KEEPING THE INTERNET FREE: WHY THE DMCA'S SAFE HARBOR PROVISION SHOULD BE EXPANDED TO HELP CURB OVER REGULATION OF CONTENT BY REMOVING THE FINANCIAL BENEFIT WITH RIGHT AND ABILITY TO CONTROL EXCLUSION

INTRODUCTION

Is there a balance to be found between the rights of copyright holders and individual users on the internet? For content hosting sites, there is a tension between going too far and not going far enough in protecting copyright holders' rights. Do too little, and there is a risk of liability for the infringing content. This could mean expensive lawsuits over copyright liability. Conversely, do too much, and information is needlessly stifled. This leads to absurd outcomes like presidential campaign ads getting flagged days before an election,[1] or footage from a NASA rover landing on Mars getting taken down due to a claim from a news channel.[2] The balance presents a dilemma. For video hosting sites such as

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[1] *See* Nate Anderson, *Fixing DMCA Takedown Problems Through Shaming, Legal Reform*, ARS TECHNICA (Oct. 20, 2008, 9:35 PM), http://arstechnica.com/uncategorized/2008/10/fixing-dmca-takedown-problems-through-shaming-legal-reform/.

[2] *See* Alex Pasternack, *NASA's Mars Rover Crashed into a DMCA Takedown*, MOTHERBOARD (Aug. 6, 2012, 10:49 AM), http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown.

YouTube, it is easier to just err on the side of clamping down on potential copyright infringements to avoid any possibility of liability at the expense of general availability of content. This has led to the implementation of measures that go beyond what is required by the governing law, the Digital Millennium Copyright Act (DMCA), to avoid liability for a copyright infringement. If the composition of the DMCA is such that it encourages sites to over regulate and stifle people's access to content that has no copyright claims made against it, then the law should be changed to remove that encouragement. What follows below is an example of the effects of over regulation and a proposal on how to solve this by changing the applicable law.

The effects of over regulating can be seen in an instance in late 2013, when YouTube made changes to their content ID detection system leading to numerous videos being targeted and removed.[3] This resulted in the removal of many "Let's Play" videos, videos in which people record themselves playing a video game and commenting while doing so or reviewing it.[4] Furthermore, in 2014, YouTube took additional steps to crack down, expanding their random checks for proof of permission to use the material for monetization or ownership of the copyright.[5] Large, official channels that were previously exempt from random checks suddenly found themselves subject to them. The end result is that it is now extremely difficult to make money off of Let's Play videos. Curiously, YouTube has gone this route independent of the requests of copyright holders, as many developers appreciate the free advertising.[6]

This does not just apply to niche portions of YouTube like Let's Play videos. Clicking a video only to see that it is blocked on copyright grounds is a common occurrence. It can happen over

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[3] *See* Paul Tassi, *YouTube Unleashes Strange Storm of Copyright Claims on Video Game Content Producers*, FORBES (Dec. 11, 2013, 9:15 AM), http://www.forbes.com/sites/insertcoin/2013/12/11/youtube-unleashes-strange-storm-of-copyright-claims-on-video-game-content-producers/.

[4] *See* Colin Campbell, *YouTube Video Game Shows Hit with Copyright Blitz*, POLYGON (Dec. 10, 2013, 9:10 PM), http://www.polygon.com/2013/12/10/5198276/youtube-video-game-shows-hit-with-copyright-blitz.

[5] *See* Robert Cram, *YouTube Getting Tough on Video Game Monetization in 2014*, CRAMGAMING (Dec. 7, 2013), http://cramgaming.com/youtube-getting-tough-video-game-monetization-12989/.

[6] *See id.*; Tassi, *supra* note 3.

something as simple as having a song play in the background of a home recording someone wants to put up. Over regulation does not just affect people who hope to make money by sharing things they enjoy; it also can deter content sharing in general. Anyone who uploads videos to sites like YouTube has a chance of eventually rubbing up against copyright infringement security. In addition, the DMCA governs more than just videos. This also applies to websites that allow people to upload pictures, written content, or anything that could be considered information.[7] Over regulation of internet content could have negative effects on social media sites such as Facebook, Twitter, and Instagram as well; all it takes is copyrighted content showing up in someone's video and pressure from copyright holders to cause a DMCA removal.

Why is there over regulation? The answer to that lies in the DMCA, a copyright law Congress passed back in 1998.[8] Within the DMCA is a Safe Harbor provision which allows video hosting sites to avoid liability for copyright infringements if they follow certain criteria. The hosting site must remove videos when they have actual knowledge of an infringement, must receive no financial benefit from infringing activity they have a right and ability to control, and must heed any notifications of claimed infringement that they receive.[9]

The lack of knowledge provision contradicts the financial benefit with right and ability to control provision. Video hosting sites make money through uploaded videos, so they must be aware of the content of all videos to avoid the risk of profiting off of infringing content. Moreover, the actual knowledge provision and the financial benefit with right and ability to control provision both closely resemble two common law forms of liability: contributory liability and vicarious liability, respectively.[10] To say that a site must act on knowledge of infringement but can also be punished for a lack of knowledge is to craft a small Safe Harbor. This is the reason sites like YouTube over regulate. So long as the risk of liability exists for any video making ad revenue, it is in the site's interest to implement means of automatically detecting

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7 17 U.S.C. § 512(c) (2012); *see also* S. REP. NO. 105-190, at 43 (1998).

8 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

9 17 U.S.C. § 512(c) (2012).

10 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 21:41 (2013).

copyright violations, despite the case law and the language of the statute itself saying that this is not required.[11]

The best solution to this problem is to remove the language in § 512(c)(1)(B) which creates liability based on financial benefits with right and ability to control. In doing so, the incentive to over regulate is removed without interrupting the request and remove scheme the DMCA has set up. While many articles have critiqued the Safe Harbor provision, few have done so from the perspective of § 512(c)(1)(B), and none appear to have proposed the removal of § 512(c)(1)(B) specifically. Under this proposal, there would be less stifling from video hosting sites, allowing for a greater sharing of content. In addition, video hosting sites could save money on excessive regulation and avoid scaring off users. This would also benefit copyright holders who enjoy free advertising and do not wish to have questionably infringing videos taken down—such as many game developers in the Let's Play situation. For those that do wish to pull videos, they would have no more trouble removing content they want removed without § 512(c)(1)(B) than they would with it. After all, § 512(c)(1)(B) has no bearing on the obligation to heed removal requests; it merely creates a concern for sites to avoid inadvertent profit off of any unknown, potential infringement.

Part I of this Comment will explain in further detail what the DMCA and the Safe Harbor provision are, the state of copyright law prior to the DMCA, and the rise of video and content hosting sites. Part II will discuss the relevant case law that affects video hosting sites. Part III will show how the law as it currently stands leads to over regulation and stifles content. Part IV will present the argument that getting rid of the language that creates liability for financial benefits with right and ability to control is the best solution, and will address some possible arguments against going that route.

