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**CLICK HERE TO SHARE! THE IMPACT OF THE VEOH  
LITIGATIONS ON *VIACOM V. YOUTUBE***

***Phong Dinh***<sup>1</sup>

*In the high-bandwidth Internet age, video sharing websites such as YouTube and Yahoo! Video are growing in popularity. The ease with which such sharing is accomplished has aided users in illegally uploading copyrighted movies, TV shows, and music. In a recent lawsuit, Viacom and its copyright-owning affiliates sought one billion dollars in damages against YouTube, one of the Web's most popular video-sharing websites, for copyright infringement. In response, YouTube invoked the affirmative defense of the Digital Millennium Copyright Act's safe harbor provisions, codified at § 512. The Act states that a service provider is not liable for hosting copyrighted information on its own system for a prolonged period of time as long the service provider has met the threshold requirements for these provisions and the specific requirements for at least one of the four safe harbors.*

*Before California district courts' holdings in *Io Group, Inc. v. Veoh Networks, Inc.* and *UMG Recordings, Inc. v. Veoh Networks, Inc.*, no court had examined the safe harbor defense as applied to video sharing websites. The success of this defense is now more certain after these recent holdings, which employed law consistent with prior applications of the safe harbor provisions. If the District Court for the Southern District of New York applies the Veoh reasoning, which provides similarly situated video-sharing websites a viable defense, the Court should find YouTube free from liability through the safe harbor provision codified at § 512(c). Despite Viacom's arguments in its amended complaints, these recent cases indicate that YouTube likely meets the threshold requirements of the safe harbor provisions. Furthermore, these cases indicate that YouTube specifically falls under the umbrella of*

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*§ 512(c) protection because it hosts copyrighted information on its system as “storage under the direction of the users.” Thus, the Veoh cases strongly suggest that YouTube should succeed in asserting the affirmative safe harbor defense.*

*A holding in favor of YouTube will correctly guide developments in copyright law toward a more efficient burden-sharing system. It would also support the goals of the Digital Millennium Copyright Act by protecting the rights of copyright holders, service providers, and end users.*

## I. INTRODUCTION

From a video of a dancing dog to a video of a talking toddler, video sharing is the new pen and paper. It is the new instant message, the way people share information and tell stories. These are the scenes repeated thousands of times a day: high-school students gathered around a computer before class, professionals bored at work in front of their computers, grandmas and grandpas sitting in front of their laptops. People of all ages are using the Internet to share a funny moment, an unforgettable scene, or to simply say hello to loved ones. This high-tech sharing is possible because of Internet service providers like YouTube, Yahoo! Video, and Veoh.<sup>2</sup>

Though the intended use of these websites is to show homemade videos and amateur films,<sup>3</sup> some users are taking advantage of these sites to share copyrighted forms of media, such as movies and television shows.<sup>4</sup> In response, copyright owners

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<sup>2</sup> Yahoo! Video also provides services similar to YouTube and Veoh by allowing users to upload their own videos and share it with other users. About Yahoo! Video, <http://www.yvideoblog.com/blog/about/> (last visited Feb. 24, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>3</sup> See *infra* notes 26–31.

<sup>4</sup> As the plaintiffs pointed out in their complaint, examples include the television shows “SpongeBob SquarePants,” “The Daily Show with Jon Stewart,” “The Colbert Report,” “South Park,” “Ren & Stimpy,” and “MTV Unplugged,” and the movies “An Inconvenient Truth,” and “Mean Girls.” See First Amended Complaint, *infra* note 14, at 2. As of Mar. 7, 2009, an example of a clip of the Colbert Report can be found at <http://www.youtube.com/watch?v=heKKBgEbtX8>.

have fought feverishly to protect their rights, resulting in an increase in copyright infringement lawsuits over the last few years.<sup>5</sup> With copyright lawsuits being filed frequently, courts are constantly presented with the opportunity to shift the law in a way that imposes on service providers a heightened duty to protect copyright owners' intellectual property. When such a shift is imposed on large sites with millions of videos, this heightened duty may be too burdensome and may force providers to limit their services or shut down completely.

Copyright law attempts to balance consumers' rights and freedom of information with the constitutional Founders' desire to protect copyrighted work.<sup>6</sup> The goal of copyright has always been to foster further innovation.<sup>7</sup> This means balancing the interests of three important groups: copyright owners, service providers, and consumers.<sup>8</sup> The Digital Millennium Copyright Act ("DMCA")<sup>9</sup>

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<sup>5</sup> See Posting of Kurt Hunt to Michigan Telecommunications and Technology Law Review Blog, <http://blog.mttl.org/2007/11/timeline-of-youtube-litigation.html> (listing several recent YouTube decisions including: *Premier League v. YouTube*, No. 1:07-cv-03582-UA (S.D.N.Y. May 4, 2007); *Grisman v. YouTube*, No. 3:2007-cv-02518 (N.D. Cal. May 10, 2007); *New Jersey Turnpike Authority v. YouTube*, No. 2:2007-cv-02414 (D.N.J. May 22, 2007); *Cal IV v. YouTube*, No. 3:2007-cv-00617 (M.D. Tenn. June 7, 2007)) (last visited Nov. 14, 2007) (on file with the North Carolina Journal of Law & Technology); see also Martha L. Arias, *Internet Law—Video-Sharing: May This New Internet Phenomenon Violate Copyrights?*, INTERNET BUSINESS LAW SERVICES (Mar. 6, 2007), [http://www.ibls.com/internet\\_law\\_news\\_portal\\_view.aspx?s=latestnews&id=1693](http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=1693) (listing several lawsuits, including *Universal suing Bolt.com*) (on file with the North Carolina Journal of Law & Technology).

<sup>6</sup> *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495 n.3 (2001) ("Congress' adjustment of the author/publisher balance is a permissible expression of the 'economic philosophy behind the [Copyright Clause],' i.e., 'the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare.'" (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985))).

<sup>7</sup> *Id.*

<sup>8</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of

was enacted in 1998 in an attempt to balance the rights of each group in this digital age.<sup>10</sup> While the Act created ways for copyright owners to enforce their rights on the Internet, it also limited such rights.<sup>11</sup> For instance, the DMCA's safe harbor provisions serve to limit enforcement rights of copyright owners and grant service providers some leeway.<sup>12</sup> This, in turn, allows consumers to produce new creative works and to maximize creative innovation.<sup>13</sup>

Consumers and service providers, however, are at great risk for having their rights and interests severely limited. In this recent lawsuit seeking damages of one billion dollars, Viacom and its affiliates—the owners of thousands of copyrighted movies, television shows and songs—sued YouTube, Inc. in the District Court for the Southern District of New York.<sup>14</sup> Viacom alleges YouTube committed willful copyright infringement by allowing users to share copyrighted videos.<sup>15</sup> YouTube's principal defense

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their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.”).

*Id.*

<sup>9</sup> Digital Millennium Copyright Act of 1998 (DMCA) Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>10</sup> See *supra* note 8 and accompanying text.

<sup>11</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (9th Cir. 2007) (stating that the DMCA “limits the liability of a service provider ‘for infringement of copyright by reason of the provider 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’ if the service provider meets certain criteria.”) (quoting the DMCA, 17 U.S.C. 512(d)).

<sup>12</sup> See *infra* notes 38–48 and accompanying text. See also *Perfect 10*, 508 F.3d at 1175.

<sup>13</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932–933 (2005) (“[T]he doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and a vigorous commerce.”).

<sup>14</sup> See First Amended Complaint, *Viacom Int’l. Inc. v. YouTube, Inc.*, No. 07-2103 (S.D.N.Y. 2008 filed Apr. 24, 2008).

