

WHOSE TUBE? YOUTUBE'S RIGHTS, LIABILITIES, AND INCENTIVES UNDER

17 U.S.C. § 512

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I. INTRODUCTION

The Internet has revolutionized the way people communicate. Innovative websites allow the average person to add their knowledge to online repositories,¹ communicate with a mass audience around the world,² or distribute creative works, including video.³ All of these websites allow anyone with an Internet connection to add content; indeed, they could not operate as well if they did not "maximize user control over what information is received by individuals."⁴

Traditional secondary liability discourages this level of user control. If a member of the public uses a website for illegal or injurious activity, the website owners might be liable for assisting, even unknowingly.⁵ Congress, aware that the Internet provides a valuable exchange of information,⁶ has recognized that such liability could discourage innovation unless its boundaries are limited and defined.⁷ In some cases, Congress

¹ See, e.g., Wikipedia, <http://www.wikipedia.org/>.

² See, e.g., Twitter, <http://www.twitter.com/>; Facebook, <http://www.facebook.com/>.

³ See, e.g., YouTube, <http://www.youtube.com/>; Blip.tv, <http://www.blip.tv/>.

⁴ See 47 U.S.C. § 230(b)(3) (2006) (describing the policy of the United States to encourage such user control).

⁵ See, e.g., *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (strict liability for allowing the posting of defamation on one's bulletin board service); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010) cert. denied, 131 S. Ct. 647 (2010) (liability for offering a market web service when one should have known it would be used for counterfeit sales).

⁶ See 47 U.S.C. § 230(a) (list of findings).

⁷ S. REP. NO. 105-190, at 8 (1998), 1998 WL 239623.

chose to eliminate liability entirely.⁸ However, in the case of copyright infringement, Congress chose to balance the policy of Internet innovation with the needs of copyright holders to protect digital forms of their works, through the Digital Millennium Copyright Act (hereinafter "the DMCA").⁹ Thus, a service provider must take certain measures before receiving immunity for the infringement of its users.¹⁰

When YouTube, a video sharing website, was founded in 2005,¹¹ infringers quickly descended to distribute copyrighted material.¹² YouTube has since implemented the measures necessary to qualify for the DMCA safe harbor.¹³ However, some commentators now argue that YouTube's policies are open to abuse and fail to consider the needs of its users.¹⁴ These policies are in need of reexamination.

This paper analyzes the liability of YouTube for the copyright infringement of its users. Part II summarizes the

⁸ See 47 U.S.C. § 230(c)(1) (creates immunity from liability for the speech of others on an "interactive computer service").

⁹ S. REP. NO. 105-190, at 8.

¹⁰ 17 U.S.C. § 512 (2006).

¹¹ YouTube Frequently Asked Questions, <http://www.youtube.com/t/faq> (last visited 4/12/2011) [hereinafter *YouTube FAQ*].

¹² See Ken Fisher, *YouTube caps video lengths to reduce infringement*, ARS TECHNICA (March 29, 2006), <http://arstechnica.com/old/content/2006/03/6481.ars> (as of 2006, copyright infringement on YouTube was "significant").

¹³ *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010).

¹⁴ See, e.g., Cattleya M. Concepcion, *Beyond the Lens of Lenz: Looking to Protect Fair Use During the Safe Harbor Process Under the DMCA*, 18 GEO. MASON L. REV. 219 (2010); Wendy Seltzer, *NFL/DMCA*, WENDY'S BLOG (February 15, 2007, 5:57 PM), <http://wendy.seltzer.org/blog/dmca-nfl>.

relevant copyright law, including the principles of fair use and secondary liability, and the safe harbors against liability introduced by the DMCA. Part III looks at YouTube itself, its business model, and its policies regarding infringement. It also examines how both copyright holders and accused infringers have fared under YouTube's policies in and out of court. Part IV considers alternatives to YouTube's policies, both in legal and pragmatic terms; it concludes with a recommendation on how YouTube might improve itself, with little to no risk or cost, by accelerating its restoration of mistakenly removed videos and dismissing repeat notifications.

II. COPYRIGHT LAW

The laws of copyright protect most "original works of authorship," including video and audio content,¹⁵ by granting to the owner several exclusive rights. Most relevant to this paper are the rights to reproduce and distribute the work, and to make "derivative works";¹⁶ A "derivative work" is any new work based on the pre-existing work, and can include content from more than one source.¹⁷

¹⁵ 17 U.S.C. § 102.

¹⁶ *Id.* § 106.

¹⁷ *Id.* § 101.

A party infringes the copyright by violating one of the exclusive rights of the copyright owner.¹⁸ An infringer may be subject to civil damages, injunctions, and criminal penalties.¹⁹

Three features of copyright law are especially relevant to the infringing status of videos on YouTube.

II.A. The Fair Use Principle

Recognizing that all works are to some extent based on others, the courts created an exception to copyright's protections where it overreached to prevent, rather than advance, such authorship.²⁰ Congress eventually codified this principle into the "fair use" limitation,²¹ but left the courts considerable leeway in interpreting its borders.²²

Courts must consider four non-exclusive factors when examining whether a use is "fair": purpose of the use, nature of the original work, amount and substantiality of the copied portion, and effect on the market of the original work.²³

¹⁸ *Id.* § 501.

¹⁹ *See id.* §§ 502-506.

²⁰ The exception first developed in British common law as "fair abridgement"; see *Gyles v Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.). Justice Joseph Story was instrumental in its further development in America; see, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841); *Emerson v. Davies*, 8 F. Cas. 615, 622 (C.C.D. Mass. 1845).

²¹ 17 U.S.C. § 107.

²² S. REP. NO. 94-473, at 76 (1975), 1975 WL 370213 ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

²³ 17 U.S.C. § 107.

First, the court should examine "the purpose and character of the use".²⁴ A commercial, as opposed to nonprofit, purpose points away from fair use,²⁵ and the work may be considered commercial even if profit was not the defendant's sole motive.²⁶ By contrast, an educational purpose weighs for fair use.²⁷ Neither purpose is dispositive.²⁸

Courts will also consider the transformative nature of the use; that is, the level to which the defendant's use "adds something new".²⁹ The "good faith and fair dealing" of the defendant also affects the character of the use; a particularly inequitable use will weigh heavily in this factor.³⁰ "Good taste" is not, however, a consideration.³¹

The second factor is "the nature of the copyrighted work".³² Factual works, for instance, are more open to fair use than fictional, due to the importance of disseminating the facts within, provided that use of the surrounding expression is still limited.³³ Conversely, a highly expressive work warrants more

²⁴ *Id.*

²⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

²⁶ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

²⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

²⁸ *Id.*

²⁹ *Id.* at 579.

³⁰ *Harper & Row*, 471 U.S. at 562 (*quoting* *Time Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968), internal quotes omitted).

³¹ *Campbell*, 510 U.S. at 582.

³² 17 U.S.C. § 107.

³³ *Harper & Row*, 471 U.S. at 563.

protection.³⁴ Meanwhile, unpublished works receive more protection than published, because of "the author's right to control the first public appearance of his expression".³⁵

Third, the courts shall consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole".³⁶ "Amount" is considered in terms of percentage of the original,³⁷ while "substantiality" refers to "the most important parts of the work".³⁸ The courts will not treat as mitigating that the copied portions make a small portion of the *defendant's* work;³⁹ however, a choice to emphasize the copied portions may weigh against the defendant.⁴⁰

Finally, the court examines "the effect of the use upon the potential market for or value of the copyrighted work."⁴¹ Courts consider this "undoubtedly the single most important element of fair use,"⁴² but it "must almost always be judged in conjunction with the other three criteria."⁴³ Hard proof of loss is not necessary; once the plaintiff shows "with reasonable probability" that the infringement resulted in lost revenue, the burden moves

³⁴ *Campbell*, 510 U.S. at 586.