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[11] *See* Viacom Int'l Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013); 17 U.S.C. § 512(m) (2012).

I. BACKGROUND

A. Copyright Liability Prior to the DMCA

Copyright law is enshrined within federal law by statute.[12] When a court finds that a party has violated another party's copyright, the court can impose an injunction on the infringing material[13] or an impound or hold on the infringing material.[14] The court can also award damages, either based on the lost profits of the copyright holder or an amount within the statutorily defined range.[15] In some cases, criminal prosecution is possible.[16] In terms of liability, video hosting sites risk running into secondary liability, as they are not uploading the content themselves. There are three different forms of secondary liability that can be applied to a site hosting content uploaded by third parties. These are contributory infringement, inducement, and vicarious liability.[17]

Contributory infringement is a knowledge-based form of secondary liability. The major focus of contributory infringement is knowledge of the infringing activity.[18] In order to be held liable for contributory infringement, the party must "with knowledge of the infringing activity, . . . cause[] or materially contribute[] to the infringing conduct of another."[19]

Inducement exists as a sort of middle ground between contributory infringement and vicarious liability. It is a form of secondary liability based on conduct, meaning that having knowledge of the individual infringements is not enough to establish liability.[20] The purpose of inducement seems to be to punish those who deliberately put out technology that is intended to be used for infringing on copyrights.[21]

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[12] Copyright law is found in Title 17 of the United States Code.

[13] 17 U.S.C. § 502 (2012).

[14] *Id.* § 503.

[15] *Id.* § 504.

[16] *Id.* § 506.

[17] *See* PATRY, *supra* note 10, § 21:41.

[18] *See* Singer v. Citibank N.A., No. 91 Civ. 4453 (JFK), 1993 WL 177801, at *4 (S.D.N.Y. May 21, 1993).

[19] *Id.* at *5 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

[20] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 984 (C.D. Cal. 2006).

[21] *Id.*

Vicarious liability focuses on the right to control infringing content and the receiving of a financial benefit from the content, language that will be seen again when looking at the Safe Harbor provisions of the DMCA.[22] Vicarious liability for infringing content has three elements: (1) a third party has infringed a copyright, (2) the defendant has the right to supervise the content, and (3) the defendant has a financial interest in the infringing content.[23]

With the passing of the DMCA, these forms of secondary liability lie in the background and only rise up when a defendant is found to not be within the protection of the Safe Harbor provision. In such instances, these are the means of liability a content hosting site will find itself open to.

B. Digital Millennium Copyright Act (DMCA)

The DMCA was passed in 1998 as a means for updating copyright law to better match the state of the internet.[24] The law was intended to provide more protection for copyright holders in an age of rapidly expanding availability of information, yet simultaneously not stifle the growth of the internet and its service providers.[25] To this end, Congress included within the DMCA the Online Copyright Infringement Liability Limitation Act, which was codified as section 512 under Title 17 of the United States Code; this is the section commonly known as the Safe Harbor provision.[26]

The Safe Harbor provision provides four types of information that are eligible for protection from liability: transitory digital network communications, system caching, information residing on systems or networks at direction of users, and information location tools.[27] The area relevant to this paper is information residing on systems or networks at direction of users, or section § 512(c). This is the section that applies to video hosting sites.[28]

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[22] *See* PATRY, *supra* note 10, § 21:41.

[23] *Id.* § 21:66.

[24] S. REP. NO. 105-190, at 1-2 (1998).

[25] *Id.* at 8.

[26] 17 U.S.C. § 512 (2012).

[27] *Id.* § 512(a)-(d).

[28] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1015 (9th Cir. 2013).

Under § 512(c), a service provider is protected from liability if they (1) do not have actual knowledge of the infringing activity or circumstances that make it apparent, and act quickly to remove infringements upon discovery; (2) do not receive a financial benefit when the service provider has a right and ability to control the infringing activity; and (3) removes infringing content upon receiving a notification of claimed infringement.[29]

People who feel that their videos have been removed by a groundless claim can file a counter-claim to get the video restored, the process of which is also detailed in the Safe Harbor provision.[30]

In addition, the Safe Harbor provision requires that a service provider designates an agent to receive notifications of infringement. The agent must make his or her name, address, phone number, and email available on "[the service provider's] website in a location accessible to the public" as well as to the Copyright Office.[31] The agent also must give the Copyright Office any additional information they "may deem appropriate."[32] On the copyright holder's end, the notification of claimed infringement has to meet a list of criteria listed out in the statute.[33] This notification is a ground for damages if it was made through an intentional misrepresentation.[34]

Service providers must meet criteria listed in section (i) to avoid liability. This requires service providers to "adopt[] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and accommodates and does not interfere with standard technical measures."[35]

It is worth noting that the accommodation does not mean that video hosting sites have to use an automated means of detecting and removing copyright infringement.[36] On a final note,

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[29] 17 U.S.C. § 512(c)(1) (2012).
[30] *Id.* § 512(g)(3).
[31] *Id.* § 512(c)(2).
[32] *Id.*
[33] *Id.* § 512(c)(3).
[34] *Id.* § 512(f).
[35] *Id.* § 512(i)(1).
[36] Viacom Int'l Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 120 (S.D.N.Y. 2013).

§ 512(m) lays out a protection of privacy waiver, which states that affirmative monitoring beyond what's needed for section (i) is not required to be within the Safe Harbor.[37]

C. The Rise of Video Hosting Sites

At the time the DMCA was drafted, the internet was far less prolific than it is today; even two years after its enactment, roughly thirty percent of Americans still used dial-up.[38] Sites that hosted large numbers of videos were not easy to come by. This changed when YouTube came into existence in 2005, kicking off the boom of video hosting sites.[39]

YouTube quickly grew in size and popularity, and was bought by Google in 2006.[40] Today, YouTube is a massive online entity which attracts over one billion unique users.[41] From these billion viewers, hundreds of millions of hours of video are watched each day.[42] Not only does YouTube have an immense, worldwide viewer base, it is also rapidly expanding, with three hundred hours of video being uploaded per minute.[43] With this information, it is not hard to believe that YouTube makes billions of dollars in ad revenue per year.[44]

YouTube is not the only site of its kind. Other video hosting sites include Veoh, which was officially launched in 2007,[45] Vimeo, which actually preceded YouTube and was founded in 2004,[46] and

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[37] 17 U.S.C. § 512(m) (2012).

[38] *See* Joanna Brenner, *3% of Americans Use Dial-Up at Home*, PEW RES. CENTER (Aug. 21, 2013), http://www.pewresearch.org/fact-tank/2013/08/21/3-of-americans-use-dial-up-at-home/.