<sup>15</sup> See *id.*

is the DMCA's safe harbor provisions.<sup>16</sup> These provisions protect service providers, such as YouTube, from infringement claims when they simply provide a file-sharing database.<sup>17</sup> Currently, the parties are in discovery. If YouTube is successful in asserting its protection under the safe harbor, then Viacom can only receive injunctive relief.<sup>18</sup> Consequently, Viacom would not be able to recover any of the one billion dollars in alleged damages.<sup>19</sup> The outcome of this case is not only important because YouTube is the most popular video-sharing website on the Internet,<sup>20</sup> but also because the outcome of this case may indicate the publishing companies' likelihood of success in future litigation against video-sharing websites. Most importantly, this decision will help determine the breadth and power of the DMCA's safe harbor provisions.

Until recently, various courts interpreted the safe harbor provisions with divergent holdings; these variations made it difficult to predict Viacom's probability of succeeding.<sup>21</sup> Cases

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<sup>16</sup> See Answer to First Amended Complaint, Viacom Int'l. Inc. v. YouTube, Inc., No. 07-2103 (S.D.N.Y. 2008 filed May 23, 2008).

<sup>17</sup> See *infra* notes 38-41 and accompanying text.

<sup>18</sup> 17 U.S.C. 512(c)(1) (2006) ("A service provider shall not be liable for monetary relief.").

<sup>19</sup> *Id.*

<sup>20</sup> Press Release, comScore.com, YouTube Surpasses 100 Million U.S. Viewers for the First Time, Mar. 4, 2009, <http://www.comscore.com/press/release.asp?press=2741> ("Google Sites once again ranked as the top U.S. video property with 6.4 billion videos viewed (43 percent online video market share), with YouTube.com accounting for more than [99] percent of all videos viewed at the property.") (on file with the North Carolina Journal of Law & Technology).

<sup>21</sup> Some courts protected a file sharing service provider through the DMCA's provision. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (holding that the service providers that provide links to websites containing copyrighted materials qualified for DMCA safe harbor provisions because the service provider acted in good faith where there were lack of adequate DMCA infringement notices). However, some courts limited such protection and imposed liability upon the service provider despite the DMCA provisions. See *ALS Scan, Inc. v. Remarq Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (holding that the newsgroup and file-sharing service provider did not qualify for safe harbor because adequate notice was given and service provider did not comply). Until *Veoh*, no case had circumstances similar to those of *YouTube*.

from the district courts of California, in particular *Io Group, Inc. v. Veoh Networks, Inc.*<sup>22</sup> and *UMG Recordings, Inc. v. Veoh Networks, Inc.*,<sup>23</sup> indicate a shift in the law toward an interpretation of the DMCA's safe harbor provision that will enhance protection for video-sharing service providers.<sup>24</sup> These holdings are the first steps toward a copyright system that will be able to more efficiently balance the competing interests of the copyright owner, service provider, and consumer. Though the *Io Group* and *UMG* decisions are not controlling in the Southern District of New York, they provide persuasive reasoning given the striking similarities between the two service providers, Veoh and YouTube. If the *YouTube* court follows the reasoning behind the *Io Group* and *UMG* decisions, then it should find that YouTube qualifies for the DMCA's safe harbor provisions. Additionally, a decision in favor of YouTube would further the legislative goals of the DMCA and would effectively allocate burdens between service providers and copyright holders.

Part I of this Recent Development examines the structure of the Veoh website and explores the basic facts behind the *Veoh* litigation. Part II looks at the DMCA, its safe harbor provisions, and the application of each in the *Veoh* holdings. This Part also analyzes the courts' conclusions of law and prior applications of the DMCA's safe harbor provisions. Part III describes the similarities between the YouTube and Veoh websites as well as the ensuing litigation with Viacom. In Part IV, this Recent Development considers the DMCA safe harbor provisions as

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That is, there has been no litigation involving a large video sharing service provider's qualification for the safe harbor provision until the *Veoh* cases.

<sup>22</sup> 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

<sup>23</sup> No. 07-5744 (C.D. Cal. Feb. 2, 2009).

<sup>24</sup> See *Io Group Inc. v. Veoh Networks Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (holding that video-sharing service provider was not liable for copyright infringement for having hosted copyrighted videos on its website because it qualified for the safe harbor provisions of the DMCA); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 07-5744 (C.D. Cal. Feb. 2, 2009) (holding that the video-sharing service provider was not liable for copyright infringement for having hosted videos that contained copyrighted songs because it qualified for the safe harbor provisions).

applied in *Viacom Int'l Inc. v. YouTube, Inc.*<sup>25</sup> Part IV also briefly attempts to determine the merits of these arguments and predicts that the court, if it chooses to follow recent holdings, will find that YouTube qualifies for the DMCA's safe harbor provisions. In Part V, this Recent Development argues that finding for YouTube will correctly balance burdens between service providers and copyright holders. Placing any additional burden on the video-sharing service providers, as Viacom suggests, would be inconsistent with the goals of the DMCA.

## II. THE VEOH WEBSITE AND ENSUING LITIGATION

Veoh Networks Inc., operates a website<sup>26</sup> where users can view uploaded videos.<sup>27</sup> The videos cover a wide variety of genres, from homemade comedies to amateur films.<sup>28</sup> Veoh dubs its website the "Internet Television Network."<sup>29</sup> Thousands of videos have been uploaded since the website's launch in February 2006.<sup>30</sup> The simplicity of the uploading process allows many users to illegally upload copyrighted contents, including full movies and TV shows.<sup>31</sup>

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<sup>25</sup> First Amended Complaint, *supra* note 14.

<sup>26</sup> Veoh, <http://www.veoh.com> (last visited Feb. 24, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>27</sup> About Us | Veoh: Open. Personalized. Free. TV, <http://www.veoh.com/static/corporate/aboutUs.html> (last visited Jan. 26, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>28</sup> *Id.* ("Veoh gives you free access to all of the great TV and film studio content, independent productions, and user-generated videos on the Web.")

<sup>29</sup> *Id.* The website also states that "Veoh is a revolutionary Internet TV service that gives viewers the power to easily discover, watch, and personalize their online viewing experience." *Id.*

<sup>30</sup> *Id.* ("Currently more than 100,000 publishers—from forward-thinking, well-known entertainment brands to independent, made-for-the-Web producers—use Veoh to connect with an audience of more than 24 million engaged, influential viewers.")