³⁵ *Harper & Row*, 471 U.S. at 564.

³⁶ 17 U.S.C. § 107.

³⁷ *Id.*

³⁸ *Folsom*, 9 F.Cas. at 345.

³⁹ *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

⁴⁰ *Harper & Row*, 471 U.S. at 566.

⁴¹ 17 U.S.C. § 107.

⁴² *Harper & Row*, 471 U.S. at 566.

to the defendant to disprove the connection.⁴⁴ The plaintiff may alternatively show "by a preponderance of the evidence that some meaningful likelihood of future harm exists."⁴⁵

This last factor in essence asks whether the copy can serve as a substitute for the original in the marketplace; that is, whether it will "supersede the use of the original work".⁴⁶ Therefore, courts will not consider loss of revenue if it results merely from the defendant's critique of the plaintiff's work.⁴⁷

There are also two long-recognized categories of fair use. The first is general criticism and comment: "no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."⁴⁸ Criticism and analysis is not always fair use, however; for instance, in the case of *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court found that, in a "scoop" quoting key elements of unpublished presidential memoirs, all four factors still pointed against fair use.⁴⁹

⁴³ S. REP. NO. 94-473, at 79.

⁴⁴ *Harper & Row*, 471 U.S. at 567.

⁴⁵ *Sony*, 464 U.S. at 451 (emphasis in original).

⁴⁶ *Folsom*, 9 F. Cas. at 345.

⁴⁷ *Campbell*, 510 U.S. at 591-92.

⁴⁸ *Folsom*, 9 F. Cas. at 344.

⁴⁹ 471 U.S. 539.

Parody is a more specific form of criticism, and it may also be a fair use,⁵⁰ although again it is not instantly so.⁵¹ To begin with, it is important to distinguish between "parody" and "satire" in legal terms. Parody borrows from the original work to comment on that work or others by the author, while satire has nothing to say about the copied work.⁵² Thus, "[p]arody needs to mimic an original to make its point . . . whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."⁵³

If a work is a parody, some of the fair use factors are altered in favor of the defendant. Expressiveness of the original is no longer a consideration in the second factor, "since parodies almost invariably copy publicly known, expressive works."⁵⁴ Also, parody by necessity must take enough that the public will recognize the source material, giving it some leeway on the question of the amount taken.⁵⁵ In addition, the fourth factor generally points to fair use as well, because the original and the parody "usually serve different market functions."⁵⁶

⁵⁰ *Campbell*, 510 U.S. at 579.

⁵¹ *Id.* at 581.

⁵² *Id.* at 580.

⁵³ *Id.* at 580-81; see also *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1404 (9th Cir. 1997) (finding that a derivative work of Dr. Seuss that discussed the O.J. Simpson trial was satire, not parody).

⁵⁴ *Campbell*, 510 U.S. at 586.

⁵⁵ *Id.* at 588. A verbatim copy, however, remains unacceptable; there must be some transformation. *Id.* at 589.

⁵⁶ *Id.* at 591.

Non-commercial use does not, by itself, mean the use is fair, but it does weigh on two factors. First, commercial purpose is an explicit part of the first factor.⁵⁷ Second, courts will more easily presume harm to the plaintiff's market under the fourth factor if the use is commercial.⁵⁸

Congress gains its power to enforce copyrights from the Constitution, which also provides a purpose to any such enforcement: "To promote the Progress of Science and useful Arts . . ."⁵⁹ The Supreme Court has declared transformative works in particular to meet "the goal of copyright, to promote science and the arts," and refers to fair use as an important protection of such use,⁶⁰ implying that the copyright system would be unconstitutional without fair use protections.

⁵⁷ 17 U.S.C. § 107.

⁵⁸ *Sony*, 464 U.S. at 451. The Court will only make a firm presumption, however, in the context of duplications, as opposed to derivative works. *Campbell*, 510 U.S. at 591.

⁵⁹ U.S. CONST. art. I, § 8, cl. 8.

⁶⁰ *Campbell*, 510 U.S. at 579.

II.B. Secondary Liability

Given the ease by which copyrighted files may be transferred over the Internet, individual infringers are often too numerous to pursue and too small-time to have resources worth pursuing. However, theories of secondary liability may allow a copyright holder to sue a company with services that allow or encourage the infringement. If successful, this strategy cuts off all infringement that uses the company's system, and reaches a pocket deep enough that the holder may seek fair compensation.

When a party gains a financial benefit from an act of direct infringement, and has the right to stop the infringement but fails to do so, the party is vicariously liable.⁶¹ An expansion of the tort principle of respondeat superior,⁶² vicarious liability requires neither intent to assist in infringement nor knowledge of the infringement.⁶³ What matters is the "right and ability to supervise."⁶⁴ The courts will therefore distinguish between "landlord-tenant" cases, where the defendant has minimal control of the infringer, and "dance hall" cases, where the

⁶¹ Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

⁶² Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996).

⁶³ Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963).

⁶⁴ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001).

defendant maintains a right to assert direct control, especially through removal of the offending material or party.⁶⁵

The plaintiff may then demonstrate financial interest simply by showing that the infringement serves as a "draw" for the defendant's business.⁶⁶ Of course, direct profit from the infringement also fulfills this element.⁶⁷

Another theory is contributory liability, which occurs when a party intentionally induces or encourages acts of direct infringement.⁶⁸ Courts have subdivided this theory into "inducement" and "material contribution."⁶⁹ Under the inducement rule of *Metro-Goldwyn-Mayer Studios v. Grokster*, the plaintiff may show contribution through evidence of "clear expression or other affirmative steps taken to foster infringement".⁷⁰

Alternatively, when a product or service of the defendant "materially contributes" to specific cases of direct infringement,⁷¹ under *A&M Records v. Napster* the plaintiff may also show that the company had knowledge of the specific

⁶⁵ See, e.g., *Shapiro*, 316 F.2d at 307 (defendant store had the contractual right to eject concessionaires for improper behavior); *Fonovisa*, 76 F.3d at 262 (defendant fairground had the right to eject sales booths for any reason).

⁶⁶ *Fonovisa*, 76 F.3d at 263.

⁶⁷ See *Shapiro*, 316 F.2d at 306 (defendant received a share of all sales, including those from bootlegs).

⁶⁸ *Grokster*, 545 U.S. at 930.

⁶⁹ *Columbia Pictures Indus., Inc. v. Fung*, 96 U.S.P.Q.2d 1620, 1628 (C.D. Cal. 2009).

⁷⁰ 545 U.S. at 937.