[39] *See* Jim Hopkins, *Surprise! There's a Third YouTube Co-Founder*, USA TODAY (Oct. 11, 2006, 10:41 PM), http://usatoday30.usatoday.com/tech/news/2006-10-11-youtube-karim_x.htm.

[40] *Id.*

[41] *See Statistics*, YOUTUBE, https://www.youtube.com/yt/press/statistics.html (last visited Aug. 11, 2015).

[42] *Id.*

[43] *Id.*

[44] *See* Tim Worstall, *Google's YouTube Ad Revenues May Hit $5.6 Billion in 2013*, FORBES (Dec. 12, 2013, 3:50 AM), http://www.forbes.com/sites/timworstall/2013/12/12/googles-youtube-ad-revenues-may-hit-5-6-billion-in-2013/.

[45] *See* Josh Goldman, *Veoh Relaunches Powerful Video Sharing Service*, TECHCRUNCH (Feb. 12, 2007), http://techcrunch.com/2007/02/12/veoh-relaunches-powerful-video-sharing-service/.

[46] *See About Vimeo*, VIMEO, http://vimeo.com/about (last visited Aug. 11, 2015).

Dailymotion, a Paris-based video hosting site that launched in 2005.[47] It could also be argued that sites and services such as Netflix and Hulu are derived in part from the success of video hosting sites, though such an argument is admittedly beyond the scope of this article.

D. Examples of Sites Over Regulating

In 2007, YouTube implemented technology to identify infringing content and pull it down automatically.[48] This coincided with the time Viacom began its billion-dollar lawsuit against YouTube.[49] The content ID program scans any uploaded video against a database filled with millions of files, and looks for any video or audio matches; even partial matches show up.[50] From there, YouTube acts upon the option previously set by the copyrighter holder whose content was detected. The video's audio is muted, ads are inserted on the video to monetize it for the copyright holder, or the video is removed all together.[51] The program is automated, and deals with an immense amount of videos. On average, over three hundred hours of video are uploaded to YouTube each minute.[52] While this program went into effect before courts spoke on *Viacom v. Youtube*, section (m) of the Safe Harbor provisions still made it clear that affirmative monitoring was not required.[53]

In late 2013, YouTube began using content ID scanning on Multi Channel Networks affiliate channels, a group that had not previously been sharply monitored through YouTube's content ID

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[47] *See* Doreen Carvajal, *Taking on the Godzilla of Video-Sharing Sites*, N.Y. TIMES (Mar. 21, 2008), http://www.nytimes.com/2008/03/21/business/worldbusiness/21iht-motion24.html.

[48] *See* Kevin J. Delaney, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (June 12, 2007, 11:59 PM), http://online.wsj.com/news/articles/SB118161295626932114.

[49] *Id.*

[50] *See How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370 (last visited Aug. 11, 2015).

[51] *Id.*

[52] *See Statistics*, *supra* note 41.

[53] 17 U.S.C. § 512(m) (2012).

program.[54] This alteration to the content ID program resulted in a massive influx of copyright notices to people who had previously received very few.[55] This had a heavy impact on makers of Let's Play videos, whose uploads had not previously attracted the ire of the game developers that held the copyrights to those games.[56]

For a while, makers of Let's Play videos had been able to make money off of their work. Some of the more well-known Let's Players were making tens of thousands of dollars a month.[57] Developers could have easily sent notifications of infringement if they wanted to, but did not. Many viewed it as free advertising, and even if they did not approve of people monetizing their content, the potential sales Let's Plays could lead to still made it a net positive.[58] When videos were abruptly taken down in massive numbers, Let's Players who monetized their videos suddenly found themselves missing huge swathes of income; for some, this was how they made a living.[59] To make the matter even more contentious, roughly half of the copyright challenges were not even officially coming from the copyright holders, but from entities with very loose and questionable ties to the copyrighted material.[60]

The troubles with YouTube and its content ID scanning system continued into 2014. YouTube's content ID scanning expanded again, so that now YouTube checks videos regardless of whether or not an uploader is partnered with a major network.[61] Now, even those whose channels are under managed accounts could be open to random video checks as well.[62] This has all gone

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[54] *See* Colin Campbell, *YouTube Defends Copyright Crackdown*, POLYGON (Dec. 11, 2013, 12:45 PM), http://www.polygon.com/2013/12/11/5200418/youtube-defends-copyright-crackdown.

[55] *See* Tassi, *supra* note 3.

[56] *See* Campbell, *supra* note 4.

[57] *Id.*

[58] *See* Cram, *supra* note 5; Erik Kain, *Another Reason Why YouTube's Video Game Copyright Crackdown Doesn't Make Sense*, FORBES (Dec. 12, 2013, 12:51 PM), http://www.forbes.com/sites/erikkain/2013/12/12/another-reason-why-youtubes-video-game-copyright-crackdown-doesnt-make-sense/.

[59] *See* Christopher Zoia, *This Guy Makes Millions Playing Video Games on YouTube*, ATLANTIC (Mar. 14, 2014, 8:15 AM), http://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/.

[60] *See* Campbell, *supra* note 4.

[61] *See* Cram, *supra* note 5.

[62] *Id.*

into policy after courts have made it clear that affirmative monitoring is not required to comply with the Safe Harbor provisions of the DMCA.[63]

YouTube is not the only site that is implementing affirmative monitoring technology that goes beyond the requirements for the Safe Harbor provisions. As another example, earlier this year, Twitch introduced a similar content ID system which scans for copyrighted music and mutes the audio on any video found to be in violation.[64] The abrupt implementation caused a great deal of outrage, forcing Twitch to clarify that the content ID scanning would not take place on live streams and would be limited to prerecorded videos.[65]

II. CASE LAW

The entertainment industry is predominately located in New York and California. Because of this, the body of case law relating to interpretation of the Safe Harbor provision on content hosting sites comes out of two circuits—the Second and Ninth. This section will look at some of the recent cases out of these circuits and how they have applied the conditions for falling within Safe Harbor protection. In doing so, the conflicting interpretations and ambiguities of the financial benefit with right and ability to control prong will be more apparent. Likewise, it will also be clearer that the other aspects of the law, while not completely agreed on, are less problematic.

A. Second Circuit

1. *Viacom v. YouTube*: Decisive on Actual Knowledge, Less So on Financial Benefit

Viacom International, Inc. v. YouTube, Inc. was a Second Circuit Court of Appeals case decided in 2012.[66] Viacom sued

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[63] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012); 17 U.S.C. § 512(m) (2012).

[64] *See* Emily Gera, *Twitch CEO: 'We Screwed Up' Disclosure of New Controversial Policies*, POLYGON (Aug. 8, 2014, 7:56 AM), http://www.polygon.com/2014/8/8/5982143/twitch-ceo-we-screwed-up-disclosure-of-new-controversial-policies.

[65] *Id.*

[66] 676 F.3d 19 (2d Cir. 2012).