<sup>31</sup> To share videos, users must register by submitting their username, email address and password. See *How Do I Begin Broadcasting My Video?*, [http://www.veoh.com/static/faq/Uploading\\_and\\_Publishing\\_Video/How\\_do\\_I\\_begin\\_broadcasting\\_my\\_video\\_.htm](http://www.veoh.com/static/faq/Uploading_and_Publishing_Video/How_do_I_begin_broadcasting_my_video_.htm) (last visited Jan. 26, 2009) (on file with the North Carolina Journal of Law & Technology). See also *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 07-5744 (C.D. Cal. Dec. 29, 2008), 2009 WL



Consequently, Io Group sued Veoh for copyright infringement in the Northern District of California.<sup>32</sup> Io Group produces, markets, and distributes adult entertainment products.<sup>33</sup> The company claimed that Veoh knowingly allowed the sharing of Io Group's registered and copyrighted videos.<sup>34</sup> Similarly, Universal Music Group ("UMG"), holders of numerous music copyrights, sued Veoh for direct, contributory, vicarious and inducement of copyright infringement in the Central District of California in 2008.<sup>35</sup> In *UMG*, it was alleged that users had shared and

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334022, at \*5–7 (C.D.Cal. Dec. 29, 2008). Users may then submit their videos to the website through the "upload" page where the server automatically makes a copy, places it on the server indefinitely, converts the video into standardized format (Flash 7) and extracts metadata from and screenshots of the videos. Metadata includes file format, movie length, and other information. Several screenshots of the videos are taken at intermittent periods in the video. When a user searches for a certain video, the website lists all of the relevant videos that are found as a result of the search. The server uses these screenshots as preview pictures for the videos. The website also uses the metadata to show to the user how long the video is, who the author is, when the movie was actually taken, and other data. *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1139–40 (N.D. Cal. 2008). Once the videos are uploaded, the website allows users to access the videos via "streaming" or by downloading them. *See generally* Macromedia Flash—Streaming and File Optimization Techniques for Flash Player, [http://www.adobe.com/support/flash/publishexport/stream\\_optimize/stream\\_optimize02.html](http://www.adobe.com/support/flash/publishexport/stream_optimize/stream_optimize02.html) (last visited Jan. 26, 2009) (discussing how streaming works). Downloading is possible by the use of a "Veoh Client" software that the user may download. The user may then "download a copy of the video file in its original format to their computer hard drive." *Io Group*, 586 F. Supp. 2d at 1140. The ease of this process made Veoh a very well-received website for video sharing. *See* Danny Allen, *Top 10 Video Sharing Sites*, PC WORLD, Aug. 27, 2007, [http://www.pcworld.com/article/136089/top\\_10\\_video\\_sharing\\_sites.html](http://www.pcworld.com/article/136089/top_10_video_sharing_sites.html) (rating Veoh as the 5th best video sharing site, higher than YouTube's #7 ranking, as well as "very good" in the ease-of-uploading category) (last visited Feb. 26, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>32</sup> *Io Group*, 586 F. Supp. 2d at 1132.

<sup>33</sup> *Id.* at 1136

<sup>34</sup> *Io Group Inc. v. Veoh Networks Inc*, 586 F. Supp. 2d 1132, 1136 (N.D. Cal. 2008). Most of the allegedly infringing videos shared were less than one minute long. Some, however, were more than twenty minutes in length. *Id.*

<sup>35</sup> *UMG*, No. 07-5744, at \*1. The direct infringement charge refers to where the service provider itself is providing copyrighted material for the user. The contributory infringement refer to where the service provider is liable for

downloaded videos containing UMG copyrighted songs and that neither Veoh nor its users obtained authorization.<sup>36</sup> Veoh argued that even where infringement was found, it was not liable for damages because it qualified for the safe harbor defense of the DMCA.<sup>37</sup>

### III. THE DIGITAL MILLENNIUM COPYRIGHT ACT AND ITS USE IN THE VEOH LITIGATION

#### A. *The DMCA and Its Safe Harbor Provisions*

The DMCA was enacted in 1998 in response to the rapid expansion of the Internet.<sup>38</sup> The Act was created to “to advance two mutually supportive goals: the protection of intellectual property rights in today's digital environment and the promotion of continued growth and development of electronic commerce.”<sup>39</sup> It protects copyright owners by creating new circumstances in which an owner may enforce his or her exclusive rights of reproduction, public distribution, public performance, and public display.<sup>40</sup> The

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contributing to the occurrence of copyright infringement by, amongst other requirements, providing a means by which the infringement may occur. Contributory infringement occurs where a party knows that infringing activity is taking place and either induces it, causes it, or materially contributes to it. Vicarious and inducement of copyright infringement refers to where the service provider has a direct financial interest in the infringing actions being committed by another (the user) and has the ability to control it, even if the service provider does not know that the infringement is taking place and does not directly take part in it. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170–71, 1173 (9th Cir. 2007).

<sup>36</sup> *UMG*, No. 07-5744, at \*3.

<sup>37</sup> *Id.*

<sup>38</sup> *See* S. REP. NO. 105-190, at 1–2 (1998) (stating one of the purposes of the DMCA is to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age”).

<sup>39</sup> NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, REPORT TO CONGRESS: STUDY EXAMINING 17 USC SECTIONS 109 AND 117 PURSUANT TO SECTION 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (2001), *reprinted in* THE DIGITAL MILLENNIUM COPYRIGHT ACT: TEXT, HISTORY, AND CASELAW 457–58 (Christopher Wolf ed., Pike & Fischer 2001).

<sup>40</sup> U.S. COPYRIGHT OFFICE SUMMARY, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 7 (1998) (allowing copyright owners to sue where another person

DMCA also delineates the safe harbor provisions, codified at 17 U.S.C. § 512. It protects Internet service providers (ISP) by sheltering them from monetary liability in circumstances in which they are inadvertently providing access to materials.<sup>41</sup> Copyright owners are limited to injunctive relief if the service provider affirmatively establishes the safe harbor defense.<sup>42</sup>

In order to gain the protection of any of the safe harbor provisions, the service provider must first meet the DMCA's threshold requirements.<sup>43</sup> The provider must show it: (1) had adopted, reasonably implemented, and informed subscribers of a policy that enables it to terminate the accounts of repeat infringers and (2) accommodated and did not interfere with "standard technical means" used by copyright owners to identify or protect copyrighted works.<sup>44</sup>

Under the DMCA, if the service provider meets all of the threshold requirements, the safe harbor provisions provide protection from liability in several circumstances.<sup>45</sup> Particularly,

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or company attempts to circumvent the technology that prevents the copyrighted content from being accessed or copied).

<sup>41</sup> To be insulated from liability, an Internet service provider (ISP) must indiscriminately provide access to both copyrighted and non-copyrighted works; an ISP cannot provide access only to copyrighted materials. *Id.* at 8 ("[T]he DMCA adds a new section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers . . . Each limitation entails a complete bar on monetary damages, and restricts the availability of injunctive relief in various respects."). *Id.* at 8–9.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> 17 U.S.C. § 512(i) (2006).

<sup>44</sup> *Id.* Further, under the safe harbor provisions, the service provider must designate an agent "to receive notifications of [copyright infringement claims] . . ." 17 U.S.C. § 512(c)(2). Viacom, through its complaint, does not deny that YouTube has made an agent available to receive copyright infringement notifications by its admission that YouTube has removed videos in responses to notices in the past. *See* First Amended Complaint, *supra* note 14, at 28.

<sup>45</sup> Under § 512(a), a service provider that has copyrighted materials on its system is not liable for copyright infringement if such information does not originate from the provider and is only for transitory purposes. 17 U.S.C. § 512(a). This primarily protects an ISP or similarly situated party simply acting as an information conduit. In other words, the provider is free from monetary liability when it simply forwards information received, such as an email, to the

§ 512(c) states that a service provider is not liable for hosting copyrighted material on its system for a prolonged or even indefinite amount of time.<sup>46</sup> The statute protects websites such as YouTube and Veoh from liability for copying and retaining copyrighted videos and songs on their servers, and insulates them from liability stemming from public distribution and display of the copyrighted materials.<sup>47</sup> However, to qualify specifically under § 512(c), a service provider must show that the storage was at the direction of a user.<sup>48</sup> The service provider must also show: (a) it does not have actual knowledge of the copyrighted materials and is not aware of any apparent infringing activities; (b) if it does have knowledge, it “acts expeditiously to remove, or disable access to, the material;”<sup>49</sup> and (c) it does not directly benefit financially from the infringing activities where it has the right and ability to control

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information’s ultimate destination. Digital Millennium Copyright Act of 1998 (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998).