⁷¹ *Napster*, 239 F.3d at 1022.

infringement and did nothing to stop it.⁷² And by the rule of *Sony v. Universal City Studios*, that knowledge may be inferred if the product or service has no “commercially significant noninfringing uses.”⁷³

Regardless of the theory of secondary liability, the plaintiff must also demonstrate direct infringement by a user of the service or product.⁷⁴

II.C. DMCA § 512 Safe Harbors

In 1998, Congress passed the Digital Millennium Copyright Act,⁷⁵ which includes safe harbors against secondary infringement liability in some online contexts.⁷⁶ Relevant to this paper is the harbor of 17 U.S.C. § 512(c), for “[i]nformation residing on systems or networks at direction of users.”⁷⁷

A provider of digital storage space faces no liability for the infringement of its users if it meets certain requirements. First, it must have no knowledge of the specific infringement before being notified.⁷⁸ A provider may also fail this element through “willful ignorance” by ignoring obvious “red flags” that

⁷² *Id.* at 1021.

⁷³ 464 U.S. at 442.

⁷⁴ *Grokster*, 545 U.S. at 940 (2005).

⁷⁵ *Doe v. Geller*, 533 F. Supp. 2d 996, 1001 (N.D. Cal. 2008).

⁷⁶ 17 U.S.C. § 512.

⁷⁷ *Id.* § 512(c).

⁷⁸ *Id.* § 512(c)(1)(A).

the infringement has occurred.⁷⁹ Second, if it has the “right and ability to control” user activity, it cannot get direct financial benefit from the infringing content.⁸⁰ Third, once it receives proper notice of the infringement, it must act “expeditiously” to remove or disable access to the infringing content.⁸¹ Fourth, it must leave a channel open to receive such notice, through contact information provided on the provider’s website.⁸² Fifth, it must implement a policy that allows and obligates it to remove repeat infringers from the service.⁸³ Sixth, it must allow use of “standard technical measures” developed by the industry to identify copyrighted works.⁸⁴

A provider may safely ignore notices that do not meet certain requirements of their own.⁸⁵ Proper notice can only come from the injured copyright holder or an agent thereof.⁸⁶ It must provide contact information for that holder or agent.⁸⁷ It must identify both the infringed and infringing material, with the

⁷⁹ *Id.* § 512(c) (1) (A) (ii); *see also Fung*, 96 U.S.P.Q.2d at 1637 (using both phrases in connection with the similar § 512(d) safe harbor).

⁸⁰ 17 U.S.C. § 512(c) (1) (B). Unlike the vicarious liability rule, this requirement has a knowledge element; it does not fail if the provider is unaware of specific infringement. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010).

⁸¹ 17 U.S.C. § 512(c) (1) (C).

⁸² *Id.* § 512(c) (2).

⁸³ *Id.* § 512(i) (1) (A).

⁸⁴ *Id.* § 512(i) (1) (B).

⁸⁵ 17 U.S.C. § 512(c) (3) (B).

⁸⁶ *Id.* § 512(c) (3) (A) (i).

⁸⁷ *Id.* § 512(c) (3) (A) (iv).

digital location of the latter.⁸⁸ And it must include a statement that the information within is true, and that the agent has a good faith belief that the activity is infringing and unauthorized.⁸⁹

Should the provider receive proper notice, and remove the content in good faith belief of that notice, it must then attempt to notify the user of the removal.⁹⁰ The user may respond with a counter-notice, identifying the removed content, providing contact information, and signed under penalty of perjury that the user in good faith believes the content was removed due to "mistake or misidentification".⁹¹ Upon receipt of this counter-notice, the provider must forward it to the copyright holder, and then restore the content between 10 and 14 business days later.⁹² The copyright holder may prevent this restoration by filing suit against the user and notifying the provider of the suit.⁹³

If a copyright holder "knowingly materially misrepresents" content as infringing, or if the user "knowingly materially misrepresents" the content as removed by mistake, the misrepresenting party is liable to the other for attorney's fees

⁸⁸ *Id.* § 512(c) (3) (A) (ii)-(iii).

⁸⁹ *Id.* § 512(c) (3) (A) (v)-(vi).

⁹⁰ *Id.* § 512(g) (2) (A).

⁹¹ *Id.* § 512(g) (3).

⁹² *Id.* § 512(g) (2) (B)-(C).

⁹³ *Id.* § 512(g) (2) (C).

and other possible injury.⁹⁴ The misrepresentation is “material” if it affects the service provider’s response to the request.⁹⁵ Such misrepresentations can include arguments that the material is or is not protected by copyright,⁹⁶ or that the infringement does or does not fall under some exception or defense.⁹⁷ As for intent, to have acted “knowingly” the complainant must have had “no substantial doubt had it been acting in good faith” that no infringement had occurred.⁹⁸ It is insufficient that a complainant failed to analyze its likelihood of success in the event of an infringement suit.⁹⁹

The provider need not actively monitor its users to be granted safe harbor.¹⁰⁰ However, as noted above, it must grant other services the right and ability to search its content with “standard technical measures.”¹⁰¹

Importantly, the safe harbors of § 512 do not eliminate other defenses against secondary liability, such as *Sony* or fair use.¹⁰² If the service has allowed no actual infringement, or if

⁹⁴ *Id.* § 512(f).

⁹⁵ *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004).

⁹⁶ *See id.* at 1203 (plaintiff failed to identify any copyrighted content in the complaint).

⁹⁷ *See Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008) (plaintiff sent notice regarding a blatant case of fair use).

⁹⁸ *Diebold*, 337 F. Supp. 2d at 1204.

⁹⁹ *Id.*

¹⁰⁰ 17 U.S.C. § 512(m)(1).

¹⁰¹ *Id.* § 512(i).

¹⁰² *Id.* § 512(l).

it has no legal liability for the infringement, it can safely ignore § 512 entirely.

III. YOUTUBE

III.A. Background and History

YouTube is a video-sharing website, with hundreds of millions of users and over 24 hours of video uploaded every minute.¹⁰³ It officially launched in December 2005, and within a year Google purchased it and made it into a subsidiary.¹⁰⁴

YouTube makes its services available for free to anyone on the Internet.¹⁰⁵ Anyone may sign up for an account and upload video files to YouTube's servers; these videos may then be viewed by anyone in the world.¹⁰⁶ Through YouTube's history, users have used its services for creative activity, political and social statements, and personal use.¹⁰⁷ YouTube does not actively monitor the content of the videos¹⁰⁸ and, due to the sheer volume of content, cannot reasonably be expected to do so. This makes YouTube a potential hotbed for copyright infringement, in the form of reproduction and distribution, through the uploading of copyrighted audio and visual works.¹⁰⁹

¹⁰³ *YouTube FAQ*, *supra* note 11; *Viacom*, 718 F. Supp. 2d at 518.

¹⁰⁴ YouTube Timeline, http://www.youtube.com/t/press_timeline (last visited 4/12/2011).

¹⁰⁵ *Geller*, 533 F. Supp. 2d at 1001.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

YouTube's income comes mostly through advertising, both in traditional banner or link form, and in the form of businesses uploading their own promotional videos.¹¹⁰ YouTube therefore profits off the number of viewers it receives.

III.B. YouTube's Anti-Infringement Policies

The YouTube Terms of Service include, in slightly paraphrased form, the notice and counter-notice procedures of § 512(c)(3) and (g)(3), complete with contact information for a designated copyright agent as required by § 512(c)(2).¹¹¹ YouTube also provides online forms for submitting both notice and counter-notice.¹¹²

YouTube responds to notifications promptly, able to process tens of thousands of requests in a single business day.¹¹³ In contrast, despite the requirement that counter-notices be answered within 14 business days,¹¹⁴ restoration of videos has been known to take six weeks or more.¹¹⁵ YouTube admits that, even if the original complainant does not file suit, restoration shall occur "at YouTube's sole discretion."¹¹⁶

¹¹⁰ *YouTube FAQ*, *supra* note 11.

