'Y, Jan. 1, 2007, at 104. Naim, the editor in chief of FOREIGN POLICY, defines the YouTube Effect as "the phenomenon whereby video clips, often produced by individuals acting on their own, are rapidly disseminated throughout the world thanks to video-sharing Web sites such as YouTube, Google Video, and others." *Id.*

¹⁵⁵ Chan, *supra* note 19.

¹⁵⁶ *Id.* Chan reports, "the sketch and the free viral marketing that followed was largely credited with stimulating interest back into the late-night broadcast. Still, NBC forced YouTube to yank the clip from its site, citing copyright infringement." *Id.*

¹⁵⁷ Gaither, *supra* note 4.

phenomenon is credited with reviving interest in the struggling late-night TV institution.¹⁵⁸ Despite the increase in ratings, NBC requested the removal of the clip from YouTube.¹⁵⁹

NBC received another boost from YouTube when its failed show, *Nobody's Watching*, received 400,000 views on YouTube.¹⁶⁰ In response, NBC decided to re-air the show.¹⁶¹ These events convinced NBC to reverse its policy from requesting removal to partnering actively with YouTube in promoting its TV shows.¹⁶² Even more fascinating, *Saturday Night Live*, in December 2006, uploaded an uncensored version of "Special Treat in a Box," a skit that featured a word banned on network television.¹⁶³ In just one week, the clip received two million viewers on YouTube.¹⁶⁴ Since then, the clip has been viewed over nineteen million times.¹⁶⁵

CBS, too, has benefited greatly from its partnership with YouTube, but its general view of YouTube is different than NBC's.¹⁶⁶ In addition to thirty million viewers of CBS clips on YouTube, CBS's television programming has increased viewership as a result of the additional YouTube exposure.¹⁶⁷ With NBC's and CBS's success on YouTube, it is likely that other copyright owners will recognize the potential YouTube Effect.¹⁶⁸ However, it has been suggested that the content owners will only tolerate their copyright on YouTube provided they set the rules.¹⁶⁹ This appears to be the case with the Viacom suit and the possible creation of a YouTube rival engineered by media giants.

¹⁵⁸ Chan, *supra* note 19.

¹⁵⁹ *Id.*

¹⁶⁰ Volpe, *supra* note 15 ("The television series *Nobody's Watching* was discarded after airing just the pilot. However, the show found new life on YouTube. After over 400,000 people downloaded the video that generated numerous positive reviews, NBC decided to put the series back into development.").

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Jacques Steinberg, *Censored 'SNL' Sketch Jumps Bleepless Onto the Internet*, N.Y. TIMES, Dec. 21, 2006.

¹⁶⁴ *Id.*

¹⁶⁵ YouTube Most Viewed Videos, <http://youtube.com/browse?s=mp&t=a&c=0&l=> (last visited April 6, 2007).

¹⁶⁶ Chris Taylor, *Google's Copyright Fix*, BUSINESS MAGAZINE 2.0, Dec. 11, 2006, available at http://money.cnn.com/2006/12/08/magazines/business2/youtube_piracy.biz2/?postversion=2006120818. Taylor notes that the relationship between CBS and YouTube has increased CBS's television ratings. *Id.* As a result, "[i]t won't take long for other networks to embrace YouTube." *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See *id.*; see Volpe, *supra* note 15 ("For all of the potential copyright issues, the content owners, like television and cable networks and the recording industry, have recognized the potential for a mutually beneficial partnership on the Internet.").

¹⁶⁹ Vanessa Juarez, *YouTube Nation*, ENT. WKLY., Aug. 25, 2006, at 7 ("The networks will work with YouTube, as long as they decide what tramps around for free.").