Under § 512(b), a service provider is also not liable for copyright infringement if it keeps copyrighted materials on its server for system caching purposes. System caching occurs when a service provider retains a copy of received information in order to more quickly send out the data when there are multiple requests for the same data. 17 U.S.C. § 512(b). This method expedites transmissions to users while also reducing server bandwidth and workload. Where the use of data meets the requirements of the safe harbor provision, a service provider is not monetarily liable for having such data on its server. 17 U.S.C. § 512(b) (2006).

Under § 512(d), a service provider is free from liability for the acts of “referring or linking users to [a site that contains] infringing material . . . by using . . . information location tools . . .” 17 U.S.C. § 512(d). This provision protects search engines and other Internet informational directories from liability for directing users to copyright infringing content. Digital Millennium Copyright Act of 1998 (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998)

<sup>46</sup> 17 U.S.C. § 512(c). § 512(c) is the safe harbor provision that Veoh, YouTube and similarly situated sites rely on. *See* Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1140 (N.D. Cal. 2008); UMG Recordings, Inc. v. Veoh Networks, Inc., No. 07-5744, 2009 WL 334022, at \*1 (C.D. Cal. Dec. 29, 2008); *supra* note 16 and accompanying text.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 17 U.S.C. § 512(c)(1) (2006). If the ISP has knowledge, then this expeditiousness test comes from 17 USC § 512(c)(1)(A)(iii) (2006). 17 USC § 512(c)(1)(C) applies the same expeditiousness standard if the ISP has received notification of infringing material. *Id.*

such activities.<sup>50</sup> If the service provider meets all the requirements, then § 512(c) limits plaintiffs to injunctive relief and forecloses any monetary relief for direct, vicarious, and contributory infringement.<sup>51</sup>

*B. Use of § 512(c) in the Veoh Litigation*

In both *Io Group* and *UMG*, Veoh argued that even in instances where copyright infringement could be shown, the plaintiffs were not eligible for monetary relief because Veoh qualified for safe harbor under § 512(c).<sup>52</sup> Veoh claimed that it qualified as a service provider that stored videos at the request of the user to enable users to engage in video sharing.<sup>53</sup>

Despite the arguments by Io Group and UMG, both the District Court for the Central District of California and the District Court for the Northern District of California ruled in favor of Veoh.<sup>54</sup> The courts held that not only did Veoh satisfy the threshold requirements of safe harbor eligibility, Veoh also satisfied the specific requirements enumerated under § 512(c)'s safe harbor.<sup>55</sup> Thus, Veoh was not subject to monetary liability.<sup>56</sup> These holdings are consistent with other courts' current interpretations of the DMCA's safe harbor provisions.<sup>57</sup>

In determining that Veoh satisfied the threshold requirements

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<sup>50</sup> See *id* (requiring that internet provider act without actual or apparent knowledge unless, where they do have knowledge, they act expeditiously to remove the content). While the DMCA protects service providers for some of their actions, it does not protect service providers who, in some manner, have acted in bad faith. A financial benefit as a direct result of infringing activities is evidence of an intent by the service provider, not just to provide a service, but to induce infringements so that it may receive financial benefits. *Id*.

<sup>51</sup> *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098–99 (W.D.Wa. 2004).

<sup>52</sup> *Io Group, Inc. v. Veoh Networks Inc*, 586 F. Supp. 2d 1132, 1140 (N.D. Cal. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 07-5744, 2009 WL 334022, at \*1 (C.D. Cal. Dec. 29, 2008).

<sup>53</sup> *Io Group*, 586 F. Supp. 2d at 1140.

<sup>54</sup> *Io Group*, 586 F. Supp. 2d at 1155; *UMG*, No. 07-5744 at \*1.

<sup>55</sup> *Io Group*, 586 F. Supp. 2d at 1145, 1155; *UMG*, No. 07-5744 at \*10.

<sup>56</sup> No injunctions or any other relief were granted. *Id*.

<sup>57</sup> See *infra* notes 58–78 and accompanying text.

of the safe harbor provisions, the District Court of Northern California held that Veoh's policy was reasonably implemented.<sup>58</sup> Thus, Veoh did not have a duty to take action beyond deleting accounts of repeat offenders.<sup>59</sup> In coming to its conclusion, the court applied a "reasonable implementation" standard developed by the Ninth Circuit's Court of Appeals and district courts.<sup>60</sup> Other courts have similarly found that a service provider has no duty to "affirmatively police users for evidence of repeat infringement."

### 1. *Storage at the Direction of the User*

The *Io Group* and *UMG* courts both held that Veoh's system of converting and copying the uploaded videos was storage at the direction of the user.<sup>61</sup> Although the users do not require the videos be converted and copied, the courts held that this process is at the direction of the user.<sup>62</sup> This is consistent with the only other case that has dealt with the issue, *Costar Group v. Loopnet*.<sup>63</sup> The court in *Costar* found that photos were stored at the direction of the user even though the defendant's employees individually examined and approved each photo before posting them on the defendant's

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<sup>58</sup> *Io Group*, 586 F. Supp. 2d at 1142–1145.

<sup>59</sup> *Id.*

<sup>60</sup> See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1111 (9th Cir. 2007) (noting further that § 512(c) expressly lists when a provider has a duty to terminate an account; a repeat offense is not grounds for termination). The *Io Group* court also cited *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D.Wa. 2004), a decision by the District Court of Western Washington. The *Corbis* court held that the standard is "reasonable" policy, not "perfect" policy. See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1104 (W.D. Wa. 2004). The "mere fact that [the repeat infringer] . . . appeared on [the defendant's website] . . . under a different user name and identity does not, by itself, create a legitimate question of fact regarding the procedural implementation of [the defendant's] . . . termination policy." *Id.*

<sup>61</sup> *Io Group* at 1148. As long as the process is automatic in some manner, the actions are still at the direction of the user. See *id.* (holding that the service provider's process was at the direction of the user where it "pre-selects the software parameters for the process from a range of default values set by the third-party software . . . [and] does not itself actively participate or supervise the uploading of the files . . . [n]or does it preview or select the files before the upload . . .").

<sup>62</sup> *Id.*

<sup>63</sup> 164 F. Supp. 2d 688 (D. Md. 2001).

website because it was “not . . . a . . . selection process, but . . . a mere screening.”<sup>64</sup> Furthermore, although Veoh goes beyond storage by duplicating, distributing, and displaying the videos, conformation to the DMCA’s goal to protect providers who allow users to share media requires shielding Veoh from liability.<sup>65</sup>

## 2. Knowledge

The *Io Group* court also held that Veoh had neither actual nor apparent knowledge of copyright infringement.<sup>66</sup> It further held that Veoh did not have actual knowledge because it had not received any notices of infringing activity.<sup>67</sup> This is consistent with the text of the DMCA, which states that where notices are not delivered to the service provider, the notices cannot impute actual knowledge.<sup>68</sup> Similarly, the *Io Group* court held that even though some of the shared videos were trademarked, Veoh did not have apparent knowledge because there was no actual evidence “from which it [could] . . . be inferred that Veoh was aware of, but chose to ignore [the trademarks] . . .”<sup>69</sup> This is consistent with *Perfect 10, Inc. v. CCBill*, the only other case where the court interpreted the requirements of “apparent knowledge.”<sup>70</sup> In *Perfect 10*, the Court of Appeals for the Ninth Circuit refused to place the burden of detecting whether an uploaded photograph is illegal on the service provider.<sup>71</sup> The court stated that even a logo appearing in a

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<sup>64</sup> *Id.* at 702.