¹¹¹ YouTube Terms of Service § 8, <http://www.youtube.com/t/terms> (last visited 4/12/2011) [hereinafter *Terms of Service*].

¹¹² As of April 12, 2011, the notification form is accessed at http://www.youtube.com/t/dmca_policy, and the counter-notice form at <http://www.google.com/support/youtube/bin/answer.py?answer=59826>.

¹¹³ *Viacom*, 718 F. Supp. 2d at 524.

¹¹⁴ 17 U.S.C. § 512(g)(2)(C).

¹¹⁵ *Lenz*, 572 F. Supp. 2d at 1152.

¹¹⁶ *Terms of Service*, *supra* note 111, § 8.B.

YouTube also implements a filtering system called "Content ID."¹¹⁷ A copyright owner may contribute reference video or audio files, which YouTube's system will automatically compare to videos as they are uploaded.¹¹⁸ Content ID is not foolproof; sufficient filtering will prevent it from recognizing content.¹¹⁹ However, mere differences in video or audio quality do not generally confuse Content ID,¹²⁰ and it has proven remarkably accurate at finding even small chunks of content.¹²¹ The holder has the option of requesting automatic removal of matching videos, contacting the uploading party with a request for license fees, or merely tracking all use of the content in question.¹²²

YouTube has also taken other measures to counter infringement. For instance, in 2006, it limited unpaid accounts to uploads of ten minutes or less, to prevent the upload of

¹¹⁷ YouTube Audio ID and Video ID, <http://www.youtube.com/t/contentid> (last visited 4/12/2011).

¹¹⁸ *YouTube Audio ID and Video ID*, *supra* note 117.

¹¹⁹ Scott Smitelli, *Fun with YouTube's Audio Content ID System*, SMITELLI.COM (June 26, 2009, 10:41 PM), <http://www.smitelli.com/index.php?page=blog&p=58>.

¹²⁰ See *YouTube Content ID* (Sept. 28, 2010) <http://www.youtube.com/watch?v=9g2U12SsRns>.

¹²¹ See Fred von Lohmann, *YouTube's Content ID (C)ensorship Problem Illustrated*, ELECTRONIC FRONTIER FOUNDATION (March 2, 2010), <http://www.eff.org/deeplinks/2010/03/youtubes-content-id-c-ensorship-problem> (Content ID detected brief segments of musical content, none more than thirty seconds in length, played during a 45-minute recorded lecture).

¹²² YouTube Content Identification Signup, http://www.youtube.com/content_id_signup (last visited 4/12/2011, YouTube login required).

entire TV episodes or movies.¹²³ And YouTube's Terms of Service forbid the uploading of copyrighted material without permission of the owner or other legal right.¹²⁴

After three notifications ("strikes") against a single user, the user's entire account is banned.¹²⁵ Multiple notifications in a two-hour period or less officially only count as one strike, as do multiple infringing videos named in one notification.¹²⁶ Also, videos removed automatically by Content ID do not count at all,¹²⁷ nor do videos later restored due to counter-notification.¹²⁸

III.C. YouTube's Current Liability

Despite its policy, YouTube was sued repeatedly for secondary infringement in the late 00s.¹²⁹ The courts vindicated it, however, in the case of *Viacom v. YouTube*, finding that YouTube complied with all requirements for § 512 safe harbor status.¹³⁰ The *Viacom* court recognized that § 512(c)(1)(A)'s

¹²³ Fisher, *supra* note 12. In response to the relative success of Content ID in fighting infringement, YouTube later raised the limit to fifteen minutes. *YouTube FAQ*, *supra* note 11.

¹²⁴ *Terms of Service*, *supra* note 111, § 6.D.

¹²⁵ *Viacom*, 718 F. Supp. 2d at 527.

¹²⁶ *Id.* at 527-28. There is, however, anecdotal evidence suggesting that a single notification naming the majority of a user's content will also result in a ban. See DaizenshuuEX Podcast Episode 187, DAIZENSHUUEX (Aug. 16, 2009), http://www.daizex.com/general/podcast/index_0101-0200.shtml [hereinafter *DaiEX Podcast*].

¹²⁷ *Viacom*, 718 F. Supp. 2d at 527-28.

¹²⁸ See Seltzer, *supra* note 14 (March 6, 2007, 6:37 PM) (YouTube's notice of video restoration).

¹²⁹ See, e.g., *Tur v. YouTube, Inc.*, 562 F.3d 1212 (9th Cir. 2009); *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp. 2d 159 (S.D.N.Y. 2009); *Viacom*, 718 F. Supp. 2d 514.

¹³⁰ *Viacom*, 718 F. Supp. 2d at 529.

requirement of lack of actual knowledge was not violated by “[m]ere knowledge of prevalence of [infringing] activity in general”;¹³¹ rather, YouTube must have notice or a “red flag” of a *specific* infringement and fail to react.¹³² It also ruled that § 512(c)(1)(B)’s requirement of no financial benefit, unlike the requirement in vicarious liability, was contingent on YouTube’s actual knowledge of the infringement, and therefore YouTube’s advertising revenue was irrelevant.¹³³

Additionally, the court found that YouTube’s display of the videos did not place its service outside the category of “storage” for the purpose of § 512(c).¹³⁴ It found no requirement that a notice for one infringing copy of a work require that YouTube locate and remove all other copies itself.¹³⁵ And it found that § 512(i)(1)(A) allowed leeway as to what defined a “repeat offender,” and that YouTube’s “three strikes” policy did not interpret the term unreasonably.¹³⁶

¹³¹ *Id.* at 523.

¹³² *Id.* at 525.

¹³³ *Id.* at 527.

¹³⁴ *Id.* at 526.

¹³⁵ *Id.* at 528.

¹³⁶ *Id.*

Viacom has appealed the ruling.¹³⁷ Nonetheless, for now YouTube is legally impregnable against secondary copyright liability due to the protections of 17 U.S.C. § 512(c).

III.D. Takedowns Under the Policy

Unfortunately, YouTube's policies may push too far the other direction; they have repeatedly resulted in the temporary or permanent removal of arguably non-infringing media. As commentators have noted, a service provider like YouTube has more incentive to side with the complainant even when the complainant acts in bad faith, leaving many users to fend for themselves.¹³⁸ This can provide these users no recourse but to go elsewhere for sharing services. Some examples follow.

III.D.i. Team FourStar

Team FourStar (hereinafter TFS), a team of amateur parody artists, has created a series of videos called "Dragon Ball Z Abridged."¹³⁹ Each video uses video content from multiple episodes of "Dragon Ball Z", a lengthy Japanese animated series, and condenses it into a ten to twelve minute comical summary.¹⁴⁰ TFS does not, for the most part, use copyrighted audio, instead dubbing in new voices to exaggerate or distort the characters'

¹³⁷ See Opening Brief for Plaintiff-Appellants, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 10-3270 (2d Cir. Dec. 3, 2010), available at <http://www.scribd.com/doc/44619889/FINAL-Viacom-Brief>.

¹³⁸ See, e.g., *Concepcion*, *supra* note 14, at 240.

¹³⁹ See *TeamFourStar.com*, <http://www.teamfourstar.com/>.

