

The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content

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INTRODUCTION

When was the first time someone sent you an e-mail link to a piece of video that you then watched on a website? Do you remember when that happened? Think about it for a couple of seconds . . . can you remember? Maybe you have a better memory than I do, but I can’t remember. All I know for sure is that for a long time (i.e., my whole life) I had never watched video online, and then, seemingly overnight, I was completely accustomed to watching videos online multiple times per day. Today, it is completely routine for people to watch videos online of almost any visual content¹—ranging from clips of films and television shows

¹ According to a com.Score report, in July of 2009 alone, over 21 billion videos were viewed online in the United States by 158,384,000 unique viewers, averaging 134.9

to anything that can be captured on a video camera or phone, such as footage of a friend's child doing something adorable—but it was not that long ago that this capability was almost completely unknown to the general public.² For those of us old enough to remember a time before watching videos online and forwarding video links to friends was commonplace, it seems like the first time this practice occurred should be a memorable, groundbreaking experience—the modern day equivalent of a Baby Boomer child seeing television for the first time. And yet, the experience of viewing videos online for the first time does not have that same type of resonance for the majority of people who have lived through the Internet revolution. Viewing videos online became a part of everyday life so quickly and thoroughly that most members of the general public did not spend a significant amount of time reflecting on its significance. Online video is a truly amazing, yet already pedestrian, development. And while, in retrospect, it seems inevitable that the professional creators of film, television, or any other visual medium would eventually distribute their content online (whether by choice or kicking and screaming), what seems less obvious, looking back, is that regular people would be able to share their own personal footage and creations with friends (and strangers) all over the world.

One of the most important developments during the current period of Internet growth is the tremendous proliferation of “User-Generated Content.”³ User-Generated Content covers a wide array

videos per viewer. Posting of Benn Parr to Mashable, <http://mashable.com/2009/08/29/youtube-viewers> (Aug. 29, 2009).

² YouTube aired its first video in April 2005. Tom Meltzer and Sarah Phillips, *From the First Email to the First YouTube Video: A Definitive Internet History*, GUARDIAN, Oct. 23, 2009, <http://www.guardian.co.uk/technology/2009/oct/23/internet-history>. Since then, Internet and media companies have launched their own versions of online video websites. See Reelpopblog.com, A Brief History of Online Video (in Pictures), http://www.reelpopblog.com/2006/09/a_brief_history.html (last visited Nov. 5, 2009).

³ See Andrew C. DeVore, *User-Generated Content: Copyright Issues in a “Do it Yourself” World*, 943 PLI/Pat 85, 87 (2008). DeVore provides the following definition of “User-Generated Content”:

1. Media created and uploaded to the Internet by non-media professionals
2. Typical examples include user-created audio or video clips, reviews, blogs, recipes, wikis, news articles, etc.

Id.

of media,⁴ but video-based User-Generated Content (“User-Generated Video Content”) raises a number of complicated issues regarding how copyright law is currently enforced in the marketplace. Over the past ten years, non-professional video makers have created and disseminated an amazing array of works. Some creators film their own material; some make copies of pre-existing works and edit them into new works; some combine original footage with pre-existing material.⁵ There are two factors that make this trend truly significant. First, a large number of people are seizing the opportunity to create User-Generated Video Content.⁶ Second, creators of User-Generated Video Content have the tools to infringe upon existing copyrights with unprecedented ease.⁷

The continued advancement, and reduction in price, of technology in the areas of digital video cameras, video editing equipment, and digital distribution has led to a dramatic increase in the number of people who are able to create and disseminate User-Generated Video Content to wide audiences through the Internet.⁸ YouTube⁹ is the most well-known website for uploading and sharing User-Generated Video Content,¹⁰ but a seemingly endless number of websites allow their users (“Users”) to upload and share video content, including other video-sharing websites like Vimeo¹¹ and prominent social networking websites like Facebook¹² and MySpace.¹³ The non-professional creators of User-Generated

⁴ *Id.*

⁵ SACHA WUNSCH-VINCENT & GRAHAM VICKERY, ORG. FOR ECON. CO-OPERATION AND DEV., PARTICIPATIVE WEB AND USER-CREATED CONTENT: WEB 2.0, WIKIS AND SOCIAL NETWORKING 35 (2007).

⁶ A recent report estimates that in 2008 there were 15.4 million creators of User-Generated Video Content, and that the number will rise to 27.2 million by 2013. Paul Verna, *A Spotlight on UGC Participants*, EMARKETER, Feb. 19, 2009, <http://www.emarketer.com/Article.aspx?R=1006914>.

⁷ See *infra* text accompanying notes 14–16.

⁸ See Verna, *supra* note 6; see also WUNSCH-VINCENT & VICKERY, *supra* note 5, at 27–30.

⁹ YouTube, <http://www.youtube.com> (last visited Aug. 2, 2009).

¹⁰ See Parr, *supra* note 1 (“YouTube became the 4th most visited site on the web . . . [making it] the web’s most popular video website.”).

¹¹ Vimeo, <http://www.vimeo.com> (last visited Aug. 2, 2009).

¹² Facebook, <http://www.facebook.com> (last visited Aug. 2, 2009).

¹³ MySpace, <http://www.myspace.com> (last visited Aug. 2, 2009).

Video Content have flocked to websites that allow uploading and streaming of video (“Video-Sharing Websites”) for a variety of reasons, but primarily these websites provide amateur Users with an opportunity to share videos with friends or connect with a community of Users with similar interests. At the same time, other technologies, like Digital Video Recorder (“DVR”)¹⁴ and DVD “ripping” software,¹⁵ have made it much easier for individuals to make high-quality copies of copyrighted motion pictures, television shows, and audiovisual works.¹⁶ Together, these advances in technology have led to the tremendous volume of User-Generated Video Content distribution online.¹⁷

The Supreme Court established in *Metro-Goldwyn-Mayer Studios v. Grokster*¹⁸ that those who distribute peer-to-peer software for the purpose of promoting its use to infringe copyright will be liable for infringement by third parties.¹⁹ Most Video-Sharing Websites that allow Users to upload and stream their own video content have generally avoided being subject to the *Grokster* ruling by closely adhering to the statutory requirements of the safe harbor provisions (“Safe Harbor Provisions”) of the Digital

¹⁴ Digital Video Recorder technology, more commonly referred to as DVR, is a hardware component that allows users to record and save television programming to a hard drive and then replay the programming at the users’ convenience. Richard Shim, *DVRs—Are They Hot or Not?*, CNET NEWS, Oct. 2, 2002, http://news.cnet.com/DVRs--are-they-hot-or-not/2100-1041_3-960554.html. The company Tivo is often credited with first popularizing the technology, but DVR service is currently offered by most cable television and satellite television companies. See, e.g., TechTerms.com—DVR (Digital Video Recorder) Definition, <http://www.techterms.com/definition/dvr> (last visited Aug. 2, 2009); Tivo, Tivo DVR Features, http://www.tivo.com/whatistivo/tivodvrfeatures/control_tv.html (last visited Aug. 2, 2009). Current estimates suggest that over 30% of U.S. households have a DVR, and those numbers have increased substantially in recent years as cable and satellite companies have integrated DVR technology into set top boxes. Posting of Bill Gorman to TV by the Numbers, <http://tvbythenumbers.com/2009/04/30/dvrs-now-in-306-of-us-households/17779> (Apr. 30, 2009).

¹⁵ See Paul Elias, *Hollywood Fights ‘Rent, Rip and Return’ Software*, MSNBC, Apr. 24, 2009, <http://www.msnbc.msn.com/id/30386423/>.

¹⁶ See Posting of Jack Gorman to eHow, http://www.ehow.com/how_4785125_copy-dvr-dvd.html (last visited Nov. 27, 2009) (providing step-by-step directions on how to copy material from a DVR, with the use of a DVD recorder).

¹⁷ See Verna, *supra* note 6.

¹⁸ 545 U.S. 913 (2005).

¹⁹ *Id.* at 936–37.

Millennium Copyright Act (“DMCA”),²⁰ which protect Online Service Providers (“OSPs”)²¹ from liability for copyright infringement by third-party Users.²²

Enacted in 1998,²³ the DMCA was intended to strike a balance between protecting the rights of copyright holders (“Copyright Holders”) online without stifling the tremendous innovation and commercial growth that was occurring in relation to the Internet.²⁴ In order to achieve this goal, the DMCA protects both Internet Service Providers (i.e., providers of access to the Internet, such as broadband, DSL, or dial-up providers) and OSPs (i.e., search engines or websites that allow Users to post content) from liability for the illegal acts of their Users or customers if they meet the criteria specified by the law.²⁵ The Safe Harbor Provisions of the DMCA provide a specific procedure—commonly referred to as a

²⁰ Digital Millennium Copyright Act, 17 U.S.C. § 512 (2006).