YouTube for copyright infringement, to which YouTube sought summary judgment under the Safe Harbor provision.[67]

The primary issue on appeal was whether the Safe Harbor required "'actual knowledge' or 'aware[ness]' of facts or circumstances indicating 'specific and identifiable infringements.'"[68] The court separated actual knowledge and red flag knowledge, describing actual knowledge as whether a provider subjectively knew about a specific infringement, and red flag knowledge as "whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."[69] The court then held that "actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement" was required in order to lose Safe Harbor immunity.[70]

While the district court was correct on the standard of actual knowledge, the case was remanded because of factual uncertainty as to whether or not YouTube had actual knowledge of some of the videos. This dispute came in the form of emails in which staff members explicitly discussed certain videos.[71] Willful blindness, consciously avoiding something to claim no knowledge of it, was also allowed to be discussed on remand.[72]

The court briefly touched on whether YouTube had the right and ability to control under § 512(c)(1)(B). The court said that a § 512(c)(1)(B) violation "'requires something more than the ability to remove or block access to materials posted on a service provider's website,'" and remanded to determine what that something is.[73] The other main point of interest here was that the court avoided touching on the financial benefit aspect of that subsection. After a brief explanation, the court left the issue open on remand and moved on to other issues.[74]

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[67] *Id.* at 28-29.

[68] *Id.* at 30 (quoting Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010)).

[69] *Id.* at 31.

[70] *Id.* at 32.

[71] *Id.* at 33-34.

[72] *Id.* at 35.

[73] *Id.* at 38 (quoting Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

[74] *Id.*

The issue of affirmative monitoring was brought up, and the court looked at § 512(i), which requires Safe Harbor eligibility on adapting a policy for terminating repeat offenders, in conjunction with § 512(m), which says that affirmative monitoring is not required beyond what is consistent with following section (i).[75] The court ruled on this issue, saying that YouTube could not be excluded from Safe Harbor protection because of a lack of restriction on its search technology.[76] The Court of Appeals then remanded the case to the Southern District Court of New York.[77]

On remand, the district court heard four issues:

1. Whether YouTube had any awareness of the infringing videos,
2. Whether "YouTube willfully blinded itself to specific infringements,"
3. "[W]hether YouTube had the 'right and ability to control' [content] within the meaning of § 512(c)(1)(B)," and
4. "Whether any clips-in-suit were syndicated to a third party."[78]

Issue one was quickly dispatched in YouTube's favor, as the court said that it was Viacom's burden to prove that YouTube had awareness. The court even mentioned the take-down regime of the DMCA and how it had worked fine for copyright holders, citing an instance of Viacom filing one hundred thousand take-down notices with YouTube which were executed the next business day.[79]

The issue of willful blindness was also addressed fairly quickly. Unless YouTube employees have specific knowledge of a clip's location, there cannot be willful ignorance. As no such knowledge was shown here, there was no willful ignorance.[80]

On the issue of right and ability to control, the court asked whether or not YouTube's lack of monitoring and its ability to restrict use of its search technology constituted a violation of the

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[75] *Id.* at 40-41.
[76] *Id.* at 41.
[77] *Id.*
[78] Viacom Int'l Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 113 (S.D.N.Y. 2013).
[79] *Id.* at 115.
[80] *Id.* at 117.

Safe Harbor provision. The court disagreed with the idea that putting the burden on copyright holders to search for infringements violates the right and ability to control provision. The court was also not persuaded by the notion that YouTube's recommended videos on the front page amounted to steering consumers towards infringing videos. The issue of financial benefit was not discussed.[81]

The fourth issue is not particularly relevant to this Comment and will be omitted. However, the court briefly touched upon the issue of interference with standard technical measures, and ruled decisively in YouTube's favor.[82] The court analyzed the section (i) language on standard technical measures with the section (m) language saying that affirmative monitoring is not required beyond what is necessary to comply with (i).[83] In doing so, the court found that YouTube did not lose its Safe Harbor protection on the grounds of not restricting the use of its search function or having a system to affirmatively monitor content at the time the litigation began.[84]

B. Ninth Circuit

1. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*: A Different Circuit's Take on *Viacom*

UMG Recordings, Inc. v. Shelter Capital Partners LLC was a Ninth Circuit case with a Safe Harbor analysis similar to the Second Circuit's *Viacom v. YouTube*. UMG argued that Veoh had knowledge or must have known videos on its site were unauthorized because they contained copyrighted music.[85] The court did not find this to be a violation of the actual knowledge requirement in § 512(c)(1)(A)(i).[86] Similarly, the court found that the burden was on the plaintiff to prove that Veoh had red flag knowledge of the violating videos.[87]

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[81] *Id.* at 117-22.
[82] *Id.* at 120.
[83] *Id.*
[84] *Id.*
[85] *See* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1011 (9th Cir. 2013).
[86] *Id.* at 1021-22.
[87] *Id.* at 1023.

On the issue of financial benefit and right and ability to control, the court followed the Second Circuit in focusing primarily on right and ability to control. The court pointed out the absurdity of penalizing sites for being able to remove content on their own site, and pointed out that the legislative intent was not to bar anyone who could potentially suffer vicarious liability from use of the Safe Harbor.[88] The court then adopted the *Viacom* standard for right and ability to control.[89]

2. *Gardner v. Cafepress Inc.*: The Ninth Circuit's Interpretation of Financial Benefit and Insight to Standard Technical Measures

Gardner v. Cafepress Inc. is a recent case that deals with the potential Safe Harbor violations of Cafepress.com, an image uploading site.[90] Images uploaded onto Cafepress can be printed on "shirts, bags, and mugs."[91] Cafepress does not determine what pictures get uploaded, but they can remove pictures and determine what content can be bought in the Cafepress Marketplace.[92] In this lawsuit, someone uploaded a painting that was sold on Cafepress for nearly a year prior to the painting being copyrighted.[93] Cafepress moved for summary judgment under the Safe Harbor provision, or alternatively for Gardner not having a copyright at the time the painting was sold.[94]

In the beginning of the court's analysis, the court found that Cafepress's deletion of metadata when a photo was uploaded possibly violated the standard technical measures required by § 512(i); because there was an issue of fact, summary judgment under the Safe Harbor was denied.[95] Despite an early denial, the court went on to analyze the elements of § 512(c).[96]

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[88] *Id.* at 1027-28.
[89] *Id.* at 1030-31.
[90] *See* Gardner v. Cafepress Inc., No. 3:13-cv-1108-GPC-JMA, 2014 WL 794216 (S.D. Cal. Feb. 26, 2014).
[91] *Id.* at *1.
[92] *Id.* at *1.
[93] *Id.* at *1-3.
[94] *Id.* at *2-3.
[95] *Id.* at *5-6.
[96] *Id.* at *6-9.