¹⁴⁰ See *id.*

personalities and poke fun at elements of the story.¹⁴¹ TFS begins every video with a text and voice disclaimer that claims itself a “non-profit, fan-based parody” and gives credit to all copyright holders in Dragon Ball Z, encouraging the audience to “support the official release.”¹⁴²

In August 2009, Toei Animation, the copyright holder in the Dragon Ball Z, sent multiple § 512(c)(3) notices regarding TFS’s videos as posted on YouTube.¹⁴³ YouTube promptly took down the videos in question, then suspended TFS’s account due to the multiple “violations”; TFS did not have the time or opportunity to respond with a counter-notification before the suspension occurred, due to the rapid nature of the complaints.¹⁴⁴

In response, TFS opened a new user channel on YouTube and began re-uploading the videos.¹⁴⁵ YouTube eventually restored TFS’s original channel in January 2010,¹⁴⁶ and TFS now also houses

¹⁴¹ See *id.*

¹⁴² See, e.g., *Episode 1: The Return of Radditz! ... Wait. . .* (Team FourStar 2008), available at <http://blip.tv/file/3050822> (last visited April 12, 2011). An in-depth analysis into the actual fair use status of the work is beyond the scope of this paper. However, as noted earlier in this paper, parodies receive considerable leeway in such analyses, see *Campbell*, 510 U.S. 569, and nonprofit qualities also weigh toward a fair use finding, see 17 U.S.C. § 107.

¹⁴³ *DaiEX Podcast*, *supra* note 126 (interview with Scott Frerichs, a.k.a. “KaiserNeko”, of Team FourStar).

¹⁴⁴ *Id.*

¹⁴⁵ *Our New Account* (Aug. 15, 2009), <http://www.youtube.com/watch?v=XZjfLLbekXM>.

¹⁴⁶ Team Four Star, THATGUYWITHTHEGLASSES WIKI, http://www.thatguywiththeglasses.wikia.com/wiki/Team_Four_Star (last visited 4/12/2011). It is unclear why YouTube took five months instead of two weeks to respond to TFS’s counter-notice.

its videos on their own website.¹⁴⁷ YouTube will, on occasion, still temporarily block access to individual videos.¹⁴⁸

III.D.ii. Charles Sonnenburg

Charles Sonnenburg writes critical reviews of science fiction TV shows under the titles "Opinionated (Series Name) Episode Guide". He has written text reviews since 1999,¹⁴⁹ but in January 2008, he first uploaded a review in video form to YouTube.¹⁵⁰ Most of his videos use clips and still frames from the episode being reviewed, in some places with the original audio, but usually with Sonnenburg dubbing his own voice with commentary on the scene in question.¹⁵¹ The average video lasts between nine and twelve minutes long, although some reviews extend over multiple videos.¹⁵² Each video concludes with recognition of the show's copyright holder.¹⁵³

The reviews focused on the various Star Trek series at first, but in late 2009, Sonnenburg reviewed the British comedy "Red

¹⁴⁷ TeamFourStar.com, <http://www.teamfourstar.com/>.

¹⁴⁸ As of this writing, on April 12, 2011, Dragon Ball Z Abridged Episode 1 is unavailable through TFS's YouTube channel on grounds of infringement. See <http://www.youtube.com/user/TeamFourStar/>.

¹⁴⁹ See SF Debris, <http://www.sfdebris.com/>.

¹⁵⁰ The review was of the Star Trek: Voyager episode "Emanations" and can still be found at <http://www.youtube.com/watch?v=NBr6JN3WnOE> as of April 12, 2011.

¹⁵¹ See sfdebris's Channel, YouTube, <http://www.youtube.com/user/sfdebris/> (last visited 4/12/2011).

¹⁵² See *id.*

¹⁵³ See *id.*

Dwarf" start to finish.¹⁵⁴ Unlike his previous videos, Sonnenburg's reviews of Red Dwarf moved through the series methodically, in episode order, and took time at the end of each season's worth to comment on how the characters and plot had developed over the year.¹⁵⁵ The Opinionated Red Dwarf Episode Guide made for his most thorough and, arguably, most professional analysis of a work to date.

The details of what happened next are unclear, but it appears that in early 2010, BBC, the copyright holders for the series, began sending notices for the various Red Dwarf video reviews.¹⁵⁶ Unwilling to risk suspension from YouTube, and uncertain of the viability of a fair use claim, Sonnenburg declined to counter-notify.¹⁵⁷ Instead, he removed the entire

¹⁵⁴ The last review was posted on November 4, 2009. SFDebris.com's Red Dwarf, <http://sfdebris.com/sff/reddwarf.asp> (last visited 4/12/2011).

¹⁵⁵ See, e.g., *Red Dwarf Series I Review (Part 2 of 2)* (SF Debris 2009), <http://sfdebris.blip.tv/file/4403232/> (last visited 4/12/2011).

¹⁵⁶ sfdebris's Profile, YouTube, <http://www.youtube.com/user/sfdebris/> (last visited 4/12/2011).

¹⁵⁷ Again, a full analysis of Sonnenburg's fair use status is beyond the scope of this paper. However, *Warner Brothers Entertainment Inc. v. RDR Books* appears comparable. 575 F. Supp. 2d 513 (S.D.N.Y. 2008). In *RDR Books*, Steven Vander Ark created an amateur website, the Harry Potter Lexicon, that compiled information on the Harry Potter series of children's books, including many direct quotes from copyrighted content. *Id.* at 520. RDR Books then made an agreement with Vander Ark to sell the contents of the Lexicon in book form. *Id.* at 521-22. J.K. Rowling and other rights-holders in Harry Potter responded with an infringement suit; the court, noting that the Lexicon took "a troubling amount of direct quotation or close paraphrasing of Rowling's original language," *id.* at 527, found against fair use despite the reference value, *id.* at 551. However, although aware that the website contained near-identical content and purpose, the court only enjoined publication of the book version of the Lexicon, *id.* at 554, and the website remains intact at www.hp-lexicon.org. This implies that the key factor was the intent to publish for profit, present for the book but not the website. See *id.* at 545. Sonnenburg,

Opinionated Red Dwarf Episode Guide from YouTube and moved it to Blip.tv, another video sharing site.¹⁵⁸

"After the incident with the BBC," Sonnenburg has expressed reluctance to expand outside Star Trek again, at least on YouTube.¹⁵⁹ As of April 12, 2011, although his Blip.tv account contains reviews of several other series and films, no review of any non-Star Trek content appears in the sfdebris YouTube channel.¹⁶⁰ Also, Sonnenburg recently created his first amateur documentary, describing how several early Doctor Who episodes went missing.¹⁶¹ However, likely because Doctor Who is also a BBC production, Sonnenburg has not uploaded this documentary to YouTube, denying the service a valuable work.¹⁶²

III.D.iii. Wendy Seltzer

At the other end of the scale is Wendy Seltzer, a fellow at multiple intellectual property research centers, including the Berkman Center at Harvard University.¹⁶³ In February 2007, as a

who does not sell his video reviews, would appear closer to the website than the book.

¹⁵⁸ sfdebris's Profile, *supra* note 156.

¹⁵⁹ *Id.*

¹⁶⁰ Compare <http://www.youtube.com/user/sfdebris/> with <http://sfdebris.blip.tv/> (last visited 4/12/2011).