²¹ The DMCA uses the term “service provider” to identify the entities that are protected by the provisions of the DMCA. *Id.* The category “service provider” is generally understood to refer to a broad spectrum of online entities, including, but not limited to, the companies that provide Internet access (i.e., TimeWarner, Verizon, Comcast) and websites that allow users to post content. Thus, for the purposes of this Note, the term “Online Service Provider,” or OSP, should be understood to refer to a wide range of entities, including Video-Sharing Websites such as YouTube.

²² See Chilling Effects, FAQ About DMCA Safe Harbor, <http://www.chillingeffects.org/dmca512/faq.cgi> (follow “Q: What Are the DMCA Safe Harbor Provisions?” hyperlink) (last visited Aug. 2, 2009) [hereinafter FAQ About DMCA Safe Harbor] (“[The DMCA] safe harbor provisions are designed to shelter service providers from the infringing activities of their customers. If a service provider qualifies for the safe harbor exemption, only the individual infringing customer are [sic] liable for monetary damages; the service provider’s network through which they engaged in the alleged activities is not liable.”); see also Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 233–34 (2009) [hereinafter Lee, *Decoding the DMCA Safe Harbors*] (“Although websites can forego the DMCA safe harbors without violating copyright law, as a practical matter virtually all commercial websites in the U.S. that deal with third-party content attempt to follow and fall within the safe harbors. Indeed, it would be foolish, if not a breach of corporate fiduciary duty, for any such company not to do so.”).

²³ The DMCA amended the Copyright Act of 1976 and implemented two treaties of the World Intellectual Property Organization. See Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 512, 1201–05, 1301–32; 28 U.S.C. § 4001 (2006) and substantially amending 17 U.S.C. §§ 101, 104, 104A, 108, 112, 114, 117, 701).

²⁴ See U.S. COPYRIGHT OFFICE, EXECUTIVE SUMMARY DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT (2001), available at http://www.copyright.gov/reports/studies/dmca/dmca_executive.html (last visited Aug. 2, 2009) [hereinafter EXECUTIVE SUMMARY].

²⁵ See FAQ About DMCA Safe Harbor, *supra* note 22.

“takedown notice”—for Copyright Holders to request that OSPs remove, or “takedown,” content that the Copyright Holders allege infringes their rights (the “Takedown Notice Procedure”).²⁶ A more detailed explanation of how the Takedown Notice Procedure functions will be provided in Part I.B of this Note. However, it is essential to recognize that since the DMCA was enacted, the Safe Harbor Provisions, and specifically the Takedown Notice Procedure, have become increasingly important due to the unforeseen development of User-Generated Video Content utilizing copyrighted content.²⁷ For both Copyright Holders attempting to police their properties online and OSPs determining how to operate their websites, the Safe Harbor Provisions of the DMCA are central to any online-oriented operation.²⁸ The DMCA was enacted over ten years ago²⁹ and the Safe Harbor Provisions of the DMCA have, perhaps by default, become the central statutory rule that determines whether User-Generated Video Content can be disseminated through Video-Sharing Websites.³⁰

Copyright law is often faced with the challenge of balancing interests when new technologies develop that allow for new or unanticipated forms of copying and distributing protected works.³¹

²⁶ See 17 U.S.C. § 512(c); see also FAQ About DMCA Safe Harbor, *supra* note 22 (follow “Q: What are the notice and takedown procedures for web sites?” hyperlink).

²⁷ See Verna, *supra* note 6.

²⁸ See Lee, *Decoding the DMCA Safe Harbors*, *supra* note 22, at 233–34.

²⁹ See *supra* note 23.

³⁰ The Online Copyright Infringement Liability Limitation Act, which creates a provisional safe harbor for service providers, was enacted as Title II of the DMCA. Pub. L. No. 105-304, §§ 201–03, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 512); FAQ About DMCA Safe Harbor, *supra* note 22.

³¹ See Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1613 (2001) (“In articulating the reach of the author’s exclusive rights over reproduction, distribution, and public performance and display, the copyright statute and the judges who interpret it attempt a balance: Creators should maintain sufficient control over new markets to keep the copyright incentive meaningful, but not so much as to stifle the spread of the new technologies of dissemination.” (internal citations omitted)). Professor Ginsburg analyzes the history of significant new technology cases where a new means of disseminating copyrighted works is introduced (“from piano rolls . . . to portable MP3 players”) and identifies two distinct responses by the courts to these types of cases: where copyright holders attempt to exploit the technology by seeking compensation for use of protected works, the courts have generally been supportive of copyright holders enforcing their rights (i.e., licensing fees for radio broadcast of musical compositions); where the courts perceive copyright holders

One of the most challenging issues raised by how the Safe Harbor Provisions are currently implemented is whether major media companies that control significant copyrighted properties (the “Copyright Industries”) have a disproportionate amount of power in determining what User-Generated Video Content is allowed to be distributed and what is deemed to be infringing,³² and whether the current regime adequately protects the public’s interest in allowing productive uses of pre-existing copyrighted materials by non-professional creators of User-Generated Video Content. Technology has given the general public an unprecedented opportunity to create and share video content, and the general public has embraced the opportunity, with amateur creators producing vibrant, exciting content.³³ It is important that copyright law effectively nurtures this tremendous growth in creative productivity, but it is apparent that the Safe Harbor Provisions of the DMCA, as currently implemented, do not adequately protect the fair use rights of this new class of amateur content creators. The Safe Harbor Provisions should be revised to more adequately balance the interests of Copyright Holders, OSPs, and the creators of User-Generated Video Content by ensuring that fair use analysis is effectively incorporated into the Takedown Notice Procedure.

This Note will analyze how advancements in technology have allowed a new class of non-professional video content creators to emerge from the general public, and how the rights of these creators of User-Generated Video Content are being interpreted

attempting to block use of a new technology entirely, the courts have been reluctant to enforce copyright holders’ rights (i.e., the motion picture industry attempting to block the VCR from coming to the market). *See id.* at 1619–26.

³² *See* Jeffrey Cobia, *The Digital Millennium Copyright Act Takedown Notice Procedure*, 10 MINN. J.L. SCI. & TECH. 387, 391–94, 397–98 (2009) (contending that enforcement of the DMCA has proven to be problematic in practice because takedown notices are often abused, used for harassment, and lead to copyright law being applied improperly). Cobia further argues that the DMCA is “somewhat effective for copyright holders who have a large number of copyrights or groups that represent a large number of copyrights” because effective use of the DMCA requires vigilant and comprehensive policing of the Internet. *Id.* at 397. Thus the DMCA rewards large copyright holders, like media corporations, who have the resources to aggressively police the Internet or can join industry groups to do so on their behalf, like the Recording Industry Association of America or the Motion Picture Association of America. *See id.*

³³ *See* ThruYou: Kutiman Mixes YouTube, <http://thru-you.com/#/videos/1/> (last visited Jan. 5, 2010).

and enforced under current copyright law. Part I of this Note will explain the technological developments in Internet video streaming and digital video editing that have led to the significant increase in distribution of User-Generated Video Content; the fair use doctrine in relation to User-Generated Video Content; the Safe Harbor Provisions of the DMCA; and how the DMCA actually impacts copyrights holders, OSPs, and creators of User-Generated Video Content. Part II of this Note will analyze the conflict that has developed between how the DMCA is enforced in practice and the fair use rights of creators of User-Generated Video Content under copyright law. Part II will also include a discussion of how copyright law has been applied in past new technology cases and how the current implementation of the DMCA regime gives insufficient consideration to the fair use doctrine. Part III of this Note will propose a revision of the current Safe Harbor Provisions of the DMCA that would more adequately balance the interests of Copyright Holders, OSPs, and the creators of User-Generated Video Content. Specifically, this Note proposes that the Takedown Notice Procedure be revised to (1) require that Copyright Holders take fair use into consideration when filing a takedown notice, (2) require that OSPs play a more substantial role in the review process of takedown notices, and (3) provide creators of User-Generated Video Content with a less burdensome process to assert their rights under the DMCA.

I. USER-GENERATED VIDEO CONTENT AND COPYRIGHT LAW: KEY DEVELOPMENTS IN USER-FRIENDLY TECHNOLOGY USE, FAIR USE, AND THE DMCA IN THEORY AND PRACTICE

A. *Technology's Impact on Defining Content Creators and Content Pirates*

Technological advances in online video streaming, digital video cameras, digital videotape formats, and digital video editing have progressed rapidly in recent years.³⁴ These technological

³⁴ See, e.g., Yukari Iwatani Kane, *Beyond Gaming: Watching TV on Your Xbox*, WALL ST. J., Nov. 12, 2009, at D1 (discussing how one such advance is the ability to stream online video content through video game consoles).

advancements have democratized the process of creating and distributing moving images, a process that was once very expensive and limited almost exclusively to a small group of professionals who had access to the equipment necessary to create films and videos.³⁵ As a result, amateur users of these technologies have an unprecedented opportunity to create and distribute new works.