The § 512(c) analysis was in line with the previously discussed cases until the court reached financial benefit. Here, the court would actually get into financial benefit, saying that "a service provider receives a direct financial benefit where 'the infringing activity constitutes a draw for subscribers, not just an added benefit.'"[97] Summary judgment for a question of financial benefit should be given "where 'the record lacks evidence that [the service provider] attracted or retained subscriptions because of the infringement or lost subscriptions because of [the service provider's] eventual obstruction of the infringement."[98] Since the plaintiff offered no evidence that the infringement was a draw for subscribers, summary judgment was granted on the issue.[99] Of course, this did not matter much since summary judgment had already been denied on § 512(i) grounds. However, it may be worth noting that the alternative motion for summary judgment over the material not being copyrighted at the time was granted.[100]

Gardner also briefly tackled the issue of what constituted an interference with standard technical measures.[101] The court asked whether the deletion of metadata counted as interference with a standard technical measure.[102] The issue was remanded because it was unclear whether the use of metadata was something done "pursuant to a broad consensus of copyright owners and service providers."[103] However, before remanding that issue, the court listed an example of interference with a standard technical measure as a site encouraging users to conceal the copyright status of a work.[104] This, along with *Perfect 10, Inc.*, suggests that the Ninth Circuit limits challenges on standard technical measures to instances where the site's action directly hinders the

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[97] *Id.* at *8 (quoting Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1117 (9th Cir. 2007)).
[98] *Id.* (quoting *Perfect 10, Inc.*, 488 F.3d at 1118).
[99] *Id.*
[100] *Id.* at *9-10.
[101] *Id.* at *5-6.
[102] *Id.*
[103] *Id.* at *6.
[104] *Id.* at *5 (citing Obodai v. Demand Media, Inc., No. 11 Civ. 2503(PKC), 2012 WL 2189740, at *5 (S.D.N.Y. June 13, 2012)).

ability of a copyright holder to take action against a potential infringement.

III. DISCOURAGING OVER REGULATION WILL ENABLE THE SHARING OF MORE INFORMATION ON THE INTERNET, LEADING TO GREATER ACCESS OF UNIQUE CONTENT

A. The Internet Should Continue to Foster the Sharing of Information

The internet is valued as a bastion for the sharing of information. Whether it is for keeping in contact with friends and family, research usage, or simple entertainment, people have come to rely on the internet for a myriad of purposes in life. When access to content on the internet is stifled, it has a direct negative impact on all of those uses. Cutting the excessive video removal stemming from efforts to avoid liability would enable the internet to better serve its purpose. The internet would continue to be a bastion for information sharing, unsullied by an overly strict regime that regulates the bounds of copyright law.

It is important to protect the rights of copyright holders, but when something is removed from the internet, the collective sum of information available to the public is diminished just a little bit. When something is removed without a legitimate copyright violation occurring, that diminishing has occurred without anything positive to show for it. A family video was removed because that song in the background might have been a copyright infringement. An entertaining video was removed because it is easier to just bar things than to see if any wrong has actually occurred. Many people have encountered such removals at some point in their life.

Where removals can be reduced, they should be. To that end, getting rid of incentives to take down content first and ask questions later is a good thing. By curbing the encouragement of over regulation, less videos will get removed or blocked in an effort to avoid liability. This means that more information will be available on the internet. Moreover, with less unexpected removals occurring, uploaders could very well produce more content due to a diminished concern over having their work disappear at the snap of a finger.

In talking about the concern of uploaders losing their work, it is worth taking a short aside to mention the counter-claim process that is provided for take down claims. On paper, going through that process leads to a video eventually getting restored if it was removed without good reason.[105]

While this looks pretty straightforward, the legal nature of filing a counter-claim can make the process seem frightening to your average video uploader. The notion of undertaking a legal notification can seem intimidating, even if sites like YouTube encourage uploaders to use the counter-claim process.[106] Even for those who go through with the process, the results are iffy. In a best case scenario, the video is restored within ten to fourteen business days of the video hosting site receiving the counter-claim.[107] In this period of time, the video could lose interest or relevancy. Those are the lucky ones. Many who file a counter-claim fail to get their video back up. A common argument for restoring the video is under fair use, an area of law that is filled with uncertainty. As a result, there is almost no way to know whether or not a counter-claim under fair use will actually work prior to its filing.[108] Even worse are those who have content that falls into a "special exception" category, something usually reserved for certain music copyright holders. For videos in this category, YouTube can basically ignore the counter-claim and keep the video removed.[109] While the counter-claim process exists, it is not a process that is friendly towards uploaders.

To better understand this, one need only to look towards the treatment of Let's Play videos again. Counter-claims did very little to stem the tide of YouTube's crackdown. The YouTube crackdown on Let's Play videos impacted an entire subset of videos, and not just on YouTube, but on other sites as well for a short time.[110]

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[105] *See supra* note 30 and accompanying text.

[106] *See* Cram, *supra* note 5.

[107] 17 U.S.C. § 512(g)(2) (2012).

[108] *See* Cram, *supra* note 5.

[109] *See* David Murphy, *YouTube Will Still Block Some Videos After DMCA Counter-Claim*, PCMAG (Apr. 7, 2013, 3:23 PM), http://www.pcmag.com/article2/0,2817,2417512,00.asp.

[110] *See* Peter Bright, *Twitch CEO Says Audio Muting Will Get Better, No Plans to Mute Live Streams*, ARS TECHNICA (Aug. 7, 2014, 7:55 PM), http://arstechnica.com/gaming/2014/08/twitch-ceo-says-audio-muting-will-get-better-no-plans-to-mute-live-streams/.

Erring on the side of caution affected everyone who wanted to make and watch Let's Plays, whether to see what a game looks like, be entertained by commentary, or just to watch someone else play through an enjoyed game. This is but a single example. Other broad subsets of videos could come under similar fire, such as book and movie reviews, parody videos, and even otherwise original content that features some form of potentially copyrighted music or imagery. If that is not enough, consider that it can go beyond videos. Photos and artwork also fall within the domain of § 512(c), as does written content.[111]

So long as incentive to over regulate exists, broad categories of online content are at risk of censorship. Video hosting sites cannot be blamed; as long as there is an apparent legal risk, it is rational for them to err on the side of over cautiousness. After all, disposing of good content and alienating some users is considerably less risky than losing a multi-million or billion-dollar lawsuit. As long as the law does not change, it will continue to be in the rational interest of video hosting sites to over regulate. In order for the internet to continue being a valuable source for unique information and content, the incentive to over regulate should be curbed.

B. The Over Enforcement of Website Content Has a Chilling Effect on Free Speech

Not only do unnecessary removals result in the loss of content and information, they also can have a chilling effect on the speech protected by the First Amendment.[112] Under the current law, a takedown notice puts the burden on the uploader to demonstrate the lawfulness of his speech, the opposite of most First Amendment situations.[113] This reversed burden makes it very easy to churn out take down notices, leading to the removal of videos that should not be removed.[114] As an extreme example, consider that in 2008, presidential campaign videos were pulled from YouTube via takedown notices, and could not be restored

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[111] S. REP. NO. 105-190, at 43 (1998).