¹⁶¹ *Lost In Time: Wiped, Junked, but Not Forgotten* (SF Debris 2011), available at <http://sfdebris.blip.tv/file/4857583/> (last visited 4/12/2011).

¹⁶² In the month since this paper was written, a notification from CBS regarding one of his Star Trek reviews caused Sonnenburg to remove the remainder of his reviews and retreat purely to Blip.tv. Important Announcement (May 12), <http://www.youtube.com/watch?v=Hg8KOFVLMao> (last visited 5/20/2011).

¹⁶³ Wendy Seltzer's Berkman Center Biography, <http://cyber.law.harvard.edu/people/wseltzer> (last visited 4/12/2011).

demonstration for her copyright students, Seltzer posted thirty-five seconds of Super Bowl XLI on YouTube.¹⁶⁴ The first ten seconds displayed the NFL copyright warning, which she believed overstated the NFL's actual rights under U.S. law, and no game play appeared in the video.¹⁶⁵

Five days later, the NFL sent a takedown notification to YouTube for several Super Bowl clips on YouTube, including Seltzer's.¹⁶⁶ Seltzer responded with a § 512(g) counter-notification, claiming fair use for educational purposes, and after the NFL declined to pursue a suit within the required window, YouTube restored her video.¹⁶⁷

The NFL then sent a second notification, this time naming Seltzer's video exclusively, and YouTube obligingly removed it again.¹⁶⁸ After Seltzer's second counter-notification, an NFL representative defended the duplicate notifications, arguing that "A notice under 512(c) (3) (A) (v) only requires a good faith belief that the use of the material 'is not authorized by the copyright owner, its agent, or the law.' . . . We are entitled to disagree, in good faith, with her asserted defense, absent a court

¹⁶⁴ Seltzer, *supra* note 14 (Feb. 8, 2007, 10:04 AM).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (Feb. 13, 2007, 8:55 PM).

¹⁶⁷ *Id.* (March 6, 2007, 6:37 PM).

¹⁶⁸ *Id.* (March 18, 2007, 10:38 AM).

decision.”¹⁶⁹ Seltzer, in response, argued that the first counter-notification put the NFL on notice of her defense, and “I think their fair use analysis is wrong as a matter of law, and therefore it was ‘knowingly materially misrepresenting’ to claim that the clip infringed”¹⁷⁰

Online Policy Group v. Diebold, where the court saw failure to file suit after a counter-notification as evidence of misrepresentation, would support Seltzer in a similar suit, given the NFL’s similar refusal to sue.¹⁷¹ However, Seltzer did not file suit for misrepresentation, and the NFL in turn declined to file a third notification.¹⁷² The first court consideration of misrepresentation on YouTube would come with another video.

III.D.iv. Stephanie Lenz

Also in February 2007, Stephanie Lenz recorded a thirty-second video of her child spontaneously dancing to Prince’s “Let’s Go Crazy”.¹⁷³ The song was audible in the video, in low

¹⁶⁹ Comment by Brian McCarthy, to Peter Lattman, *Law Professor Wendy Seltzer Takes on the NFL*, WALL STREET JOURNAL LAW BLOG, March 21, 2007, <http://blogs.wsj.com/law/2007/03/21/law-professor-wendy-seltzer-takes-on-the-nfl/tab/comments/>.

¹⁷⁰ Seltzer, *supra* note 14 (April 5, 2007, 8:24 AM).

¹⁷¹ 337 F. Supp. 2d at 1204-05.

¹⁷² The video has been restored to YouTube and can be viewed at <http://www.youtube.com/watch?v=a4uC2H10uIo> as of April 12, 2011.

¹⁷³ *Lenz*, 572 F. Supp. 2d at 1152.

quality, for approximately twenty seconds.¹⁷⁴ Lenz uploaded the video to YouTube to share with family and friends.¹⁷⁵

In response, Universal Music Corp., the owner of copyright in the song, sent a takedown notification to YouTube.¹⁷⁶ Lenz consulted with a lawyer and sent a counter-notification.¹⁷⁷ When YouTube failed to restore the video for six weeks,¹⁷⁸ she also filed a suit against Universal for § 512(f) misrepresentations.¹⁷⁹

Rejecting Universal's motion to dismiss, the court noted that the DMCA required all notifications to include "a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."¹⁸⁰ Therefore, because fair use is lawful use, the court found a notification misrepresents if it was issued without considering whether fair use applies.¹⁸¹ In most cases, a belief that no fair use exists cannot be found in subjective bad faith, and a detailed analysis of fair use is unnecessary; however, in the case at hand, Lenz alleged that Universal knowingly sent

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1153.

¹⁸⁰ 17 U.S.C. § 512(c)(3)(A)(v).

¹⁸¹ *Lenz*, 572 F. Supp. 2d at 1155.

notifications for all video with Prince's music solely to satisfy Prince, giving no attention to the principles of copyright law.¹⁸²

The court also found that Lenz's legal and personal costs from her decision whether to counter-notify constituted sufficient damage for a § 512(f) lawsuit.¹⁸³

Universal sought but was denied an interlocutory appeal.¹⁸⁴ As of April 12, 2011, the case is still ongoing.¹⁸⁵

Other copyright owners have also overreached the purpose of § 512 and YouTube's policies, including:

- o The International Olympic Committee, sending notice for a video displaying pro-Tibetan protests during the 2008 Olympics;¹⁸⁶
- o Uri Gellar, sending notice for eight seconds of a copyrighted show within a thirteen-minute video debunking his work;¹⁸⁷ and

¹⁸² *Id.* at 1155-56.

¹⁸³ *Id.* at 1156-57.

¹⁸⁴ Lenz v. Universal Music Corp., 2008 WL 4790669 (N.D. Cal. Oct. 28, 2008).

¹⁸⁵ Lenz v. Universal, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/cases/lenz-v-universal/> (last visited 4/12/2011). The video has been restored and is still viewable at <http://www.youtube.com/watch?v=N1KfJHFWlhQ> as of April 12, 2011.

¹⁸⁶ Stephanie Condon, *Olympic committee rethinks copyright infringement claim on YouTube*, CNET NEWS (Aug. 15, 2008, 12:32 PM), http://news.cnet.com/8301-13578_3-10018234-38.html.

¹⁸⁷ Sapient v. Geller, ELECTRONIC FRONTIER FOUNDATION, <http://www.eff.org/cases/sapient-v-geller/> (last visited 4/12/2011).

- o The Warner Music Group, sending notice for music content posted by the actual music artist, when Warner itself no longer had any rights to the content.¹⁸⁸

Such abuses of the process will likely continue unless YouTube re-evaluates its policy.

IV. ALTERNATIVE POLICIES AND DEFENSES

The courts have declared YouTube's existing policies sufficient for § 512 safe harbor,¹⁸⁹ so it is understandable that YouTube may not wish to rock the boat by altering them. Nonetheless, alternative paths may remain available. This paper will now examine each of them for viability and risk.

IV.A. Secondary Liability Analysis

To avoid a charge of contributory liability, under the *Sony* rule YouTube's service must have "commercially significant noninfringing uses."¹⁹⁰ Such uses are immediately apparent in the case of YouTube. A free video uploading service provides many legal expressive outlets to the world at low cost.¹⁹¹ By comparison, the Supreme Court has allowed devices with only 9%

¹⁸⁸ Tom Shear, *The Day I Infringed My Own Copyright*, WAVEFORMLESS (March 8, 2010, 12:02 AM), <http://waveformless.blogspot.com/2010/03/day-i-infringed-my-own-copyright.html>.