The last ten years have seen a tremendous shift in who has the tools to create video content, and with this change, a significant portion of the population has embraced the opportunity to create User-Generated Video Content.³⁶ These works can be created entirely from original elements, utilize copyright-protected works, or be comprised of some combination of both.³⁷ When User-Generated Video Content utilizes copyright-protected works, the amateur creators may be liable for copyright infringement.³⁸ However, there are also instances where User-Generated Video Content uses copyright-protected works in creative and unexpected ways, which may make the new works more deserving of protection under the fair use doctrine as non-infringing uses of copyrighted works.³⁹ The copyright issues that have grown out of the explosion of User-Generated Video Content can be attributed,

³⁵ See Press Release, Apple, Apple's iMovie Software Brings Digital Video Editing to Consumers and Classrooms (Oct. 5, 1999), available at <http://web.archive.org/web/19991012125440/http://apple.com/pr/library/1999/oct/05imovie.html> [hereinafter Apple Press Release] ("The new iMacs with our iMovie software usher in the era of desktop video, allowing mere mortals to easily create professional-quality movies right in their homes or classrooms." (quoting Steve Jobs, Apple CEO)).

³⁶ See *id.*; Verna, *supra* note 6.

³⁷ See WUNSCH-VINCENT & VICKERY, *supra* note 5, at 35 ("User-produced or edited video content has taken three primary forms: homemade content, such as home videos or short documentaries; remixes of pre-existing works such as film trailer remixes; and hybrid forms that combine some form of self-produced video with pre-existing content.").

³⁸ "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author . . ." 17 U.S.C. § 501 (2006).

³⁹ See Stanford Copyright & Fair Use, What is Fair Use?, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html (last visited Nov. 19, 2009) ("In its most general sense, a fair use is any copying of copyrighted material done for a limited and 'transformative' purpose such as to comment upon, criticize or parody a copyrighted work. Such uses can be done without permission from the copyright owner. . . . If your use qualifies under the definition above . . . then your use would not be considered an illegal infringement."); *infra* Part I.B.

to great extent, to Congress not anticipating that so many regular citizens would very suddenly have the means to both create and distribute works in the digital video format when the DMCA was enacted in 1998.⁴⁰

1. Internet Video Streaming

YouTube and other Video-Sharing Websites⁴¹ allow Users to upload and stream video content, which can then be distributed or shared through the Internet.⁴² The tremendous growth of YouTube since its inception in 2005⁴³ shows just how rapidly the opportunity to distribute and view User-Generated Video Content through the Internet has become a part of the public consciousness in the past four years.⁴⁴ According to YouTube, as of May 2009, twenty hours of video are uploaded to the website *every minute*.⁴⁵

⁴⁰ See EXECUTIVE SUMMARY, *supra* note 24 (explaining that when the DMCA was enacted, user-created video content on the Internet was not as widespread as it would ultimately become).

⁴¹ See *supra* notes 9, 11–13 and accompanying text.

⁴² See YouTube, Company History, <http://www.youtube.com/t/about> (last visited Aug. 2, 2009) (“YouTube is the leader in online video, and the premier destination to watch and share original videos worldwide through a Web experience. YouTube allows people to easily upload and share video clips on www.YouTube.com and across the Internet through websites, mobile devices, blogs, and email.”).

⁴³ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1513 [hereinafter Lee, *Warming Up*] (“The growth of YouTube has been phenomenal. By December 15, 2005—when YouTube officially launched—people were viewing three million videos a day on YouTube, while people were adding another 8,000 videos each day to the site. Within the first six months of 2006, the growth rate was staggering: the number of visitors grew by 300%, from 4.9 million to 19.6 million per month. By July 2006, YouTube served 100 million videos a day, which marked an increase of over 3,200% from the three million per day in the last December. By September 2006, the number of video uploads jumped to 65,000 per day, increasing more than eight-fold from December. According to Hitwise, by May 2006 YouTube had captured the leading position in the online video market with a 42.94% market share (based on the number of visits to the site). By October 2006, the number of unique visitors to YouTube had grown to 34 million per month, elevating it to one of the top fifteen most visited Web sites worldwide. Within just nine months, the number of visitors to YouTube grew by a staggering 600%.” (internal citations omitted)).

⁴⁴ *Id.*

⁴⁵ Posting of Ryan Junee to Broadcasting Ourselves, The Official YouTube Blog, http://youtube-global.blogspot.com/2009/05/zoinks-20-hours-of-video-uploadedevery_20.html (May 20, 2009) (“In mid-2007, six hours of video were uploaded to YouTube

“In April [2008] alone, 82 million people in the United States watched 4.1 billion clips [on YouTube] Some experts say virtually every Internet user has visited YouTube.”⁴⁶ Although other methods of distributing video online pre-exist YouTube, the staggering volume of material that is currently posted on YouTube every day⁴⁷ and the number of people who have viewed a video on YouTube,⁴⁸ demonstrate how significantly the landscape has been altered since YouTube launched in 2005.

As YouTube and other Video-Sharing Websites grew, the immense amount of content being uploaded to Video-Sharing Websites led the Copyright Industries to see these websites as a substantial risk to their business models.⁴⁹ Because Video-Sharing Websites give Users the opportunity to upload copyright-protected works, the Copyright Industries saw vast amounts of their content appearing on these websites, where they had little control over how the content was distributed.⁵⁰ More importantly, the Copyright Industries received no direct financial benefit from their content appearing on Video-Sharing Websites.⁵¹

The Copyright Industries have adopted a number of strategies in order to try and capitalize on the substantial demand for online content that YouTube and other Video-Sharing Websites revealed. In an effort to generate profits from Internet streaming, the Copyright Industries have partnered with YouTube,⁵² created competitive websites and services,⁵³ and pursued extensive

every minute. . . . Now, 20 hours of video are uploaded to YouTube *every minute*” (emphasis added)).

⁴⁶ Miguel Helft, *Google Told to Turn Over User Data of YouTube*, N.Y. TIMES, July 4, 2008, at C1.

⁴⁷ See June, *supra* note 45.

⁴⁸ See Helft, *supra* note 46; Lee, *Warming Up*, *supra* note 43.

⁴⁹ See Anne Broache & Greg Sandoval, *Viacom Sues Google over YouTube Clips*, CNET NEWS, Mar. 13, 2007, http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html.

⁵⁰ See, e.g., Candace Lombardi, *Viacom to YouTube: Take Down Pirated Clips*, CNET NEWS, Feb. 2, 2007, http://news.cnet.com/Viacom-to-YouTube-Take-down-piratedclips/2100-1026_3-6155771.html (showing that Viacom properties have repeatedly been found on YouTube).

⁵¹ See, e.g., *id.*

⁵² See YouTube, Company History, *supra* note 42.

⁵³ See, e.g., Hulu, <http://www.hulu.com/> (last visited Aug. 2, 2009).

policing of YouTube and other Video-Sharing Websites by utilizing the Takedown Notice Procedure of the DMCA.⁵⁴ Many major media companies have formed partnerships and licensing agreements with YouTube⁵⁵ that allow the companies to monetize their presence on YouTube through revenue sharing of advertising.⁵⁶ Other major media companies created their own online sites to deliver copyrighted works directly to consumers; one example is Hulu,⁵⁷ the partnership between NBC Universal, News Corp., and Disney.⁵⁸ In some instances, media companies brought suit against Video-Sharing Websites for copyright infringement; the most famous of these cases was the action brought by Viacom against YouTube.⁵⁹ In other instances, media companies submitted large numbers of takedown notices to Video-Sharing Websites, such as when Viacom requested over 100,000 videos be taken down from YouTube in January 2007.⁶⁰

2. Non-Linear Video Editing

It is not merely the opportunity to use the Internet as a distribution tool that has led to this unique moment of needing to

⁵⁴ See, e.g., Lombardi, *supra* note 50.

⁵⁵ See YouTube, Company History, *supra* note 42 (“YouTube has struck numerous partnership deals with content providers such as CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA, The Sundance Channel and many more.”).

⁵⁶ See YouTube, Partner Benefits, http://www.youtube.com/t/partnerships_benefits (last visited Oct. 11, 2009) (stating that partnering with YouTube allows content providers to share in revenue from advertisements that run on the same page as the content provider’s videos).

⁵⁷ Hulu, *supra* note 53. Hulu is a video content aggregation site that was created in 2007 by NBC Universal, News Corp., and Providence Equity Partners. See Hulu, Media Info, <http://www.hulu.com/about> (last visited Nov. 7, 2009). Hulu differs from Video-Sharing Websites like YouTube in that it does not offer users the ability to upload their own videos. Hulu does, however, allow users to share content found on the website: “Hulu offers the freedom to share full-length episodes or clips via e-mail or embed on other Web sites, blogs and social networking pages.” *Id.*

⁵⁸ See, e.g., Paul Thomasch, *Disney Joins Hulu Video Site, Takes Ownership Stake*, FORBES.COM, Apr. 30, 2009, <http://www.forbes.com/feeds/afx/2009/04/30/afx6364646.html>. With Disney joining NBC Universal and News Corp. as an equity partner, Hulu is owned by the corporate parent of three of the major network broadcasters: NBC, Fox (News Corp.), and ABC (Disney). *Id.*

⁵⁹ See Broache & Sandoval, *supra* note 49; Helft, *supra* note 46.