2. Benefits to Society

Society may benefit because YouTube provides an alternate forum compared to traditional methods of educating and influencing the public.¹⁷⁰ Recently, unlikely sources such as the federal government and political candidates have recognized the value of YouTube by posting videos.¹⁷¹ Unlike expensive television commercials, YouTube provides a free venue for the government and politicians to air their messages to audiences traditionally difficult to reach.¹⁷²

In addition, YouTube's presence may encourage innovation.¹⁷³ With YouTube, creative people are able to find an audience while avoiding the necessity of being promoted by a major media giant.¹⁷⁴ One observer calls this phenomenon the "democratization of pop culture."¹⁷⁵ Now people have an outlet "to tell the story of our generation and to shape the landscape of the civil space."¹⁷⁶

D. Disadvantages

Accepting the YouTube model is not without disadvantages, some of them significant. The main problems of YouTube's business model *vis-à-vis* copyright infringement are that it focuses on partnerships with large media groups and accepting such a model increases the possibility of unintentionally reducing copyright protections.

First, YouTube focuses on preventing infringement of the major media companies' copyrighted materials as opposed to copyrights held by individuals.¹⁷⁷ Currently, YouTube is devoting much energy toward appeasing these media giants through potentially lucrative advertising revenue.¹⁷⁸ The fingerprinting software that will be available only to media giants is an example of YouTube's myopic views disfavoring independent copyright owners.¹⁷⁹ In addition, smaller copyright holders receive no revenue even if YouTube receives substantial money for the number of views.¹⁸⁰ Further still, they must go through the bureaucratic DMCA removal process while their material is infringed.¹⁸¹

¹⁷⁰ See Judy Keen, *Websites Win Candidates' Praise; Young People Pushed Them to Get Online*, USA TODAY, Oct. 17, 2006, at 3A (noting the recent phenomenon of politicians embracing sites frequented by younger generations to spread their message).

¹⁷¹ *Id.*; *US Takes War on Drugs to YouTube*, CHI. TRIB., Sept. 20, 2006, at 3. (noting that the White House recently posted its anti-drug videos on the site to broaden its exposure to younger audiences that were difficult to reach through conventional means of communication).

¹⁷² See Keen, *supra* note 170; see *US Takes War on Drugs to YouTube*, *supra* note 171.

¹⁷³ See About YouTube, <http://youtube.com/t/about> (last visited April 3, 2007). YouTube's website states this goal explicitly, "[a]s more people capture special moments on video, YouTube is empowering them to become the broadcasters of tomorrow." *Id.*

¹⁷⁴ See Patrick Goldstein, *The People's Republic of YouTube*, L.A. TIMES, Oct. 17, 2006, at 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11 (statement by Prof. Palfrey).

¹⁷⁷ Delaney, *YouTube Model*, *supra* note 28.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

Second, YouTube's existence may water down copyright protections.¹⁸² The copyright system was designed to offer incentives and rewards to artists who produce original works.¹⁸³ By receiving advertising revenue and not sharing it with copyright owners, YouTube may receive a financial benefit from the works of others and decrease a person's incentive to produce works in the future.¹⁸⁴

On the other hand, a copyright owner's overaggressive protection of copyright, called copyright misuse,¹⁸⁵ may have a chilling effect on innovation.¹⁸⁶ Stanford Law Professor Larry Lessig argues that this misuse has created a "permission culture" that stifles both artistic and technological creativity.¹⁸⁷ Similarly, author David Bollier notes, "the overexpansion of copyright laws can wreak havoc on all sorts of important values in American life."¹⁸⁸ The continuing lawsuits against other innovators from media giants have discouraged individuals from pursuing creative endeavors on the Internet where the law is unclear.¹⁸⁹

As discussed in this section, YouTube is not a perfect solution to copyright infringement. Nevertheless, YouTube is sufficiently different from past cases of massive Internet infringement and its inherent benefits demonstrate the need for a new standard. The next section proposes three courses of action to provide a balance between the needs of copyright owners with the need to continue Internet innovation.

III. PROPOSAL

This section proposes three courses of action to deal with the new legal issues that have developed in the wake of YouTube and sites like it. First, courts should adopt a different approach when adjudicating claims against YouTube and sites that adopt YouTube's model. YouTube is neither Napster nor Grokster redux. Asserting a *Grokster*-like case, founded on inducement, will not be easy because YouTube continually removes content in compliance with the DMCA.¹⁹⁰ It is important that both copyright owners and courts recognize that the YouTube model is distinct from past Internet models because its ability to harm copyright owners is significantly reduced.