¹⁸⁹ *Viacom*, 718 F. Supp. 2d 514.

¹⁹⁰ *Sony*, 464 U.S. at 442.

¹⁹¹ See *Geller*, 533 F. Supp. 2d at 1001 (describing the uploading of family videos, creative projects, and political messages).

noninfringing use, when the other requirements of contributory infringement were not invoked.¹⁹²

YouTube may alternatively be liable if they learn of infringement but do not act to stop it, under the *Napster* rule.¹⁹³ However, this requires knowledge of specific cases of infringement, not simply of the fact that the system allows infringement.¹⁹⁴ This requirement is identical to the § 512(c)(1)(A) requirement that YouTube either be unaware of specific cases of infringement or act promptly to remove it,¹⁹⁵ which the *Viacom* court has already found YouTube meets.¹⁹⁶

Finally, YouTube may be liable if they take affirmative steps to encourage infringement, under the *Grokster* rule.¹⁹⁷ But the *Viacom* court, although it made no official finding on the matter, hinted heavily that the contrary was true: the affirmative steps test “does not comport” with YouTube’s open notification system and prompt removal of infringing material on notice.¹⁹⁸ The Terms of Service also explicitly forbid infringing

¹⁹² See *Grokster*, 545 U.S. at 951 (2005) (Breyer, J., concurring).

¹⁹³ *Napster*, 239 F.3d at 1021.

¹⁹⁴ *Id.*

¹⁹⁵ 17 U.S.C. § 512(c)(1)(A).

¹⁹⁶ *Viacom*, 718 F. Supp. 2d at 525.

¹⁹⁷ *Grokster*, 545 U.S. at 937.

¹⁹⁸ *Viacom*, 718 F. Supp. 2d at 526.

uploads,¹⁹⁹ and unlike in *Grokster*, there is no evidence at present that YouTube encourages infringement on the side.²⁰⁰

Under its current removal system, therefore, YouTube is protected from contributory infringement suits with or without the § 512 safe harbor, and it need not follow § 512 to the letter so long as it (a) avoids the *Napster* rule by removing infringing content whenever it becomes aware of it, and (b) avoids the *Grokster* rule by discouraging rather than encouraging copyright infringement within its service.

However, YouTube might still be in danger from a vicarious infringement suit without the protection of § 512. Vicarious liability has only two requirements, neither of which are specific knowledge of the infringement.²⁰¹

Rather, YouTube must first exercise supervision, which has been found repeatedly in cases where the defendant maintained the right to eject infringers for the offending actions.²⁰² YouTube freely declares that it "may at any time, without prior notice and in its sole discretion, remove such Content and/or terminate a user's account for submitting such material in violation of

¹⁹⁹ *Terms of Service*, *supra* note 111, § 6.D.

²⁰⁰ Compare with *Grokster*, 545 U.S. at 923-27 (defendants marketed themselves as a replacement for another infringing service, provided technical support that assisted in known infringement, included features that served no purpose other than the aid of infringement, and blocked efforts to monitor their service for infringement).

²⁰¹ *Shapiro*, 316 F.2d at 308.

²⁰² See, e.g., *Napster*, 239 F.3d at 1023; *Fonovisa*, 76 F.3d at 262.

these Terms of Service,"²⁰³ and its terms include a restriction against using the service for infringement.²⁰⁴

If supervision is found, YouTube is liable if it gains a financial benefit from the infringement.²⁰⁵ Unlike the requirement of § 512(c)(1)(B),²⁰⁶ this benefit need not be traced to any specific infringement but may come from the general attraction of customers by the infringing material.²⁰⁷ Such benefit has already been found in other cases when a defendant's business model depends on advertising, because more viewers gives the defendant more profit, and free copyrighted material attracts large numbers of viewers.²⁰⁸ Therefore, YouTube's own advertising²⁰⁹ may put it in danger of a vicarious suit, unless it remains behind the shield of § 512.

IV.B. Fair Use and Other Direct Infringement Defenses

Of course, YouTube does not face secondary liability for infringement if there is no actual infringement.²¹⁰ Therefore, if

²⁰³ *Terms of Service*, *supra* note 111, § 7.B.

²⁰⁴ *Id.* § 6.D.

²⁰⁵ *Fonovisa*, 76 F.3d at 262.

²⁰⁶ *Viacom*, 718 F. Supp. 2d at 527.

²⁰⁷ *Fonovisa*, 76 F.3d at 263.

²⁰⁸ *Napster*, 239 F.3d at 1023. *Contrast with Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc.*, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (no financial benefit found when users paid a fixed fee for use, and plaintiff offered no evidence that paying users were attracted to the service for its ability to distribute copyrighted materials).

²⁰⁹ See *YouTube FAQ*, *supra* note 11.

²¹⁰ *Grokster*, 545 U.S. at 940.

it continues to remove any actual infringement, but declines to remove videos that do not infringe, it cannot be held liable.

The legislative history of § 512 suggests that such a refusal will only remove the safe harbor for that specific video, not for every video on YouTube.²¹¹ This interpretation is in line with the idea that a takedown notice could clearly be in bad faith, a possibility that Congress clearly contemplated when it included the "material misrepresentation" clause.²¹² The *Diebold* court further supports this interpretation, by defining a "material" misrepresentation as one that "affect[s] the ISP's response to a DMCA letter";²¹³ this suggests that a service may safely respond "no" to a notification in certain "material" circumstances. Therefore, YouTube may refuse to take down cases of fair use,²¹⁴ or other non-infringements, without opening itself up to vicarious liability from other infringement on its servers.

Realistically, however, YouTube cannot be expected to examine every complaint for fair use. The company has been known to face 100,000 takedown requests in a single day,²¹⁵ which could

²¹¹ "On the other hand, the service provider is free to refuse to 'take down' the material or site, even after receiving a notification of claimed infringement from the copyright owner; *in such a situation*, the service provider's liability, if any, will be decided without reference to section 512(c)." S. REP. NO. 105-190, at 45 (emphasis added). The House Report for the DMCA uses identical language. H.R. REP. NO. 105-551, at 54 (1998).

²¹² 17 U.S.C. § 512(f).

²¹³ *Diebold*, 337 F. Supp. 2d at 1204.

²¹⁴ Misrepresentation of fair use is material. *Lenz*, 572 F. Supp. 2d at 1155.

²¹⁵ *Viacom*, 718 F. Supp. 2d at 524.

take weeks or even months to examine. Failing to take down actual infringements in a prompt manner would both eliminate any § 512 shield, which requires removal “expeditiously” upon discovery,²¹⁶ and put it at risk of additional, *Napster*-style liability if any requests are forgotten entirely.²¹⁷

YouTube will also face the possibility that a court will disagree on whether a given video constitutes fair use. Again, given the sheer numbers of notifications it must handle, YouTube can neither argue every refusal before a court of law, nor risk that even a small percentage of its arguments will be rejected.

IV.C. Timing and Response to Repeat Notices

Although YouTube promptly removes content on notification,²¹⁸ it exercises considerable discretion whether to restore the content upon counter-notification.²¹⁹ In practice, it sometimes but not always responds within fourteen business days.²²⁰ In this respect, YouTube leaves itself open to suit from its users, if not from copyright owners; § 512 provides a safe harbor from suits by content uploaders only if mistakenly-removed content is restored within the fourteen day limit.²²¹

²¹⁶ 17 U.S.C. § 512(c) (1) (C).