⁶⁰ Lombardi, *supra* note 50.

reevaluate the DMCA. Of equal importance is the drastic democratization of video-making that has come with video cameras, and more importantly, video editing equipment becoming available to amateur users.⁶¹ While home movie cameras have become increasingly accessible to consumers over the last fifty years—from the introduction of the Kodak Super 8 film camera in the 1960s⁶² through the boom in video camcorder sales in the 1980s and 1990s⁶³—the availability of video editing equipment geared towards consumers is a relatively recent phenomenon.⁶⁴ The development of non-linear editing systems for home computers has been the key factor in bringing video editing capabilities to the general public.⁶⁵

Non-linear editing refers to an editing process for film or video that utilizes digital technology to allow a user to access any frame of video from a digital video file,⁶⁶ in contrast to traditional film or video editing that relies on physically cutting and splicing film or video footage into a desired order.⁶⁷ Because the limitations of physical film or videotape are removed in a non-linear environment, non-linear editing allows film and video editors to experiment with their footage more easily than traditional editing. Non-linear editing systems⁶⁸ were first developed for professional

⁶¹ See Apple Press Release, *supra* note 35.

⁶² See Kodak: Super 8 mm Film History, http://motion.kodak.com/US/en/motion/Products/Production/Spotlight_on_Super_8/Super_8mm_Success/history.htm (last visited Aug. 2, 2009).

⁶³ See Posting of Gareth Marples to TheHistoryOf.net, <http://www.thehistoryof.net/> (Sept. 10, 2008, 09:15 EST) (“In 1985, half a million [video camcorders] were sold. Within 3 years, that number had multiplied to 3 million . . .”).

⁶⁴ See Apple Press Release, *supra* note 35 (stating that Apple introduced iMovie to the public in 1999).

⁶⁵ *Id.*

⁶⁶ See Webopedia, Non-linear Editing, http://www.webopedia.com/TERM/N/non_linear_editing.html (last visited Nov. 11, 2009).

⁶⁷ See PCMAG.com, Encyclopedia Definition of Linear Video Editing, http://www.pcmag.com/encyclopedia_term/0,2542,t=linear+video+editing&i=46135,00.asp (last visited Nov. 11, 2009).

⁶⁸ Non-linear editing systems refer to digital format video editing programs designed to be operated on desktop computers. See PCMAG.com, Encyclopedia Definition of Non-linear Editing, http://www.pcmag.com/encyclopedia_term/0,2542,t=nonlinear+edit+or&i=48064,00.asp (last visited Aug. 2, 2009).

film and television use in the early 1970s.⁶⁹ The technology continued to advance, which reduced the price of editing film and video, but as recently as the late 1990s, these systems were almost entirely used only by professionals.⁷⁰

When the DMCA was enacted in 1998, Apple Computers had not yet introduced Final Cut Pro, which was Apple's foray into the professional non-linear video editing market.⁷¹ When this editing software was introduced in 1999, it was still geared toward professionals but carried a greatly reduced price tag compared to the dominant companies in the non-linear editing market, such as Avid and Adobe Premier.⁷² In 1999, Apple also introduced the editing software iMovie, which was arguably the first non-linear digital video-editing software geared directly to non-professional users.⁷³ Upon the launch of iMovie, a new iMac computer could be purchased with iMovie software pre-installed for \$1,299.⁷⁴ Within a few years, iMovie came standard with any Apple computer,⁷⁵ and any Microsoft Windows operating system included Windows Movie Maker.⁷⁶ By 2009, nearly every owner of a personal computer had a non-linear video editing system at his or her disposal, without even having to think about whether he or she wanted to purchase the software or not.⁷⁷ Today's non-linear editing systems are easy to use and more powerful than the editing equipment used by Hollywood professionals as recently as twenty years ago.⁷⁸ The impact of the development in consumer access to

⁶⁹ See Heather Wallace, *The History of Digital Nonlinear Editing*, FACER E-ZINE, http://www.sundialmedia.com/sait/articles/found_a/heat_f.htm (last visited Nov. 11, 2009).

⁷⁰ See AllExperts.com, Non-linear Editing System, http://en.allexperts.com/e/n/no/non-linear_editing_system.htm (last visited Nov. 12, 2009).

⁷¹ See generally Ben Long, MacInTouch Special Reports, MacInTouch Special Report: Final Cut Pro (May 10, 1999), <http://macintouch.com/finalcutrvw.html> (reviewing the original version of Final Cut Pro shortly after its release).

⁷² See *id.*

⁷³ See Apple Press Release, *supra* note 35.

⁷⁴ See *id.*

⁷⁵ See Press Release, Apple, Apple Introduces iLife (Jan. 7, 2003), <http://www.apple.com/pr/library/2003/jan/07ilife.html>.

⁷⁶ See Arnold Zafra, *History of Windows Movie Maker*, BRIGHT HUB, Nov. 21, 2008, <http://www.brighthub.com/computing/windows-platform/articles/16044.aspx>.

⁷⁷ See *supra* notes 75–76 and accompanying text.

⁷⁸ See AllExperts.com, *supra* note 70.

video-editing software cannot be over-emphasized, and it begs the question, “Without the democratization of video editing would YouTube even exist?”

B. The Fair Use Doctrine in Relation to User-Generated Video Content

A key factor in determining whether User-Generated Video Content that contains copyrighted work is an infringing use of the copyrighted material is whether the use is protected under the fair use doctrine.⁷⁹ When an individual User uploads and streams User-Generated Video Content containing elements taken from a copyrighted work, the Copyright Holder may assert that the User is infringing the exclusive rights specified in section 106 of the Copyright Act.⁸⁰ Most claims in relation to User-Generated Video Content would likely focus on the exclusive rights to reproduce and distribute copies of the copyrighted work⁸¹ and prepare derivative works based upon the copyrighted work.⁸² It is also conceivable that a Copyright Holder may assert infringement of the exclusive performance and display rights.⁸³ Depending on how

⁷⁹ See 17 U.S.C. § 107 (2006).

⁸⁰ See *id.* § 106.

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id. For an example of a defendant raising the defenses enumerated in § 106, see *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

⁸¹ 17 U.S.C. § 106(1), (3).

⁸² *Id.* § 106(2).

⁸³ *Id.* § 106(4), (6).

a work of User-Generated Video Content utilizes elements taken from a copyrighted work, the Copyright Holder will usually be able to claim that at least one of the § 106 exclusive rights was infringed.⁸⁴ Whether such a work of User-Generated Video Content would be protected by the fair use doctrine is less clear.

Under section 107 of the Copyright Act, “the fair use of a copyrighted work [including the uses specified in section 106] for purposes such as criticism, comment, news reporting, teaching, . . . scholarship or research, is *not* an infringement of copyright.”⁸⁵ The list of exempted uses within the statute (“criticism, comment, news reporting, teaching, . . . scholarship or research”) is a suggestive, rather than exclusive, list.⁸⁶ Section 107 of the Copyright Act also provides four factors to guide fair use analysis:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁷

A wide array of uses have been found to be non-infringing fair use, ranging from the use of video cassette recorders (“VCRs”) to record television shows for personal use⁸⁸ to the “transformative” use of Roy Orbison’s song “Pretty Woman” in a “parody” rap song⁸⁹ to the use of thumbnail images by Google for the purpose of making a search engine more effective.⁹⁰

⁸⁴ See *id.* § 106.

⁸⁵ *Id.* § 107 (emphasis added).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). In the *Sony* decision VCRs were referred to as “videotape recorders” or “VTRs,” but in this Note the more commonly used term “VCRs” will be used.

⁸⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

⁹⁰ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 733 (9th Cir. 2007).