<sup>65</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 07-5744, 2009 WL 334022, at \*5–7 (C.D. Cal. Dec. 29, 2008).

<sup>66</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp.2d 1132, 1148–1149 (N.D. Cal. 2008).

<sup>67</sup> *Id.* at 1148.

<sup>68</sup> *See* 17 U.S.C. § 512(c)(3).

<sup>69</sup> *Io Group*, 586 F. Supp. 2d at 1149. While the plaintiff made a similar argument that Veoh had “apparent knowledge” of copyrighted material, there were no arguments involving “tags or description terms” of copyrighted materials. *Id.*

<sup>70</sup> *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

<sup>71</sup> *Id.* at 1114 (“When a website traffics in pictures that are titillating by nature, describing photographs as ‘illegal’ or ‘stolen’ may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen. We do not place the burden of determining whether photographs are actually illegal on a service provider.”).

video is not enough to impute apparent knowledge on the service provider.<sup>72</sup>

### 3. *Financial Benefits and Control*

The *Io Group* court finally held that although Veoh received financial benefits attributable to the infringing activity by having received profits from advertisements, it still met the specific requirements of § 512(c) because it did not have the requisite “control” over the infringing activities.<sup>73</sup> The *Io Group* court stated that the ability of a service provider to block or remove access to material stored on its website does not equate to a right and ability to control all infringing activity.<sup>74</sup> Furthermore, the court stated that such a holding would be incompatible with the goals of the DMCA.<sup>75</sup> The *Io Group* holding conforms with prior decisions concerning the “right and ability to control” the infringing activity.<sup>76</sup> The Central District Court of California, for

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<sup>72</sup> Satirical videos, in some cases, have been seen as fair use. See *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994) (deciding the issue of whether 2 Live Crew’s commercial parody of the song “Oh Pretty Woman” may be fair use within the meaning of the Copyright Act of 1976).

<sup>73</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1150–1155 (N.D. Cal. 2008).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see also *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1109 (W.D. Wash. 2004). Similarly, in *Perfect 10, Inc. v. CCBill LLC*, the service provider’s right and ability to control infringing activity was limited to disconnecting the webmaster’s access to Internet Key’s services. The court held that this type of control is not sufficient under the DMCA to show “right and ability to control” the infringing activity and that “closing the safe harbor based on the mere ability to exclude users from the system is inconsistent with the statutory scheme.” 488 F.3d 1102, 1181 (9th Cir. 2007).

<sup>76</sup> See *Tur v. YouTube*. No.06-4436, 2007 U.S. Dist. WL 1893635, at \*3 (C.D. Cal. 2007) (finding defendant, internet provider, did not have the requisite control even though it maintained its website because it did not have the technical ability to detect and prescreen infringing material); *MGM, Inc. v. Grokster*, 545 U.S. 913, 926 (2005) (finding defendant, music sharing service provider, had the ability to block users and had rejected other companies’ offers to help monitor its servers for infringing materials); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir.1996) (holding a swap meet proprietor liable for third party’s record sale at swap meet because sufficient elements of control were present when the defendant had the right to terminate vendors, had



example, held that the requirement “presupposes some antecedent ability to limit or filter copyrighted material.”<sup>77</sup> The Ninth Circuit, similarly, found that the right and ability to control infringing activity “has been held to mean ‘something more’ than just the ability of a service provider to remove or block access to material posted on its website.”<sup>78</sup> Thus, the *Io Group* holding is consistent with courts’ prior applications of the “right and ability” to control the infringing activity. These holdings were consistent with the few cases, thus far, that have tested the DMCA’s safe harbor provisions.

Though not controlling in the District Court for the Southern District of New York, these holdings may nonetheless forecast a similar result in *Viacom v. YouTube*. The similarities between YouTube’s and Veoh’s services and the parallels between Viacom’s, Io Group’s, and UMG’s arguments may be sufficiently analogous for the Viacom court to adopt a holding in favor of YouTube.

#### IV. AN OVERVIEW OF THE YOUTUBE WEBSITE AND THE VIACOM LITIGATION

YouTube’s website and the services it provides are almost identical to that of Veoh’s.<sup>79</sup> Like Veoh, YouTube is a website that allows users to upload and share a wide range of videos.<sup>80</sup> Like Veoh, when a user uploads a video, YouTube copies the video, converts it to its own video format, adds the video to its server, and

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the ability to promote the swap meet, and could control customer access); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir.2001) (holding that “[t]he ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise”).

<sup>77</sup> *Tur v. YouTube, Inc.* No.06-4436, 2007 U.S. Dist. WL 1893635, at \*3 (C.D. Cal. 2007) (referencing *MGM, Inc. v. Grokster*, 545 U.S. 913, 926 (2005)).

<sup>78</sup> *Id.*

<sup>79</sup> See *supra* note 27; *infra* note 80.

<sup>80</sup> See YouTube Company History, <http://www.youtube.com/t/about> (last visited Feb. 2009) (on file with the North Carolina Journal of Law & Technology).

makes it available for public or private viewing.<sup>81</sup> YouTube then transmits the video by sending streaming data to the user.<sup>82</sup> Like Veoh, YouTube's users may share videos by sending a link to the video through email or Facebook.<sup>83</sup> Users may also embed the video on their website by using the "share" feature.<sup>84</sup>

In its Terms of Use, YouTube, like Veoh, retains the right to take down videos that users upload online.<sup>85</sup> YouTube also reserves the right to terminate and ban any users who are repeat offenders.<sup>86</sup> Additionally, both Veoh's and YouTube's websites provide users and content providers with the ability to notify the service provider of potentially infringing videos.<sup>87</sup> The primary

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<sup>81</sup> First Amended Complaint at 4, *Viacom Int'l Inc. v. YouTube, Inc.* No. 07-2103 (S.D.N.Y. 2008 filed Apr. 24, 2008). Data and screenshots of the videos are also taken from the uploaded video in order to enhance the search results. *Id.* at 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 12-13.

<sup>84</sup> *Id.*

<sup>85</sup> See YouTube Terms of Use, <http://www.youtube.com/t/terms> (last visited Jan. 27, 2009) (on file with the North Carolina Journal of Law & Technology). Every user who uploads a video must agree to the Terms of Use before uploading a video to the site. *Id.* Also, every time a user submits a video, YouTube warns: "Do not upload any TV shows, music videos, music concerts, or commercials without permission . . . ." YouTube Video File Upload, [http://www.youtube.com/my\\_videos\\_upload](http://www.youtube.com/my_videos_upload) (last visited Jan 27, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>86</sup> See YouTube Terms of Use, <http://www.youtube.com/t/terms> (last visited Jan. 27, 2009) (on file with the North Carolina Journal of Law & Technology). ("YouTube will terminate a User's access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.").