²¹⁷ See *Napster*, 239 F.3d at 1021 (requiring removal of known infringing material, if not promptly then eventually).

²¹⁸ *Viacom*, 718 F. Supp. 2d at 524.

²¹⁹ *Terms of Service*, supra note 111, § 8.B.

²²⁰ Compare Seltzer, supra note 14 (March 6, 2007, 6:37 PM) (video restored on time) with *Lenz*, 572 F. Supp. 2d at 1152 (video restored six weeks later).

²²¹ 17 U.S.C. § 512(g) (2) (C).

YouTube's removal system disables access to videos, rather than deleting them from the server entirely.²²² Restoration of a disabled file is surely no more difficult than disabling its access in the first place, and YouTube has shown the ability to disable thousands of videos in a short period.²²³ There would be little additional cost to restoring them at the same speed on counter-notification, especially as YouTube has fourteen days to make a preliminary check.

Importantly, no court could interpret such a policy as pushing YouTube outside the bounds of the § 512 safe harbor. To the contrary, § 512 encourages restoration within fourteen business days by granting *more* protections against liability, specifically against suit by the accused user.²²⁴ Currently, YouTube has decided it does not need these additional protections, and it exercises the right to restore content when it chooses, if at all.²²⁵ However, it would not alter its liability in *Viacom*-like cases in the slightest to exercise the additional safe harbor by implementing fourteen-day restoration.

YouTube could also address the NFL's response to Seltzer's video, by declining to honor repeated takedown requests. Such

²²² The original upload date and other information remains when the video is restored. See, e.g., *Episode 2: And They All Lived Happily Ever... Oh...*, (Team FourStar 2008), http://www.youtube.com/watch?v=aBm_2IUn4MU (listed upload date is July 9, 2008, which precedes TFS's temporary ban in 2009).

²²³ *Viacom*, 718 F. Supp. 2d at 524.

²²⁴ 17 U.S.C. § 512(g) (2) (C).

requests are arguably harassing and almost certainly in bad faith, as the complaining party has all the information and consent necessary to get a court order against the poster of the video²²⁶ and was encouraged to do so by statute as remedy,²²⁷ yet has so far declined to do so, strongly implying that the notification was a knowing material misrepresentation under *Diebold*.²²⁸ Therefore, it is not effective notification under § 512(c)(1)(C) and § 512(c)(3)(A), and YouTube does not gain knowledge of infringement from it.²²⁹

Such a policy shift could, like the restoration process, be automated. If the same party issues a second notification against the same video, YouTube's takedown system ignores the request. This would require maintenance of a list of all takedown requests. A request by the same party regarding a different video would, of course, be accepted and processed. A request regarding the same video by a different party should also be accepted; a video could include material from multiple copyrighted works, and the decision of one infringed party not to pursue further legal recourse should not prevent another from making the opposite decision.

²²⁵ See *Terms of Service*, *supra* note 111, § 8.B; *Lenz*, 572 F. Supp. 2d at 1152.

²²⁶ 17 U.S.C. § 512(g)(3)(D).

²²⁷ 17 U.S.C. § 512(g)(2)(C).

²²⁸ See *Diebold*, 337 F. Supp. 2d at 1204-05.

²²⁹ 17 U.S.C. § 512(c)(3)(B)(i).

YouTube may not wish to be the party that argues such a repeat complainant is always in bad faith, the precedent of *Diebold* notwithstanding. However, a single such test case would only open it to liability for one particular video, as Section IV.B. notes above. Success would then allow full implementation of the new policy, while failure would mean at most \$30,000 in statutory damages for a single infringement, and possibly as little as \$750.²³⁰

Therefore, neither policy change, if implemented carefully, would place risk of liability on YouTube beyond what it could easily bear.

IV.D. YouTube's Incentives to Change Policies

YouTube's current priorities are understandable. Although § 512 creates a specific cause of action against abuse by copyright holders,²³¹ a service user must find a separate cause to sue for abuse by a service provider, such as breach of contract. YouTube's terms of service indemnifies itself against all damages from use of the service, including attorney's fees,²³² and it reserves the right not to restore removed content, regardless of counter-notifications.²³³ Thus, when choosing between an entertainment corporation with a large legal department and an

²³⁰ 17 U.S.C. § 504(c) (1).

²³¹ 17 U.S.C. § 512(f) (1).

²³² *Terms of Service*, *supra* note 111, § 11.

²³³ *Terms of Service*, *supra* note 111, § 8.B.

individual account owner with no legal recourse against YouTube, YouTube naturally errs on the side of the former.²³⁴

Nonetheless, YouTube does face a cost by ignoring its honest patrons: it loses business. If one wants to see the latest review from Charles Sonnenburg, one checks his account on Blip.tv, not YouTube.²³⁵ Likewise, many fans of DragonBall Z Abridged moved to Team FourStar's website during the group's lengthy suspension; it is safe to assume that some did not return. And Lenz has not uploaded a single video since YouTube removed "Let's Go Crazy," in fear that she will have to repeat the entire notice-counternotice-lawsuit process with another party.²³⁶

YouTube's mission statement includes the desire to "give everyone a voice."²³⁷ Also, YouTube's business model depends at least partially on advertising dollars,²³⁸ which require as many viewers as possible. If people feel the need to go elsewhere to post and view legal material, both objectives have failed.

YouTube could implement both improved restoration time and screening of repeat notifications with minimal cost, and only the

²³⁴ Seltzer has noted that, due to boilerplate language like YouTube's in most terms of service agreements, "512(g) doesn't have much bite." Seltzer, *supra* note 14 (Feb. 15, 2007, 5:57 PM).

²³⁵ As of May 20, 2011, Sonnenburg's only YouTube videos are a few schedule announcements and several "trailers" of roughly thirty seconds that advertise reviews exclusive to his Blip channel. See sfdebris's Channel Archive, <http://www.youtube.com/user/sfdebris#g/u>.

²³⁶ Lenz, 572 F. Supp. 2d at 1156. Lenz made her last upload to YouTube on March 19, 2007. See edenza's Channel, <http://www.youtube.com/user/edenza> (last visited 4/12/2011).

²³⁷ YouTube FAQ, *supra* note 11.

latter would present any legal risk at all. In return, viewers and account owners would feel more welcome and less at risk of losing their content permanently.

V. CONCLUSION

YouTube, like many large-scale service providers on the Internet, has been relieved of much liability by the protections of the DMCA. Without the § 512 safe harbor, it might be trapped in a choice between drastically limiting its services and facing regular infringement suits. However, it can better service its users without sacrificing the needs of copyright holders who act in good faith.

With minimal cost to itself and little risk of new liability, YouTube could restore videos within fourteen business days of counter-notification, and then ignore duplicate takedown requests. This new policy would show good customer service and mitigate damage to honest users, resulting in greater user and viewer retention. It would also place itself more in line with both its own mission, to "give everyone a voice,"²³⁹ and the mission of the DMCA, to strike a balance between the needs of copyright holders and the growth of the Internet.²⁴⁰

²³⁸ *Id.*

²³⁹ *YouTube FAQ*, *supra* note 11.

²⁴⁰ S. REP. No. 105-190, at 8.