The complexity of pinning down how fair use actually functions, or should function, and how the four factors should be utilized, is a subject that has been written about extensively.⁹¹ Professor Paul Goldstein emphasizes that over-reliance on the four factors as a strict guide to determining fair use decisions can be problematic because the factors:

are an abstracted, antiseptic version of the real world; they do not mirror, or even refract, the features a world in which authors create works and publishers market them in which copyright users must decide whether to take a license or risk going without; and in which judges must decide whether the user guessed right or wrong.⁹²

Goldstein suggests that the best way to approach fair use is by focusing on the different “contexts” or “categories” in which the doctrine tends to arise before considering the factors.⁹³ Goldstein argues that by focusing on the specific contexts in which fair use cases often arise, the application of fair use reveals itself to be more consistent than it often appears from a broader perspective.⁹⁴ Because courts usually seek pragmatic solutions that address the issues raised by specific contexts, Goldstein contends that courts have shown a consistent application of fair use within specific contexts or categories.⁹⁵ For instance, many fair use cases address “new technologies for the distribution of copyrighted content [such as] photocopying, cable retransmission, and home videotaping.”⁹⁶

⁹¹ See Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008) (“Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it. Just consider a few laments from the literature. Judge Pierre Leval: ‘throughout the development of fair use doctrine, courts have failed to fashion a set of governing principles or values.’ Professor Wendy Gordon: this doctrine, which ‘has been called ‘the most troublesome in the whole law of copyright’ . . . has traced a quicksilver course of judicial development.’ Professor William Fisher: the Supreme Court’s decisions in the *Sony* and *Nation* cases failed ‘to identify and advance a coherent set of values.’” (internal citations omitted)).

⁹² *Id.* at 437–38.

⁹³ *Id.* at 438.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (internal citations omitted).

Within the specific context of “new technology” cases, Goldstein believes courts have shown a consistency in their fair use analyses.⁹⁷ “New technology” cases are often well outside the suggested types of protected uses (“criticism, comment, news reporting” etc.) and are focused almost exclusively on the fourth factor of assessing the effect of the use on the potential market for the copyrighted work.⁹⁸ In addition, Goldstein suggests that in “new technology” cases the courts consistently weigh additional contextual factors beyond the scope of the four statutory factors, such as how a widely used new technology has become a part of the culture at large,⁹⁹ like VCRs in *Sony Corp. of America v. Universal City Studios, Inc.*¹⁰⁰

C. The Safe Harbor Provisions of the DMCA and Takedown Notices

In 1998, Congress passed the On-Line Copyright Infringement Liability Limitation Act (“OCILLA”), which was codified as section 512 of the DMCA, in order to address issues arising in relation to the growth of Internet use.¹⁰¹ Congress enacted the DMCA “to move the nation’s copyright law into the digital age.”¹⁰² Congress was primarily interested in balancing the promotion of “electronic commerce” and “providing copyright owners with legal tools to prevent widespread piracy.”¹⁰³ When

⁹⁷ *Id.*

⁹⁸ *Id.*; see also Ginsburg, *supra* note 31, at 1637.

⁹⁹ See Goldstein, *supra* note 91, at 439 (“What factors not mentioned by the Court played a role in the Sony decision? In terms of equities, the Court could not have ignored the fact that while only 50,000 Betamax home videorecorders had been sold into American homes by 1976, when the case was filed, 475,000 American households had them by 1979 when the district court decided their use was fair—a number that rose to five million in the year before the Supreme Court first heard argument in the case. In terms of efficiency considerations, the Ninth Circuit Court of Appeals, below, had clearly thought about the payment mechanisms that might follow in the wake of a decision imposing liability, and the Supreme Court, too, presumably had these in mind along with the impact, if any, that a decision imposing liability might have on future innovations in home recording technologies.”).

¹⁰⁰ 464 U.S. 417 (1984).

¹⁰¹ See Pub. L. No. 105-304, §§ 201–03, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 512 (2006)); FAQ About DMCA Safe Harbor, *supra* note 22.

¹⁰² EXECUTIVE SUMMARY, *supra* note 24.

¹⁰³ *Id.*

the DMCA was enacted in 1998, the primary copyright issue that Congress was responding to was piracy¹⁰⁴ in the form of straight copying¹⁰⁵ and distribution of protected works in the digital realm.¹⁰⁶ The Safe Harbor Provisions of the DMCA¹⁰⁷ were intended to protect service providers from liability for infringing uses by third-party Users.¹⁰⁸

The Safe Harbor Provisions of the DMCA were codified as section 512(c) of the Copyright Act.¹⁰⁹ Section 512(c)(1) provides that an OSP¹¹⁰ “shall not be liable . . . for infringement of copyright” by the actions of a User provided that the OSP is in compliance with a series of requirements.¹¹¹ The requirements include the following: the OSP must not have “actual knowledge” of infringing material;¹¹² upon becoming aware of infringing material, the OSP must act “expeditiously to remove, or disable access to, the [infringing] material”;¹¹³ and the OSP must “not receive a financial benefit directly attributable to the infringing activity” where the OSP “has the right and ability to control such activity.”¹¹⁴

Sections 512(c)(2) and (3) provide guidelines for how the Takedown Notice Procedure should operate for both OSPs and Copyright Holders.¹¹⁵ Section 512(c)(2) specifies that an OSP

¹⁰⁴ *See id.*

¹⁰⁵ For the purposes of this Note, the term “straight copying” refers to the unlawful reproduction of copyrighted works in their entirety or substantial portions, where there is no possibility of the copying being considered a derivative work or transformative use (i.e., where an entire song, television show, film, or other protected work is copied and posted online solely for the purpose of allowing others to view or copy the work).

¹⁰⁶ U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 83 (2001), *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> [hereinafter DMCA SECTION 104 REPORT].

¹⁰⁷ 17 U.S.C. § 512.

¹⁰⁸ *See* FAQ About DMCA Safe Harbor, *supra* note 22.

¹⁰⁹ 17 U.S.C. § 512.

¹¹⁰ Recall that an OSP is a type of service provider. *See supra* note 21 and accompanying text. The actual language of the DMCA refers generally to “service providers.” 17 U.S.C. § 512; *see also supra* note 21.

¹¹¹ 17 U.S.C. § 512(c)(1).

¹¹² *Id.* § 512(c)(1)(A)(i).

¹¹³ *Id.* § 512(c)(1)(A)(iii).

¹¹⁴ *Id.* § 512(c)(1)(B).

¹¹⁵ *Id.* § 512(c)(2)–(3).

must have a designated agent to receive takedown notices.¹¹⁶ Section 512(c)(3) specifies what elements a Copyright Holder must include in a notification to an OSP requesting the takedown of material the Copyright Holder asserts is infringing.¹¹⁷ Among the elements required in a takedown notice are the signature of the complaining party,¹¹⁸ identification of the copyrighted work the complaining party asserts is being infringed,¹¹⁹ “identification of the material that is claimed to be infringing”¹²⁰ and information that allows the service provider to locate the material.¹²¹ Of particular relevance for the purposes of this Note is § 512(c)(3)(v), which states that the party requesting the takedown must also submit “[a] statement that the complaining party has a *good faith* belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or *the law*.”¹²² This provision suggests that a Copyright Holder who files a takedown notice has an affirmative obligation to analyze whether the use of copyrighted material is non-infringing under the fair use doctrine.

Once a takedown notice is filed, the User who posted the alleged infringing material is given the opportunity to challenge the claim.¹²³ Section 512(g) specifies that the OSP must “take steps to promptly notify the subscriber” that the material has been taken down.¹²⁴ Upon receiving notification of the takedown notice, the User then has the option of filing a counter-notice with the service provider’s designated agent.¹²⁵ The requirements of counter-notification include “[a] statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled”¹²⁶ and a statement by the subscriber that establishes his or her consent to federal jurisdiction

¹¹⁶ *Id.* § 512(c)(2).

¹¹⁷ *Id.* § 512(c)(3).

¹¹⁸ *Id.* § 512(c)(3)(A)(i).

¹¹⁹ *Id.* § 512(c)(3)(A)(ii).

¹²⁰ *Id.* § 512(c)(3)(A)(iii).

¹²¹ *Id.*

¹²² *Id.* § 512(c)(3)(A)(v) (emphasis added).

¹²³ *See id.* § 512(g)(3).

¹²⁴ *Id.* § 512(g)(2)(A).

¹²⁵ *Id.* § 512(g)(3).

¹²⁶ *Id.* § 512(g)(3)(C).

if the claimant chooses to respond to the counter-notice by pursuing a judicial resolution.¹²⁷ Upon receipt of a counter-notice, the OSP begins a ten to fourteen day period of keeping the material disabled,¹²⁸ at which point it will be reinstated unless the OSP's designated agent receives notice that the claimant will seek judicial enforcement against the alleged infringer.¹²⁹ At this point, the material would remain disabled if the claimant decides to proceed to the court system and would remain disabled while awaiting judicial resolution.¹³⁰

Section 512(f) provides that liability may be found against "any person who knowingly materially misrepresents . . . (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification."¹³¹ It is under this section that a User whose non-infringing work is the subject of an erroneous takedown notice may seek recourse against the Copyright Holder who files the request.¹³²

D. The Impact of the DMCA on Copyright Holders, OSPs, and Users

The Takedown Notice Procedure of the DMCA affects the interests of Copyright Holders, OSPs, and Users in very different ways. The Takedown Notice Procedure provides Copyright Holders with a procedure to assert their rights when their properties are uploaded without permission and without the User making any changes or creative additions to the work. Although this is a useful tool, there are still significant drawbacks for

¹²⁷ *Id.* § 512(g)(3)(D).