[112] *See* Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010).

[113] *Id.* at 177.

[114] *Id.* at 176.

until a ten to fourteen day waiting period had passed.[115] As this was near the end of the election, that amount of time was huge.

If political advertisements uploaded to reach the public prior to an election are not safe from the DMCA under the First Amendment, it is hard to imagine what is. As opposed to erring on the side of excessive takedowns to avoid any potential liability, the law should be designed to err on the side of as few removals as are necessary to protect copyright holders; anything else goes against the spirit of the First Amendment.

In this day and age, the internet is a crucial part of most people's lives. The vast majority of the population has some form of online presence, be it a social media page, an account on some kind of content-sharing site, or something as simple as an account on a shopping site such as Amazon.[116] In addition, the immense number of people that can be reached via the internet means that putting a message online can be the best way to get a thought, idea, or opinion out. For many people, the internet is a crucial part of their expression. Unnecessary blocks on sites stifle information, and for those people who view the internet as a major source of self-expression, it stifles their ability to exercise their First Amendment rights.

Sites going overboard in regulating their content are not violating the Constitution under the First Amendment, but the effect it has on speech and expression warrants serious consideration. The First Amendment is evidence that the freedom to express oneself is a valued and cherished concept in the United States. Not all speech is protected; the common example is that a person cannot yell fire in a crowded theater.[117] However, limits on speech and protection do not go further than is necessary for the public good the limit seeks to protect.[118] To that end, sites should

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[115] *Id.* at 171-73.

[116] *See Health Fact Sheet*, PEW RES. CENTER, http://www.pewinternet.org/fact-sheets/health-fact-sheet/ (last visited Aug. 11, 2015). While the information merely details the percentage of Americans who use the internet as opposed to those who use social media or have an account on any site, the percentage is high enough to suggest that there is a huge connection between the internet and most people's lives.

[117] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[118] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law

not regulate their content any more strictly than is necessary to preserve the rights of copyright holders.

IV. THE REMOVAL OF THE FINANCIAL BENEFIT PROVISION IS THE BEST SOLUTION TO MITIGATING OVER REGULATION

A. The Incentive Does Not Come from the Actual Knowledge Provision, the Provision Requiring the Heeding of Takedown Notices, or the Provision Dictating Standard Technical Measures

The incentive for video hosting sites to over regulate arises from § 512(c)(1)(B), the portion of the statute addressing financial benefit, and not from the other sections. Over regulation occurs as a result of caution in trying to avoid lawsuits. Given the current case law, law suits arising from questions of actual knowledge or the heeding of takedown notices do not seem likely.

In 2012, *Viacom v. YouTube* was heard in the Second Circuit Court of Appeals.[119] The court remanded four issues that would determine whether or not YouTube would be liable to Viacom for hosting copyright infringing videos: (1) whether YouTube had any awareness of the infringing videos, (2) whether YouTube willfully blinded itself to specific infringements, (3) whether YouTube had the "right and ability to control" content within the meaning of § 512(c)(1)(B), and (4) whether any clips in the suit were syndicated to a third party.[120]

The Court of Appeals reversed summary judgment on issue (1) and ordered the district court to consider issue (2).[121] On (1), the issue of awareness, the court found that actual knowledge or "red flag" awareness was required. However, emails from YouTube staff explicitly talking about infringing videos created an issue of fact for a jury to determine whether there was actual knowledge or "red flag" awareness.[122] This suggests an incredibly high barrier for violation of the actual knowledge provision in §

violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[119] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

[120] *Id.* at 41-42.

[121] *Id.*

[122] *Id.* at 33-34.

512(c)(1)(A). Without explicit evidence for awareness of the infringing video in question, there is not an actual knowledge violation.[123]

Moving on to issue (2), willful blindness, the court remanded this in a similar manner.[124] Willful blindness is not directly discussed in the DMCA, so the court looked to language in § 512(m) saying that affirmative monitoring is not required and remanded to determine whether or not YouTube deliberately avoided knowledge of the infringing videos.[125]

Issue (3), right and ability to control, is where things get ambiguous for YouTube and other video hosting sites. The court was troubled by the contradiction between the control language of § 512(c)(1)(B) and the other requirements of subsection (c), going so far as to call it a "catch-22."[126] The court merely said that a § 512(c)(1)(B) violation "'requires something more than the ability to remove or block access to materials posted on a service provider's website,'" and remanded to determine what that something is.[127] Issue (4), third party syndication, was barely touched on in the opinion and was remanded as a fact issue.[128]

On remand, the issues of actual knowledge and willful blindness were decided quickly in YouTube's favor. For actual knowledge, the burden of proof was on Viacom to show that YouTube knew about each individual infringing clip; this was a burden they could not carry.[129] Likewise, willful blindness had to be proven for each specific clip in the suit in order to remove the Safe Harbor exemption.[130]

Issue (4), third party syndication, was also quickly dismissed here, making issue (3), the right and ability to control, the most perplexing issue.[131] In discussing § 512(c)(1)(B), the court steered clear of issues about financial benefit and stuck to YouTube's right

[123] *Id.*
[124] *Id.* at 35.
[125] *Id.*
[126] *Id.* at 37 (quoting UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1112 (C.D. Cal. 2009)).
[127] *Id.* at 38 (quoting Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).
[128] *Id.* at 40.
[129] Viacom Int'l Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013).
[130] *Id.* at 115-17.
[131] *Id.* at 122-23.

and ability to control content, ultimately holding it did not have to aggressively monitor itself for infringing content under the Safe Harbor provision.[132]

A later case in the Second Circuit, *Capitol Records v. Vimeo*, reaffirmed the reasoning of the *Viacom* case.[133] Here, the financial benefit aspect of § 512(c)(1)(B) was also ignored in favor of an analysis on the right and ability to control infringing content that was found to be in Vimeo's favor.[134] The analysis for actual knowledge also resembled that of *Viacom*, with Vimeo easily getting summary judgment on the videos Capitol Records could not prove staff members interacted with.[135]

The issue has also been heard in the Ninth Circuit, in *UMG Recordings v. Shelter Capital Partners*.[136] The Ninth Circuit Court of Appeals treated the Safe Harbor questions similarly to the Second Circuit. On actual knowledge and "red flag" awareness, the Ninth Circuit fell in line with the Second Circuit and put the burden of proof on the plaintiffs.[137] On the § 512(c)(1)(B) issue, the Ninth Circuit also followed the Second Circuit in disregarding the financial benefit aspect and focusing on the right and ability to control infringing activity, ultimately finding in UMG's favor.[138]

The "standard technical measures"[139] language in section (i) sounds like something that could be ambiguous, so it warrants a quick look into why it is not problematic. First of all, there is a precise definition for standard technical measures in the statute. Standard technical measures refer to

> technical measures that are used by copyright owners to identify or protect copyrighted works and–(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not

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[132] *Id.* at 117-22.
[133] Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 500 (S.D.N.Y. 2013).
[134] *Id.* at 525-27.
[135] *Id.* at 523.
[136] 718 F.3d 1006 (9th Cir. 2013).
[137] *Id.* at 1025-26.
[138] *Id.* at 1026-31.
[139] 17 U.S.C. § 512(i)(2) (2012).