<sup>87</sup> YouTube Glossary: Flag As Inappropriate, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=95403> (last visited Jan. 27, 2009) (on file with the North Carolina Journal of Law & Technology). On every page in which a video is shown, the user has the ability to "flag" a video if he or she thinks it may be infringing on a copyright. *Id.* Copyright owners may also file with YouTube a DMCA complaint notification of infringing videos. See YouTube Terms of Use (stating that "if you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act"). When YouTube receives notice that a user has uploaded infringing content, it gives the user a warning. *Id.* If another notification is filed, YouTube terminates the account, bans the email address,

difference between the two providers is that YouTube's capabilities are limited to online sharing, while Veoh allows users to view videos offline.<sup>88</sup>

In March 2008, Viacom and its affiliates, the owners of thousands of copyrighted materials, including popular TV shows such as *The Daily Show* and *South Park*, sued YouTube for copyright infringement.<sup>89</sup> Viacom alleged that YouTube committed direct, contributory, and vicarious copyright infringement.<sup>90</sup> In response, YouTube denied all allegations of infringement and argued that its conduct fell within the safe harbor provisions of the DMCA.<sup>91</sup>

Before holdings in *Io Group* and *UMG*, the viability of YouTube's defense was unclear. With these recent holdings, however, YouTube's success is more certain. Although the *Veoh* cases were heard in a different federal circuit, the District Court for the Southern District of New York should consider the similarities between Veoh and YouTube and find the arguments made in favor of the safe harbor defense persuasive.<sup>92</sup> The *Veoh* decisions' conclusions of law, which are consistent with prior applications of the DMCA, may also be convincing. If the court chooses to follow these recent developments that lend favorable precedent on the side of a similarly situated video-sharing website, it should find YouTube free from liability through the safe harbor provision codified at § 512(c).

## V. YOUTUBE'S LIKELIHOOD OF SUCCESS

YouTube must satisfy the threshold requirements in order to affirmatively present the safe harbor defense. The threshold

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and disables all of the content provided by that user. *Id.* ("If you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act.").

<sup>88</sup> See *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1139 (N.D. Cal. 2008);

<sup>89</sup> See First Amended Complaint, *supra* note 14.

<sup>90</sup> *Id.* at 22–29.

<sup>91</sup> *Id.* at 8–10.

<sup>92</sup> *Id.* at 10.

requires that YouTube reasonably implement plans to terminate the account of repeat offenders and not take steps to hinder a copyright owner's "standard technical means" of identifying copyright infringement.

A. *Threshold Requirements for Safe Harbor Provisions*

1. "Reasonable implementation" of Repeat Offender Account Termination

Because of the similarities in YouTube's and Veoh's policies and Terms of Use, the *Viacom* court should find that YouTube's policy was also "reasonably implemented."<sup>93</sup> Essentially, because Veoh and YouTube both reserve the option to terminate repeat offenders, the reasonable implementation threshold is established. Furthermore, both Veoh and YouTube take affirmative steps to notify users if they provide infringing materials to the site.

2. *Interference with "Standard Technical Means"*

Further, YouTube can show that it has not interfered with the standard technical means used by copyright owners to identify copyrighted work on its websites, despite Viacom's arguments that YouTube interfered by limiting search results to 1,000 videos and preventing copyright owners from searching privately-shared

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<sup>93</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 (N.D. Cal. 2008). Veoh also alleged in its complaint:

YouTube does not even try to block slightly altered copies of the very same video from being uploaded again immediately after being removed . . . [a]nd it removes only the specific infringing clips at the specific web addresses (URLs) identified in a takedown notice, rather than all infringing works that can be reasonably located using the representative lists and other information in the notice.

First Amended Complaint, *supra* note 14, at 16. This argument, however, does not disqualify YouTube from safe harbor because § 512(i) only requires that there is a reasonable policy of removing repeat offenders. Even assuming that it is required, the standard is only that of reasonableness. Given the size of YouTube's video library and also the number of videos uploaded per day, it can be argued that it would be unreasonable to require YouTube to find all of the "similar videos" that may be infringing. Such requirements would place too much burden on the service provider who does not know as well as the copyright owner what content they actually own. This is discussed *infra*, Part V.

videos.<sup>94</sup> Internet users cannot retrieve more than 1,000 results from a search engine; this result limitation is an industry standard.<sup>95</sup> Requiring service providers to produce more would impose substantial costs on them and burden their networks.<sup>96</sup> Likewise, there is no consensus that copyright owners have the right to look at privately-shared videos. In fact, in response to Viacom's motion to compel, the *Viacom* court found that there was "no sufficiently compelling need" for Viacom to have access to these privately shared videos.<sup>97</sup> Thus, the court is unlikely to find that these two abilities are standard technical means, to which all copyright owners are entitled. Therefore, YouTube's refusal to share privately shared videos and its limitation on search results do not violate Viacom's standard technical means to identify infringing materials. The court should, therefore, find that YouTube satisfies the threshold requirements of the safe harbor provisions by reasonably implementing methods to terminate repeat offender user accounts and by not hindering Viacom's identification of copyright infringing materials.

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<sup>94</sup> See First Amended Complaint, *supra* note 14, at 17 ("YouTube is deliberately interfering with copyright owners' ability to find infringing videos even after they are added to YouTube's library. YouTube offers a feature that allows users to designate 'friends' who are the only persons allowed to see videos they upload, preventing copyright owners from finding infringing videos with this limitation. YouTube has also recently limited the search function so that it identifies no more than 1,000 video clips for any given search.").

<sup>95</sup> Yahoo, Google, Excite and Altavista are currently the predominant search engines used on the Internet. Each of these sites has implemented a 1,000 search result maximum policy. Regardless of what the search term is, each search engine limits the results to 1,000 entries, even where there may be more. See Advanced Search Tips: Viewing more results, <http://www.google.com/support/websearch/bin/answer.py?answer=484> (last visited Jan 27, 2009) (on file with the North Carolina Journal of Law & Technology); Search Engine Size Test: July 2000, <http://searchenginewatch.com/2162821> (last visited Jan 27, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>96</sup> Millions and Millions of Search Results . . . Ignored, <http://louisgray.com/live/2007/12/millions-and-millions-of-search-results.html> (quoting Google's statement that "[i]t would heavily tax our system to provide these results for everyone.") (last visited Jan. 27, 2009) (on file with the North Carolina Journal of Law & Technology). Google, for example, states that returning more than 1,000 results would impose a substantial burden on their servers. *Id.*

<sup>97</sup> *Id.*

### B. *Specific Requirements of § 512(c)*<sup>98</sup>

To be eligible for safe harbor protection, YouTube must also satisfy the specific requirements enumerated under § 512(c). In order to do so, YouTube must establish that the online storage occurs at the direction of the user and that the company does not have actual knowledge of infringement, responds expeditiously to DMCA take-down requests, and lacks financial benefits and control over the copyright infringement.<sup>99</sup>

#### 1. *Storage at the Direction of the User*<sup>100</sup>

As seen from the holdings in *Io Group* and *UMG*, the court is likely to find that YouTube's actions are storage at the direction of the user. Like Veoh, each time a user uploads a video, all of the functions and data in the conversion process are predetermined and automatically executed without human intervention.<sup>101</sup> As the *UMG* court interpreted § 512(c), "storage" is not limited to merely holding the material in an online database but can include showing the video, converting the video format, or allowing users to download the video.<sup>102</sup> Thus, YouTube also offers a service that provides storage at the direction of the user.

#### 2. *Knowledge*

According to *Io Group*, if a service provider receives DMCA takedown notices, then the service provider is deemed to have actual knowledge of the existence of a specific copyright-

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<sup>98</sup> As it stores and is the source of potentially infringing videos, YouTube does not qualify for three of the four safe harbor provisions: § 512(a) (transitory digital network communications), § 512(b) (system caching), or § 512(d) (information location tools). See First Amended Complaint, *supra* note 14.

<sup>99</sup> See *supra* notes 46–51 and accompanying text.

<sup>100</sup> First, Viacom alleges that YouTube converts and copies videos at its own direction, not that of the user. First Amended Complaint, *supra* note 14, at 11. It also argues that YouTube's actions are beyond that of "storage." *Id.*

<sup>101</sup> See *supra* notes 65–70 and accompanying text. If YouTube were to individually determine whether a video was to be picked, an uploaded video would not, in that case, be at the direction of a user. It is still at the direction of the user where a service provider manually checks the content and converts the video if it is to check whether a video is copyrighted. *Costar Group, Inc. v. Lognet, Inc.*, 164 F. Supp. 2d 688, 702 (D. Md. 2001).