¹²⁸ *Id.* § 512(g)(2)(C).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* § 512(f).

¹³² *Id.*; see also FAQ About DMCA Safe Harbor, *supra* note 22 (follow "Q: What rights do I have if someone knowingly demands removal of material to which they do not have the rights?" hyperlink) ("[O]ne who knowingly materially misrepresents a claim of infringement is liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer or ISP injured by the misrepresentation, as the result of the service provider relying upon the misrepresentation in removing or disabling access to the material or activity claimed to be infringing. If you are harmed by a mistaken takedown (as poster or as ISP), you may be able to recover damages and your legal fees from the person who made the wrongful claim.").

Copyright Holders using the Takedown Notice Procedure, as will be explained more in Part I.D.1 below. Nonetheless, OSPs benefit the most unambiguously from the Takedown Notice Procedure because they are provided with a clear set of rules to follow in order to avoid liability.¹³³ Yet, it is difficult to assess how the Takedown Notice Procedure affects Users' interests. While the Takedown Notice Procedure provides Users of websites with a procedure to contest a takedown notice they believe is inaccurate,¹³⁴ there are indications that Users do not utilize their rights under the DMCA as fully as Copyright Holders and OSPs.¹³⁵

1. Copyright Holders

Copyright Holders must submit a takedown notice for each instance of copyright infringement they are alleging, or a "representative list" if an online site contains "multiple copyrighted works" that can be covered in one notification.¹³⁶ The general practice of large media companies has been to use automated screening or filtering software¹³⁷ to identify their works online and periodically submit large numbers of takedown notices to OSPs based on these searches,¹³⁸ such as when Viacom requested that YouTube takedown over 100,000 video clips in one action.¹³⁹ Although the use of broad screening methods, such as filtering software, is effective for identifying protected works

¹³³ See *supra* Part I.C.

¹³⁴ See *supra* notes 125–27 and accompanying text.

¹³⁵ See *infra* Part I.D.3.

¹³⁶ 17 U.S.C. § 512(3)(A)(ii). In theory, the requirement that each copyrighted work must receive its own takedown notice could be a positive requirement if it encouraged Copyright Holders submitting takedown notices to closely analyze each item and ensure that a takedown request was in compliance with the "good faith" requirement under 17 U.S.C. § 512(c)(3)(A)(v).

¹³⁷ See YouTube, Content Management, http://www.youtube.com/t/content_management (last visited Aug. 9, 2009). YouTube offers copyright holders the "Content ID" system for managing content, which includes automated identification of copyrighted materials. *Id.*; see also Scott Smitelli, Fun with YouTube's Audio Content ID System, <http://www.csh.rit.edu/%7Eparallax/> (last visited Nov. 27, 2009) (recounting how a YouTube user conducted an informal test of the YouTube audio fingerprinting system to see under what circumstances the use of a copyrighted song would trigger removal of a video from the site).

¹³⁸ See, e.g., Lombardi, *supra* note 50.

¹³⁹ See *id.*

online, these methods do not analyze the material to determine whether the use is infringing.¹⁴⁰ It is not surprising that the Copyright Industries have chosen to utilize takedown notices in this way. The very fact that these companies have so many properties to police encourages them to use broad, cost-effective screening methods. Given the volume of material that a major media company would need to review, analysis will almost certainly be limited to a basic attempt to identify any element of a protected work in the User-Generated Video Content.¹⁴¹ At the same time, these companies have little incentive to take a close look at the works in question and determine if they may actually constitute a non-infringing use.¹⁴²

There are also significant drawbacks for Copyright Holders in how the Takedown Notice Procedure operates. Copyright Holders must spend significant time and resources monitoring OSPs for infringing uses and filing takedown notices.¹⁴³ Any effort by Copyright Holders to try and distinguish infringing from non-infringing uses would substantially increase these costs because it would demand more time-consuming efforts than the automated screening or filtering software currently used. Additionally, some have argued that these policing costs create disparities between large and small Copyright Holders because use of the Takedown Notice Procedure is more effective for larger Copyright Holders that have the resources to commit to comprehensive online monitoring programs.¹⁴⁴ Copyright Holders also face questions regarding how effective use of the Takedown Notice Procedure actually is for combating piracy. A common complaint of Copyright Holders is that when protected content is removed by

¹⁴⁰ Fred von Lohmann, *YouTube's January Fair Use Massacre*, ELECTRONIC FRONTIER FOUND., Feb. 3, 2009, <http://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre> (stating that the use of filtering software on YouTube allows copyright holders to screen content uploaded to the site, but does not provide a means of analyzing whether the use of a work would be protected fair use).

¹⁴¹ *See id.*

¹⁴² *See, e.g.,* Ben Fritz, *YouTube All Tied Up*, VARIETY, Feb. 2, 2007, at 5, available at <http://www.variety.com/article/VR1117958556.html?categoryid=18&cs=1&nid=2562>; Lombardi, *supra* note 50 (noting that Viacom submitted Takedown Notices to YouTube requesting the takedown of over 100,000 video clips); von Lohmann, *supra* note 140.

¹⁴³ *See* Cobia, *supra* note 32, at 397–98.

¹⁴⁴ *See id.* at 397; *supra* note 32.

filing a takedown notice, nothing prevents the same content from merely being reposted shortly thereafter on another website,¹⁴⁵ thus contributing to the substantial cost of diligent monitoring.

2. OSPs

The DMCA is designed to protect OSPs from liability for the infringing acts of third-party Users by providing OSPs with clear guidelines for dealing with takedown notice requests.¹⁴⁶ So long as OSPs adhere to these provisions, the law protects them from liability for the infringing actions of their Users.¹⁴⁷ Upon receiving a takedown notice, the policy of most major OSPs like YouTube is to simply remove the requested material.¹⁴⁸ Most Video-Sharing Websites have adopted a policy of implementing every takedown notice they receive.¹⁴⁹ This approach makes sense for companies in the OSP position because they can both avoid liability and avoid the responsibility of screening what their Users upload. Thus, infringing material remains on the website until a takedown notice is received.¹⁵⁰

3. Users

Of the three parties affected by the DMCA, Users who create User-Generated Video Content have the strongest incentive to seek meaningful review of whether materials that are the subject of takedown notices are actually infringing¹⁵¹ because when non-infringing materials are taken down improperly, the Users' rights are directly violated. However, in practice, the options provided to alleged infringers by the Takedown Notice Procedure do not offer most amateur, non-commercially motivated Users with a strong incentive to fight to have their work reinstated because the counter-

¹⁴⁵ See *id.* at 393.

¹⁴⁶ See FAQ About DMCA Safe Harbor, *supra* note 22 (follow “Q: What are notice and takedown procedures for websites?” and “Q: What are the counter-notice and put-back procedures?” hyperlinks).

¹⁴⁷ See *supra* Part I.C.

¹⁴⁸ See YouTube, Content Management, *supra* note 137; see also Lee, *Decoding the DMCA Safe Harbors*, *supra* note 22, at 233–34.

¹⁴⁹ See Lee, *Decoding the DMCA Safe Harbors*, *supra* note 22, at 233–34.

¹⁵⁰ See *id.* at 234.

¹⁵¹ See Cobia, *supra* note 32, at 398–99.

notification procedures described in Part I.C. are complicated, time-consuming, and potentially costly for Users unfamiliar with their legal rights.¹⁵²

It is important to remember that most Users have little or no knowledge of either their rights under the DMCA or the protections of the fair use doctrine.¹⁵³ What would most Users do upon receiving notification that their content has been taken down? Some Users may have knowledge of the technological or legal landscape and will look into their rights when faced with a takedown notice. But most amateur Users will simply accept their work being removed, either because they assume the legal notification they have received is accurate or because they do not have the time and resources to investigate the matter further.¹⁵⁴

4. The Cumulative Effect

The interests of Copyright Holders, OSPs, and Users are represented very differently by how the Takedown Notice Procedure of the DMCA functions in actual practice. Under the current system, the burden of identifying infringing works falls upon Copyright Holders, but there is little incentive for Copyright Holders to invest the resources necessary to analyze whether the use of copyrighted materials in User-Generated Video Content constitutes non-infringing use. It is not surprising that the Copyright Industries generally use the Takedown Notice Procedure to try and remove every online use of their work that they can identify without trying to distinguish non-infringing uses.¹⁵⁵ After all, why should the Copyright Industries bother to analyze the

¹⁵² See Mike Scott, Note, *The Unintended Consequences of Legislating Technology: The Digital Millennium Copyright Act: Safe Harbors Under the Digital Millennium Copyright Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 99, 136–37 (2005).

¹⁵³ See Cobia, *supra* note 32, at 395.