> impose substantial costs on service providers or substantial burdens on their systems or networks.[140]

In *Viacom*, the court read section (i) in conjunction with section (m), the section saying that affirmative monitoring is not required.[141] In doing so, the court found that not providing mechanisms for affirmative monitoring is not the same thing as failing "to accommodate or implement a 'standard technical measure.'"[142] While there may indeed be some ambiguity on what exactly a standard technical measure is, there is not any ambiguity on whether or not the Safe Harbor provision requires video hosting sites to implement programs that affirmatively monitor any and all uploaded content; the answer is a clear-cut no, it does not.

The issue is similarly clear on not needing to affirmatively monitor in the Ninth Circuit. In *Gardner v. Cafepress Inc.*, the district court asked whether the deletion of metadata counts as interference with a standard technical measure.[143] The issue was remanded because it was unclear whether the use of metadata was something done "pursuant to a broad consensus of copyright owners and service providers."[144] However, before remanding that issue, the court listed an example of interference with a standard technical measure as a site encouraging users to conceal the copyright status of a work.[145] The message from this case is fairly clear. Issues of interference with standard technical measures are restricted to sites using technology in a manner which actively impedes copyright holders from exercising their rights. The use of affirmative monitoring does not fall into this category. Such an issue does not appear to have been tried in the Ninth Circuit, but if it is tried, there is no reason to believe that the courts would look upon a lack of affirmative monitoring as an interference with standard technical measures. This is especially likely since so far,

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140 *Id.*

141 *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2d Cir. 2012).

142 *Id.*

143 *See* Gardner v. Cafepress Inc., No. 3:13-cv-1108-GPC-JMA, 2014 WL 794216, at *5-6 (S.D. Cal. Feb. 26, 2014).

144 *Id.* at *6.

145 *Id.* at *5 (citing Obodai v. Demand Media, Inc., No. 11 Civ. 2503(PKC), 2012 WL 2189740, at *5 (S.D.N.Y. June 13, 2012)).

no court in any district has outright gone against *Viacom v. YouTube*. If section (i) is not an issue either, that just leaves section (c)(1)(B) and its financial benefit language.

While many Safe Harbor cases have avoided the question of financial benefit, there are some that have taken the issue on. The standard appears to be that "financial benefit" is given the same meaning it receives in vicarious liability, meaning that financial benefit is present "where 'the infringing activity constitutes a draw for subscribers, not just an added benefit.'"[146] The Ninth Circuit has held that summary judgment is entitled "where 'the record lacks evidence that [the service provider] attracted or retained subscriptions because of the infringement or lost subscriptions because of [the service provider's] eventual obstruction of the infringement.'"[147]

These cases have made it evident that it is extremely difficult to be held liable under § 512 (c)(1)(A), and liability under § 512(c)(1)(C) would not arise unless a video hosting site deliberately ignored a takedown notice. However, it also reveals an ambiguity in § 512(c)(1)(B). Very few courts have addressed both the right to control and the financial benefit part of the section at once.

In addition, the implications of § 512(c)(1)(B)'s language are far reaching. The statute removes Safe Harbor protection for anyone who "receive[s] a financial benefit directly attributable to the infringing activity."[148] Most video hosting websites do in fact exist to make money, and it is highly difficult to know what videos will constitute a draw for viewers. This uncertainty creates a broad potential area of liability that could result in the revocation of Safe Harbor protection. So long as this possibility of a debilitating lawsuit remains, sites like YouTube will continue to err on the side of over regulation to avoid this potential liability under § 512(c)(1)(B).

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[146] *Id.* at *8-9 (quoting Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1117 (9th Cir. 2007)).

[147] *Id.* at *8 (quoting *Perfect 10, Inc.*, 488 F.3d at 1118).

[148] 17 U.S.C. § 512(c)(1)(B) (2012).

B. Removal of the Financial Benefit with Right and Ability to Control Language Is the Most Likely Way to Curb Over Regulation Without Gutting the Rights of Copyright Holders

As was established above, the source of the incentive for over regulation of videos arises from ambiguities in § 512(c)(1)(B), the provision detailing financial benefit.[149] This means that removing § 512(c)(1)(B) is the best option for preventing over regulation, as it will take care of the legal ambiguities created by a lack of litigation on the issue of financial benefit. Other possible solutions either involve a complete overhaul of copyright law or would put copyright holders in too disadvantageous of a position.

An alternative to removing the language of § 512(c)(1)(B) would be to just alter the DMCA to automatically exempt video hosting sites and other service providers, shifting the liability onto the individuals committing the copyright infringements in the first place. This idea is problematic for several reasons. First, individuals uploading videos are likely to be insolvent in cases where enough money is on the line for copyright holders to care about suing in the first place. This effectively would make litigation useless for copyright holders, so they would not get on board with this. Second, while video hosting sites would no longer have a need to over regulate, the chilling effect would be passed on to individuals. Your average internet user would not like this idea any more than copyright holders would. If anything, the newly shifted fear of lawsuits would lead to less videos getting uploaded in general.

Another possibility is to strengthen the counter-claim process on DMCA removals. The DMCA currently has a process for contesting copyright claims within it.[150] While the way the counter-claim provision is written is pretty good in theory, it does not always lead to the expedient re-uploading of questionable removals. Moreover, the waiting period is often enough time for the damage of removal to be done.

Unfortunately, there do not seem to be feasible ways to strengthen the counter-claim process. One idea is to remove the

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149 *See supra* Part IV.A.
150 17 U.S.C. § 512(g) (2012).

provision stating that sites aren't liable for good faith disabling.[151] However, this would just put video hosting sites in an even worse position than they currently are now. They would have virtually no way to avoid the risk of liability, which could lead to them shutting down. Such a catastrophic outcome is surely something to be avoided.

Another possibility is to flesh out the law on what arguments disprove a copyright infringement. While certainly a better approach than leaving video hosting sites stuck between a rock and a hard place, this would require extensive legislation and/or litigation. Any approach that requires Congress to essentially create and pass a new, large body of law is questionable in feasibility. Likewise, waiting for the relevant issues to be litigated and raised in court is not necessarily a sound approach either. Since the focus of video hosting sites is on avoiding liability, questions of what works as a counter-claim may not appear before a court.