<sup>102</sup> See *supra* notes 61–65 and accompanying text.

infringing video.<sup>103</sup> Because YouTube has received and complied with many takedown notices from Viacom, it is likely the court will find that YouTube has actual knowledge of specific copyright-infringing videos.<sup>104</sup> If a service provider does not expeditiously remove the infringing material of which it has actual knowledge, the service provider loses the safe harbor defense available under the DMCA.<sup>105</sup>

Where a notice provides insufficient detail, however, courts may refuse to impose a duty on the service provider to remove similar infringing materials not explicitly listed.<sup>106</sup> Some courts have read the notice requirement strictly. For example, the court in *Arista Records Inc. v. MP3Board Inc.*<sup>107</sup> held that a notice was insufficient where the copyright owner only listed artists and failed to include references to the material claimed to be infringing by, such as, highlighting links to website pages.<sup>108</sup> As a result, the court did not impose a duty on the service provider to find all

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<sup>103</sup> *Io Group*, 586 F. Supp. 2d at 1148; see *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wa. 2004) (“The notice of infringement constitutes evidence of the service provider’s knowledge.”); cf. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“Since Perfect 10 did not provide effective notice, knowledge of infringement may not be imputed to CCBill or CWIE based on Perfect 10’s communications.”).

<sup>104</sup> See, e.g., Posting of Eric Bangeman to Ars Technica, <http://arstechnica.com/tech-policy/news/2007/04/viacom-we-goofed-on-colbert-parody-takedown-notice-case-dismissed.ars> (last visited Apr. 2, 2009) (on file with the North Carolina Journal of Law & Technology).

<sup>105</sup> 17 U.S.C. § 512(c)(1)(A)(iii) (2006). Viacom alleges that YouTube did not act expeditiously by failing to remove all similar videos on its website and to ensure that no previously removed video is re-uploaded. First Amended Complaint, *supra* note 14, at 17 (“[YouTube] remove[d] only the specific infringing clips at the specific web addresses (URLs) identified in a takedown notice, rather than all infringing works that can be reasonably located using the representative lists and other information in the notice.”).

<sup>106</sup> No. 00 Civ. 4660 (SHS), 2002 U.S. Dist. LEXIS 16165 (S.D.N.Y. Aug. 28, 2002).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*25–26. That court held that a notice is sufficient only when it goes beyond simply naming particular artists and songs, such as by highlighting links to website pages which the copyright owners believed led to copyright infringing material. *Id.*

infringing materials by the same artist.<sup>109</sup>

In YouTube's case, it is likely the court will conclude that YouTube had no duty to find all other "works that can be reasonably located using . . . [Viacom's] notice."<sup>110</sup> Viacom's notices do not explicitly describe locations where the other infringing videos can be found and do not give clear notice to YouTube that a video is infringing.<sup>111</sup> These notices are too broad and should not trigger a duty on the part of YouTube to search its entire website.<sup>112</sup> Furthermore, the efforts required to compare side-by-side all videos contained on the website are unrealistically high for a service provider, while relatively low for copyright owners, especially where there are many files located on the website.<sup>113</sup> Even where it is feasible,<sup>114</sup> "there is no assurance that

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<sup>109</sup> *Id.* at \*30. The court also did not impose a duty to identify infringing works that are uploaded in the future. *Id.* Similarly, the court in *ALS Scan, Inc. v. Remarq Communities, Inc.* found that notice imposed a duty only when it explicitly listed links to "two sites created for the sole purpose of publishing [the plaintiff's] copyrighted works." 239 F.3d 619, 625 (4th Cir. 2001).

<sup>110</sup> See First Amended Complaint, *supra* note 14, at 17.

<sup>111</sup> See *Id.* at 16–17 (admitting that the notices indicate the infringing videos but then demand that YouTube remove all the videos that can be reasonably located). It only directs YouTube to the allegedly infringing video. *Id.*

<sup>112</sup> See *ALS Scan, Inc. v. Remarq Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001). Unlike *ALS Scan*, in which the two referenced websites only contained copyright infringing material, Viacom's DMCA notice pointing to "YouTube website" is a general listing of a website that contains both non-infringing and allegedly infringing videos. *Id.*

<sup>113</sup> The 4th Circuit Court of Appeals in *Costar Group* found that there is a duty to ensure that a similar copyright is not re-uploaded in the future. 373 F.3d 544, 556 (4th Cir. 2004). The court found that, where a notice is given to remove one specific infringing photo, the service provider is imputed to have knowledge and such a duty is imposed. The service provider in *Costar* met this duty to act expeditiously when it manually conducted a "side-by-side review between the known infringing photo with all other future uploaded photos. In *Io Group*, the court stated that where there are many files located on the website, "no reasonable juror could conclude that a comprehensive review of every file would be feasible." *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1153 (N.D. Cal. 2008). A manual side-by-side comparison with the 200,000 videos uploaded per day on YouTube's website is, in itself, practically impossible. See Posting of Michael Wesch to Digital Ethnography @ Kansas State University, <http://mediatedcultures.net/ksudigg/?p=163> (Mar. 18, 2008).



[a video sharing service provider] could accurately identif[y] the infringing content in question” because it is the copyright owner and not the service provider who has better knowledge of the copyright and its details.<sup>115</sup>

Even if YouTube had actual knowledge of the infringing material, the *Viacom* court will likely find that YouTube is not disqualified from the safe harbor provision of § 512(c) because they acted expeditiously to remove all videos explicitly listed in Viacom’s takedown notices. If the court strictly scrutinizes the takedown notice, as expected, it will likely find that YouTube had no duty to remove similar videos without more exacting notification from Viacom. Under the DMCA and the takedown notice requirements, Viacom has the duty to find copyright infringing videos on YouTube and to provide YouTube with the address (URL) to the infringing videos. Unless YouTube fails to expeditiously remove the infringing video, YouTube can successfully assert the safe harbor defense.

### 3. *Financial Benefits and Control*

While it is undisputed that YouTube received financial benefits from advertising revenue,<sup>116</sup> YouTube would not be disqualified

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(on file with the North Carolina Journal of Law & Technology) (estimating over 150,000 videos uploaded per day).

<sup>114</sup> The plaintiff even concedes in its complaint that YouTube does have some tools available to fight this problem. *See* First Amended Complaint, *supra* note 14, at 16 (“Although YouTube touts the availability of purported copyright protection tools on its site, at best these tools help copyright owners find a portion of the infringing files, and, as to that portion, only after the files have been uploaded. These tools also prevent upload of the exact same video (or the exact same excerpt of a video) after YouTube receives a takedown notice from the owner.”).

<sup>115</sup> *Io Group*, 586 F. Supp. 2d at 1153. *See also* *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 Civ. 4660 (SHS), 2002 U.S. Dist. LEXIS 16165, at \*19 (S.D.N.Y. Aug. 29, 2002). The Northern District Court of California in *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, stated that “where a service operator cannot reasonably verify a claim of infringement due to the copyright holder’s failure to provide the necessary documentation to show there is a likely infringement, the operator’s lack of knowledge is reasonable and there is no liability.” 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

<sup>116</sup> Yinka Adegoke, *YouTube to Sell Music, Games in Revenue Push*, REUTERS UK, <http://uk.reuters.com/article/technology-media-telco-SP/idUKN>

from the safe harbor provision of § 512(c) if it did not have the requisite control over the infringing activities.<sup>117</sup> Because YouTube's ability to control the infringing activity is limited to the ability to block or remove access to materials stored on its website, a court following *Veoh* will likely find that YouTube also lacked the necessary control.<sup>118</sup> Thus, because *Veoh* and YouTube offer similar services and undertook similar actions, the *Viacom* court may be persuaded to find that YouTube satisfies all of the requirements of the safe harbor provisions of § 512(c) and is therefore free from monetary liability.