¹⁵⁴ “Protections for the target of the notice . . . are relatively few, as material can come down in advance of notice to the target, and judicial protection is not available unless three things occur: the target elects to submit a counternotice; the complainant files suit; and a court reviews the issue.” Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH L.J. 621, 628 (2006).

¹⁵⁵ See Fritz, *supra* note 142 (noting that Viacom requested that YouTube take down “every single clip of its copyrighted content”).

content themselves when the response of most OSPs is to immediately take down all material named in a takedown notice,¹⁵⁶ and when the vast majority of takedown notices are not challenged with counter-notification by Users unfamiliar with their rights under the law?¹⁵⁷ Because the Takedown Notice Procedure does not offer Users sufficient incentive to consistently assert their rights to counter-notification claims, the Takedown Notice Procedure does not provide a functional mechanism for substantive review.

II. THE APPLICATION OF COPYRIGHT LAW TO USER-GENERATED VIDEO CONTENT CONTAINING COPYRIGHTED MATERIAL

A. *Fair Use Protection for Online Distribution of User-Generated Video Content Containing Copyrighted Material*

1. Takedown Notices in Relation to Past New Technology Cases

The fair use analysis of the distribution of User-Generated Video Content through streaming websites should be analyzed within the context of past “new technology” cases in order to determine whether the new use constitutes fair use. “New technology” cases, as explained in Part I.B, refer to the category of decisions where courts applied the fair use analysis to new technologies that allow for distribution of copyrighted content.¹⁵⁸ Influential cases include the fair use analysis applied to VCRs in *Sony*¹⁵⁹ and to photocopying in *Williams & Wilkins Co. v. United States*.¹⁶⁰ In *Sony*, *Williams & Wilkins*, and other “new technology” cases, the courts have shown a reluctance to prohibit

¹⁵⁶ See, e.g., YouTube, Content Management, *supra* note 137 (providing directions and a tool—the “Copyright Complaint Webform”—to make it as simple as possible for copyright holders to file a DMCA takedown notice).

¹⁵⁷ See *Cobia*, *supra* note 32, at 395.

¹⁵⁸ See *supra* Part I.B.

¹⁵⁹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 428–56 (1984).

¹⁶⁰ 487 F.2d 1345 (Ct. Cl. 1973).

new uses of technology in order to avoid stifling innovation.¹⁶¹ The *Sony* case is particularly relevant in relation to User-Generated Video Content as many of the same contextual factors that were significant in the *Sony* decision are present in the current context surrounding the use of Video-Sharing Websites to distribute User-Generated Video Content.¹⁶²

The Supreme Court's 1984 decision in *Sony* ruled: (1) that it is fair use when individual users of VCRs made their own copies of copyrighted television shows,¹⁶³ and (2) that the manufacturers of VCRs could not be held liable for the potentially infringing uses of their product, in part because the plaintiff in the case could not show that there were *no* legitimate non-infringing uses for VCR technology.¹⁶⁴ In both the context of the *Sony* case and the current context of User-Generated Video Content being streamed on Video-Sharing Websites, a new technology gives members of the general public the capability to easily make copies of copyrighted works. Further, in both contexts, the alleged infringing use of a new technology is embraced by a sharply increasing segment of the public;¹⁶⁵ the substantial number of alleged direct infringers makes it very difficult for Copyright Holders to identify and police

¹⁶¹ See, e.g., *Sony*, 464 U.S. at 431 (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”); *Williams & Wilkins Co.*, 487 F.2d at 1362 (“Especially since we believe, as stressed *infra*, that the problem of photo and mechanical reproduction calls for legislative guidance and legislative treatment, we feel a strong need to obey the canon of judicial parsimony, being stingy rather than expansive in the reach of our holding.”).

¹⁶² See generally Goldstein, *supra* note 91. “Section 107’s preambular threshold disappeared as a consideration—criticism, comment, news reporting, teaching, scholarship or research do not really count for much Only [the effect of the use upon the potential market for or value of the copyrighted work] mattered” *Id.* at 438–39.

¹⁶³ *Sony*, 464 U.S. at 454–55.

¹⁶⁴ See *id.* at 456.

¹⁶⁵ Compare Goldstein, *supra* note 91, at 439 (discussing the significant growth in the use of VCRs from 1976 to the Supreme Court’s 1984 ruling in the *Sony* case), with Lee, *Warming Up*, *supra* note 43, at 1513 (detailing the significant growth in use of YouTube from its 2005 launch).

infringement on a case-by-case basis;¹⁶⁶ and the Copyright Industries bring contributory infringement claims against the companies that provide the “new technology” rather than against the direct infringing users.¹⁶⁷ However, one notable difference between the contextual background of the *Sony* decision and the present context of User-Generated Video Content being distributed through Video-Sharing Websites is that the DMCA Takedown Notice Procedure allows the Copyright Industries to enforce claims of alleged infringement without having a court review whether the use actually constitutes fair use.¹⁶⁸

2. Disincentives for Users to Exercise Their Rights Under the DMCA

It is possible that many instances of User-Generated Video Content, which are currently receiving takedown notices, would actually be found to be protected fair use if analyzed in court. As discussed in Part I.B, fair use would likely protect User-Generated Video Content that uses copyrighted materials in a creative or transformative way.¹⁶⁹ Additionally, based on analyzing User-Generated Video Content from the perspective of the “new technology” category, it seems likely that courts would be cautious of restricting use of Video-Sharing Websites when Users could make legitimate fair use arguments. However, most creators of User-Generated Video Content who receive takedown notices simply accept their video being taken down and do not challenge whether the takedown notice is invalid.¹⁷⁰

In the event that a User does file a counter-notice, the OSP is not permitted to repost the video for ten to fourteen business days,¹⁷¹ and the OSP can only allow access to the video to resume if the party that filed the takedown notice does not file an action seeking a court order against the User alleged of posting infringing

¹⁶⁶ See Lee, *Decoding the DMCA Safe Harbor Provisions*, *supra* note 22, at 438–39 (discussing various instances of infringement and the many forms in which they appear).

¹⁶⁷ See Broache & Sandoval, *supra* note 49; Helft, *supra* note 46.

¹⁶⁸ See *supra* Part I.D.3.

¹⁶⁹ See *supra* Part I.B.

¹⁷⁰ See *supra* note 154 and accompanying text.

¹⁷¹ See 17 U.S.C. § 512(g)(2)(C) (2006).

material.¹⁷² Even if a User has a strong fair use claim, chances are that most individual Users are not aware of their rights. Further, even if a User were to explore his or her right to file a counter-notice, chances are he or she would decide the process is not worth the time and potential expense involved; after all, when a User files a counter-notice, he or she is basically throwing the ball back to the Copyright Holder and asking the Copyright Holder whether it cares enough about the takedown notice to pursue court proceedings.¹⁷³ The individual User who posted a short video he or she created for fun is unlikely to risk being brought into court to fight for his or her fair use rights.¹⁷⁴ With the great majority of takedown notices being initiated by large media corporations (and their deep pockets),¹⁷⁵ the Takedown Notice Procedure of the DMCA creates formidable disincentives to pursue fair use claims for most creators of User-Generated Video Content.¹⁷⁶ As a result, many Users who create User-Generated Video Content are foregoing their legitimate right to protection under the fair use doctrine for videos they upload to Video-Sharing Websites that are taken down under the DMCA regime.¹⁷⁷

3. Fair Use Under the DMCA: The *Lenz v. Universal* Decision

The decision in *Lenz v. Universal*¹⁷⁸ confirmed that a party requesting a DMCA takedown notice must consider fair use.¹⁷⁹ In *Lenz*, a woman brought suit against Universal Music after YouTube received a takedown notice from Universal for a 29-second video the woman posted of her toddler dancing to Prince's

¹⁷² See *id.*

¹⁷³ Posting of Mehan Jayasuriya to Public Knowledge, <http://www.publicknowledge.org/node/1959> (Jan. 26, 2009, 18:43 EST) (noting that once a counter-claim is filed it is up to the copyright holder to decide what happens).

¹⁷⁴ See *supra* note 154 and accompanying text.

¹⁷⁵ See Lombardi, *supra* note 50.

¹⁷⁶ See *supra* note 32 and text accompanying note 153.

¹⁷⁷ Nate Anderson, *Victims Fight Back Against DMCA Abuse*, ARS TECHNICA, Mar. 16, 2007, <http://arstechnica.com/tech-policy/news/2007/03/victims-fight-back-against-dmca-abuse.ars> ("Instead, [ISPs and companies like YouTube] rely on users to rebut the allegations, which many users don't know how to do or don't bother to attempt.").

¹⁷⁸ 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

¹⁷⁹ *Id.* at 1154-55.