¹⁸² See *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11 (statement by Prof. Liebowitz) ("[YouTube] shouldn't be allowed to usurp the rights of the copyright owners who have not voluntarily agreed to provide such rights, not when someone is making big bucks from the properties.").

¹⁸³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹⁸⁴ See *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11 (statement by Prof. Liebowitz).

¹⁸⁵ See Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L. & POLY 565, 565 (2006). Copyright misuse occurs "when the plaintiff has claimed a right in his work beyond the scope of copyright law and when such a claim is contrary to public policy." *Id.* A defendant accused of copyright infringement may claim copyright misuse as an affirmative defense. *Id.* at 568.

¹⁸⁶ See LESSIG, *FREE CULTURE*, *supra* note 27, at 185.

¹⁸⁷ See *id.* at 192.

¹⁸⁸ DAVID BOLLIER, *BRAND NAME BULLIES: THE QUEST TO OWN AND CONTROL CULTURE* 194 (John Wiley & Sons) (2005).

¹⁸⁹ See LESSIG, *FREE CULTURE*, *supra* note 27, at 193.

¹⁹⁰ *Does YouTube Make Google a Big Target for Copyright Suits?*, *supra* note 11.

The best test for courts to apply in such cases is *Sony*. Under this test, a device that has substantial non-infringing uses does not subject its creator to copyright infringement.¹⁹¹ Whether YouTube's inventory is substantially non-infringing is a question for the courts. The YouTube Effect and other benefits of YouTube call into question whether YouTube is harming Viacom or Tur. As discussed earlier, exposure via YouTube may lead to more viewers and increase interest. The benefits to society further bolster YouTube's position.

Second, Congress's amendment of the DMCA is needed to end the confusion. When the DMCA was passed, Congress did not contemplate video sharing sites like YouTube.¹⁹² As a result of this ambiguity, lawsuits against YouTube and similar sites will continue to proliferate. In response to the sites, courts have asserted their role in determining the intent of Congress.¹⁹³ Without a change by Congress, the confusion and the ensuing lawsuits may hinder the development of the Internet.¹⁹⁴

Third, media giants should adapt to the changing world of YouTube. If history is any indicator, future litigation against suspected copyright infringers will be very expensive.¹⁹⁵ To this day, many sites still skirt the law despite continued litigation against P2P companies.¹⁹⁶ Instead of stopping P2P infringement, litigation simply encouraged new sites to offer the same illegal content as Napster and Grokster after their respective demise.¹⁹⁷ Even after the protracted legal battles, there exists the risk that the infringer may not be able to compensate for the past infringement.

Nevertheless, YouTube should still cooperate with copyright owners to provide them with proper compensation even if it attains safe harbor status. Further, YouTube should redouble its effort to provide fingerprinting software to prevent infringing videos from continually appearing on YouTube. Continuing without the software only creates the appearance of illegality, an attribute that may hurt YouTube.¹⁹⁸

V. CONCLUSION

Gone are the Wild West days of the Internet, when companies like Napster and Grokster skirted the law. Today, the Internet has evolved significantly. Emerging companies like YouTube have sought to work within the confines of the DMCA. At the same time, YouTube continues to work with media giants to create mutually beneficial relationships. Further, YouTube is unique in that it provides benefits to copyright holders and society at large. These attributes are unique to YouTube and

¹⁹¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

¹⁹² Davis, *supra* note 74, at 11.

¹⁹³ See Lessig, *Copyright Chaos*, *supra* note 92.

¹⁹⁴ See *id.* ("The Internet will now face years of uncertainty before this fundamental question about the meaning of a decade-old legislative deal gets resolved.")

¹⁹⁵ See Coats, *supra* note 101, at 327 (noting that litigation against these companies has been both expensive and ineffective because new infringing sites simply replaced the old infringing sites once they no longer permitted copyright infringement).

¹⁹⁶ Correy E. Stephenson, *As Technology Continues to Advance, Tech-Related Lawsuits Continue to Proliferate*, LAWYERS WKLY USA, March 27, 2006.

¹⁹⁷ *Id.*

¹⁹⁸ Davis, *supra* note 74, at 11.

support its legitimacy. In the end, if copyright owners fail to recognize the place of YouTube, they run the risk that courts might.