## VI. ENFORCING THE GOALS OF THE DMCA

Congress enacted the DMCA "to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."<sup>119</sup> The Act's goal is to balance the interests of three essential groups: creators, users, and facilitators of content.<sup>120</sup> In other words, it is important that the interdependent interests of the

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0748166220081007, Oct. 7, 2008. Viacom argues that YouTube does not meet the requirements for the safe harbor provisions of § 512(c) because it received a financial benefit directly attributable to such activity. See First Amended Complaint, *supra* note 14, at 14 ("Defendants profit handsomely from the infringement of Plaintiffs' copyrighted works, and receive financial benefits directly attributable to the infringing activity.").

<sup>117</sup> See 17 U.S.C. § 512(c)(1)(B) (2006). Viacom argues that YouTube had sufficient control because it had the power to remove any video. See First Amended Complaint, *supra* note 14, at 10–11, 15 ("Though the videos available on YouTube are uploaded by users in the first instance, upon upload the videos become part of the YouTube library for performance and display on YouTube's own website, which Defendants control and directly profit from . . . . YouTube has the right and ability to control the massive infringement on its site . . . . Through its Terms of Use, YouTube imposes a wide number of content-based restrictions on the types of videos uploaded to the site, and reserves and exercises the unfettered right to block or remove any video which, in its sole discretion, it deems 'inappropriate.'").

<sup>118</sup> See *supra* notes 73–78 and accompanying text.

<sup>119</sup> See *Io Group*, 586 F. Supp. 2d at 1141 (quoting the Senate Judiciary Report, 105-190, at 1–2). See also Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (current version at 17 U.S.C. § 512 (2006)).

<sup>120</sup> See *supra* note 8 and accompanying text.

copyright owner, the end user, and the service provider are protected in order to achieve the copyright law's overall purpose of facilitating creative innovation. If one group is not sufficiently protected, the others will ultimately suffer harm.

Because of the ever-changing nature of technology and the Internet, DMCA's effectiveness is unclear. Specifically, the DMCA's ability to balance the interests and burdens of content creators, users, and facilitators has been uncertain, especially in light of emerging methods of creating, sharing, and using information<sup>121</sup> such as videos sharing.<sup>122</sup> With the holdings of *Io Group* and *UMG*, however, the federal courts are clarifying the DMCA's safe harbor provisions. These recent decisions are part of a growing movement to expand the DMCA's power to protect service providers like Veoh. As a result, it is more likely that a service provider will satisfy the safe harbor provisions in the face of challenges to its safe harbor eligibility. This is congruent with the recent broadening of protection for service providers beyond the video-sharing industry and even beyond § 512(c). For example, one court found Google was not liable where a search engine service provider had copied, stored, and published thumbnail images of copyrighted photos in its search results.<sup>123</sup> This is just one of many such results in which the courts have protected service providers. The court in *Viacom v. YouTube* should follow this recent trend in the law and uphold the goals of the DMCA by finding that YouTube's circumstances satisfy the safe harbor provisions.

The court would rightly place the burden of protection on those who own the copyright by ruling for YouTube. Instead of shifting

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<sup>121</sup> Cf. U.S. CONST. art. I, § 8, cl. 1, 9. The U.S. Constitution, the source of congressional power in creating patent and copyrights, states that "[t]he Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

<sup>122</sup> Video-sharing services not only induce sharing among users but also induce the creation and usage of such information because of the increased ease at which videos can be found and the increased speed at which a video can become popular.

<sup>123</sup> *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

the burden of protection almost entirely to the service provider, the legal duty should be placed on the owner of the copyright. The owners are in the best position to know the intricate details of what is protected and can most accurately determine when another's product is infringing their copyright. At the same time, the court should balance this burden by creating, but limiting, liability of a service provider only when it is no longer acting innocently. Especially in recent times, courts have rejected putting additional burdens on service providers.<sup>124</sup> Placing the burden on the service provider could create an enormous disincentive for service providers to offer access to their services, since each could be targeted for copyright infringement.

Balancing the burden in this way would benefit all three groups—content providers, users, and facilitators—and would support the DMCA's goal of fostering innovation. Copyright owners have the incentive to create new works because they have much to gain financially. Along with receiving revenue through their traditional means, video-sharing service providers allow copyright owners to spread their copyrights even further and maximize their profits. Word of mouth promotional communication between users is an efficient method of creating chatter to popularize content owners' copyrights<sup>125</sup> and ultimately to increase the owners' profits.<sup>126</sup> Users who see videos and clips on YouTube are more likely to visit the original source than those who have not seen them. Also, as seen from recent contracts between YouTube and some content providers, the copyright owners can benefit financially in a way they otherwise could not

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<sup>124</sup> Courts have rejected putting a burden on service providers based on merely imputed knowledge. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) ("Permitting a copyright holder to cobble together adequate notice from separately defective notices also unduly burdens service providers.").

<sup>125</sup> The trademark used in the videos may also become popular along with the copyright.

<sup>126</sup> Greater chatter may increase the sales of the video (for example DVDs). Further, as it becomes more popular, the demand for the video may increase and the demand for licenses to use the videos may also increase as a result.

by licensing to content providers.<sup>127</sup> Along with benefitting the end-users by maximizing the number of channels to reap the benefits of art and innovation, balancing the burden also induces innovation. Users have more access to content that they can use as inspiration to create their own innovative and artistic products. Finally, by creating the means through which users and copyright owners may cooperate, service providers benefit financially through several business models including advertisements and licensing. Thus, by ruling for YouTube, the court would be protecting the interests of the copyright owners, service providers and end-users—the three groups essential to innovation—by correctly balancing the burden of copyright protection. Consequently, the court would be supporting the goals of the DMCA and following the recent trend of case law.

## VII. CONCLUSION

YouTube's website and the services it provides are almost identical to those of Veoh. The two companies provide similar websites where users upload, view, and share videos. However, the ease with which such sharing is accomplished has aided users in illegally uploading copyrighted movies. As a result, copyright owners have sued the websites, alleging copyright infringement. Both companies asserted the affirmative defense of DMCA's safe harbor provisions. These provisions protect service providers from monetary damages where they have met the threshold requirements for all safe harbors and the specific requirements for at least one of the safe harbors. In examining whether Veoh is liable for copyright infringement, the District Courts for California found that Veoh qualified for the safe harbor provisions. As a result, only an injunctive remedy was available for the copyright owners. While the decisions of the California courts are not controlling, their reasoning, along with the reasoning of the Ninth Circuit Courts, provides persuasive evidence that YouTube meets the

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<sup>127</sup> See Miguel Helft, *YouTube and Universal Music Are Said to Discuss Deal*, N.Y. TIMES, Mar. 5, 2009, at B2, available at <http://www.nytimes.com/2009/03/05/technology/internet/05music.html> (reporting that YouTube has been in deals with Amazon and other companies, including Universal Music).

burden of § 512(c)'s safe harbor affirmative defense. A holding in favor of YouTube furthers the goals of the DMCA by protecting the rights of copyright holders, service providers, and end users.