There are other possible answers out there too, but many are even less feasible than the ones raised above. Congress could potentially go further than the focus shift proposed a few paragraphs ago and just say that copyright law does not apply on the internet. This would never pass, and even if it did, copyright holders would be justifiably outraged and not let it stay on the books for long. Such a move would gut creative rights for an increasingly growing portion of media distribution; it is simply a bad idea. On the other end of the spectrum, the Safe Harbor could be removed all together, returning copyright law to its pre-DMCA state and putting more power in the hands of copyright holders. This would lead to the death of sites like YouTube and crush content sharing, however, so this is not exactly a better move than getting rid of copyright law on the internet. In terms of reasonable solutions, removing the language of § 512(c)(1)(B) takes away the urge to over regulate without crippling copyright holders or requiring the rewriting or creation of huge bodies of law. For this reason, it seems like the best solution.

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[151] *Id.* § 512(g)(1).

C. The Benefit of Reducing Unnecessary Takedowns Greatly Outweighs the Small Potential Harm that Would Arise from Copyright Holders Needing to Do More Policing

A lot of the validity for the removal of § 512(c)(1)(B) as a feasible solution to curbing over regulation hinges on it not doing great harm to copyright holders. Here is where copyright holders are most likely to disagree with my thesis; some may feel that the removal of this language would give too much power to video uploading sites and other applicable web services. There are also those who feel that the current structure does not do enough to support the rights of copyright holders, and would oppose anything that does not shift the balance in that direction. This would include people who think that the current system places too much of a burden on copyright holders to police their own content with takedown notices. In this section, I hope to demonstrate why removing the § 512(c)(1)(B) language does not overburden copyright holders.

It goes without saying that copyright holders do not object to the continued existence of § 512(c)(1)(B). The section allows for another avenue to hold host sites liable, even if it has not been too successful in that regard yet. More importantly, the over regulation it encourages through its ambiguity means that sites are removing content before copyright holders have to send notifications of claimed infringement. This means that for those in charge of sending out notifications of claimed infringement, some of their job is being done for them. In the very least, removal of § 512(c)(1)(B) will likely draw objections from this group, as they will have more notifications to send out as a result of less over regulation. While this may be the case, it is not a reason to hold on to that language.

The removal of § 512(c)(1)(B) would not cause any changes to how copyright holders go about taking down videos. On occasion, a site will see a video that looks like a copyright infringement and will remove it upon doing so. However, the vast majority of DMCA removals arise from notifications of copyright infringement. The process for filing a notification of copyright infringement is laid out in the DMCA, and has been the standard method of removing infringing content from internet sites since the DMCA was passed.[152] These notifications have worked well for copyright holders so far. Many places have people whose job it is to seek out infringing content and send out notifications of copyright infringement. The process has been standardized to the point where mass-sendings are simple. As a single example, Microsoft has sent roughly eight hundred thousand notices in a single month before, and that was just to Google.[153] While it is true that copyright holders would have less enforcement done for them, their ability to police infringing content is not stifled. Sending out some more takedown notices seems like more than a fair tradeoff for greater freedom to share information and content on the internet.

In addition to being a fair tradeoff, it also helps preserve the balance Congress intended to create when they passed the DMCA. The DMCA was drafted before the advent of video hosting sites such as YouTube, so it is difficult to guess how Congress intended for § 512(c)(1)(B) to apply to them. From what legislative commentary there is, it seems like Congress intended to punish sites whose primary value came from providing access to infringing material.[154] They also noted that "[i]n general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service."[155] This suggests that video hosting sites would not be held liable for inadvertent violations under Congress's intention for what the DMCA would do. Removing the § 512(c)(1)(B) language does not seem like it would go against Congress's intent for what the DMCA would do, as sites who run a business model of profiting off of infringing content violate far more sections than just § 512(c)(1)(B).

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152 *Id.* § 512(c)(3).

153 *See* Ernesto Van der Sar, *Microsoft's Bing Removes Several Hundred Thousand "Pirate" Search Results*, TORRENTFREAK (Aug. 8, 2013), https://torrentfreak.com/microsofts-bing-removes-several-hundred-thousand-pirate-search-results-130808/.

154 S. REP. NO. 105-190, at 45 (1998).

155 *Id.* at 44.

In addition, on the few occasions where financial benefit has been litigated, it has not worked out for the plaintiffs.[156] This means that copyright holders are not losing anything of value they have relied on to enforce copyrights. One could argue that a possibly successful avenue of legal argument is being shut down before it can be adequately examined, and in that manner it causes harm to copyright holders. However, the reluctance judges have shown to invoke financial benefit language in previous cases combined with the loose definition used when it is invoked suggests that this will not change.[157] Scrapping this language merely gets rid of a loose end in the law that is encouraging risk adverse companies to over regulate.

This raises another question: if sites would probably win the issue, how is the uncertainty in § 512(c)(1)(B) causing over regulation, and why bother getting rid of it? As suggested above, the answer lies in risk aversion. Yes, video hosting sites would *probably* win a financial benefit case if it was litigated, but that is just speculation based on how courts have treated Safe Harbor questions in the past. The "probably" cannot be emphasized enough—there is a possibility that video hosting sites could lose such a case. Where a loss could mean losing millions or possibly over a billion dollars, it is much safer for them to just set strict policies and stop anything that looks even remotely questionable. The risk is not worth it, even if the odds may be in their favor, so to that end § 512(c)(1)(B) remains a looming specter on the regulatory schemes of video uploading sites.

In the face of over regulation, the removal of § 512(c)(1)(B) is a straightforward solution that does not do grave harm to copyright holders. Notifications of copyright infringement have been the standard means through which copyright holders get infringing content removed. Removing the language of § 512(c)(1)(B) does absolutely nothing to change this, meaning that the position of copyright holders is not really being changed. There may be objections to having to do more of their own policing, but as this was the initial scheme, that is not a dire burden. Add that

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[156] *See generally* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); Gardner v. Cafepress Inc., No. 3:13-cv-1108-GPC-JMA, 2014 WL 794216 (S.D. Cal. Feb. 26, 2014).

[157] *See generally* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

to the fact that financial benefit remains somewhat ambiguous, and this is a move to curb over regulation that does very little harm to copyright holders.

CONCLUSION

The Safe Harbor provision seeks to fulfill a good purpose, but as it currently stands, it encourages sites that host independently uploaded content to err on the side of over regulating. This results in a lot of good, user-created content getting unnecessarily removed.

The solution is to give sites less reason to over regulate, and to that end, removing the financial benefit language from the Safe Harbor provision is the best solution. That is where the incentive to over regulate is coming from, and removing that language does not inflict any serious harm on copyright holders, as other sections already protect the rights that language was intended to protect. The good vastly outweighs the bad, so removing the financial benefit with right and ability to control language is a safe and straight forward solution to the problem of incentivizing over regulation.

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