“Let’s Go Crazy”.¹⁸⁰ In the video, the Prince song can be heard in the background,¹⁸¹ but it cannot be heard very clearly and would not be useful for the purpose of copying and distributing high-quality sound recordings.¹⁸² The video is obviously a spontaneous family moment captured on video and put on YouTube in order to easily share with friends and family.¹⁸³

Universal argued that under the Safe Harbor Provisions of the DMCA, it did not have to consider whether the works were protected by the fair use doctrine.¹⁸⁴

Universal contends that copyright owners cannot be required to evaluate the question of fair use prior to sending a takedown notice because fair use is merely an *excused* infringement of a copyright rather than a use *authorized* by the copyright owner or by law. Universal emphasizes that Section 512(c)(3)(A) does not even mention fair use, let alone require a good faith belief that a given use of copyrighted material is not fair use. Universal also contends that even if a copyright owner were required by the DMCA to evaluate fair use with respect to allegedly infringing material, any such duty would arise only *after* a copyright owner receives a counter-notice and considers filing suit.¹⁸⁵

Universal essentially argued that fair use is only a defense to infringement and therefore Universal did not have to consider fair

¹⁸⁰ David Kravets, *Universal Says DMCA Takedown Notices Can Ignore ‘Fair Use,’* WIRED, July 18, 2008, <http://www.wired.com/threatlevel/2008/07/universal-says/>.

¹⁸¹ Youtube, “Let’s Go Crazy” Baby Video, <http://www.youtube.com/watch?v=N1KfJHFWlhQ> (last visited Nov. 13, 2009).

¹⁸² See *Lenz*, 572 F. Supp. 2d at 1152.

¹⁸³ See *id.*; Let’s Go Crazy: The Assignment, <http://www.lets gocrazy.info/interview.html> (last visited Nov. 27, 2009). When asked how the “Let’s Go Crazy” baby video came to exist and whether the use of Prince’s song was purposeful, Stephanie Lenz responds that “I hadn’t planned to make a video with that song in the background, or video really, but Holden would stop and dance in front of the CD player almost every time he passed it.” *Id.*

¹⁸⁴ *Lenz*, 572 F. Supp. 2d at 1154.

¹⁸⁵ *Id.*

use until fair use was raised as a defense by the alleged infringer.¹⁸⁶ Lenz countered “fair use *is* an authorized use of copyrighted material, noting that the fair use doctrine itself is an express component of copyright law.”¹⁸⁷ Lenz argued that because section 107 of the Copyright Act states “‘fair use of a copyrighted work . . . is not an infringement of copyright’ [C]opyright owners cannot represent in good faith that material infringes a copyright without considering all authorized uses of the material, including fair use.”¹⁸⁸ At the core of Lenz’s argument and the court’s analysis of the issue is the assertion that even though fair use claims generally arise as a defense to infringement claims, this practical reality is misleading because use of a copyrighted work is either a fair use or not, non-infringing or infringing, from the moment the copyrighted work is used without authorization.¹⁸⁹

The court rejected Universal’s argument and emphasized that in order to make a good faith assessment of whether the use is authorized by law in accordance with § 512(c)(3)(A)(v), the party submitting a takedown notice must consider fair use.¹⁹⁰ Section 512(c)(3)(A)(v) requires that notice include “[a] statement that the complaining party has a *good faith belief* that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or *the law*.”¹⁹¹ Because the Copyright Holder must consider whether the law would allow the use in question in order to make a true “good faith” assessment, the court’s ruling places the burden of assessing fair use under the DMCA squarely on the shoulders of the Copyright Holder filing a takedown notice.¹⁹² However, in practice, it is unlikely that this ruling will have a significant effect on the way fair use is assessed in most instances where takedown notices are filed. This is because the

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (emphasis in original).

¹⁸⁸ *Id.* at 1154 (citing 17 U.S.C. § 107 (2006)).

¹⁸⁹ *See id.* at 1154 n.4 (“The Supreme Court also has held consistently that fair use is not infringement of a copyright.”); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (“[A]nyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use.”).

¹⁹⁰ *Lenz*, 572 F. Supp. 2d at 1154.

¹⁹¹ 17 U.S.C. § 512(c)(3)(A)(v) (emphasis added).

¹⁹² *See Lenz*, 572 F. Supp. 2d at 1154–56.

significant disincentives mentioned above discourage alleged infringers from challenging takedown notices; thus the validity of takedown notices are rarely subject to judicial review.¹⁹³

It is informative to look at how Stephanie Lenz ended up pursuing her case against Universal. In an interview regarding the case, Stephanie Lenz stated that:

[w]hen the video was pulled, I was worried that it might be followed with a lawsuit from Universal. A friend of mine recommended that I contact . . . EFF [Electronic Frontier Foundation]. . . . I spoke via e-mail and then via phone with people at EFF and together we decided to file this lawsuit upon YouTube's reinstatement of the video.¹⁹⁴

It is important to note that Lenz was not initially motivated by a desire to fight for her right to fair use or even a broader idea of fighting for her right to express herself, but by a fear that a large media corporation might sue her.¹⁹⁵ That seems like a rational response to receiving a takedown notice. The fact that Lenz quickly connected with the Electronic Frontier Foundation ("EFF"), which is a not-for-profit organization dedicated to fighting for individual rights in the digital world,¹⁹⁶ probably best explains how this case evolved into a high profile challenge of how Universal was using the DMCA takedown provisions.¹⁹⁷

It is not hard to imagine what type of advice Lenz would have received if she had spoken with an average practicing attorney, rather than the digital rights specialists at EFF; Lenz likely would have been told that if she just wanted the situation to go away, she should just accept the video of her son being taken down because

¹⁹³ See Urban & Quilter, *supra* note 154, at 166 ("The alleged infringer is in the position of having material removed before any court review . . .").

¹⁹⁴ Let's Go Crazy: The Assignment, *supra* note 183.

¹⁹⁵ See *id.*

¹⁹⁶ See Electronic Frontier Foundation, About EFF, <http://www.eff.org/about> (last visited Aug. 2, 2009) ("EFF has championed the public interest in every critical battle affecting digital rights.").

¹⁹⁷ See Posting of Jonathan Bailey to The Blog Herald, <http://www.blogherald.com/2007/10/08/copyright-cases-to-watch-lenz-v-universal> (Oct. 08, 2007, 15:13 EST) ("[W]hat started out as a PR misstep and a copyright faux pas has grown into one of the most important ongoing copyright cases for bloggers to follow.").

companies like Universal rarely pursue lawsuits after submitting takedown notices. Basically, Lenz would be told she should not bother filing a counter-notice, unless she was willing to take on the expense of defending herself against a large corporation. Since most members of the public are not even aware of the fair use doctrine, they are unlikely to become crusaders for recognition of fair use rights. Rather than pursue their fair use rights as a matter of principle, most Users are probably primarily concerned with how to avoid being sued and will pursue the course of action that quickly puts a potential lawsuit behind them. Thus, despite Lenz's success in this case, underlying the ruling is the implication that if companies like Universal are improperly submitting takedown notices without considering fair use, there are likely a significant number of Users who are not aware of their rights and simply accept that the takedown notices they receive are valid. The volume of takedown notices being issued by the Copyright Industries suggests that the policy of these companies is to seek the takedown of every potentially infringing work without giving any consideration to fair use.¹⁹⁸ In this environment, despite the occasional victory by a User like Lenz, the rights of the new class of video-makers who create User-Generated Video Content are underrepresented within the current implementation of the DMCA system, because so few Users exercise their right to challenge a takedown notice.¹⁹⁹

Although it is debatable whether the DMCA has been effective in achieving its goals of protecting the rights of Copyright Holders online while also protecting OSPs from liability,²⁰⁰ what has become apparent since the legislation was implemented is that the rights of the creators of User-Generated Video Content have not been effectively represented, and the rights of Users in general are underrepresented in comparison to the rights of Copyright Holders and OSPs.²⁰¹ The DMCA, as currently implemented, creates

¹⁹⁸ See, e.g., Lombardi, *supra* note 50 (discussing YouTube's agreement with Viacom to remove over 100,000 video clips from its site).

¹⁹⁹ See Cobia, *supra* note 32, at 391.

²⁰⁰ See *id.* at 387.

²⁰¹ See Ian Chuang, Comment, *Be Wary of Adding Your Own Soundtrack: Lenz v. Universal and How the Fair Use Policy Should Be Applied to User Generated Content*, 29 LOY. L.A. ENT. L. REV. 163, 175 (2009).

disincentives for Users to assert their rights. Because many creators of User-Generated Video Content are amateur members of the public who have little knowledge of their legal rights, whereas most Copyright Holders and OSPs are sophisticated corporate entities, the DMCA should take into account the Users relatively weak position and provide an effective process for Users to assert their rights in relation to Copyright Holders and OSPs.

4. The Limitations of Fair Use as a “Defense” in the DMCA Context

The *Lenz* case exposed the problem caused by the common conception of the fair use doctrine as solely a defense within the context of the DMCA.²⁰² Fair use is often thought of as a defense based on the progression of a traditional copyright infringement case: a Copyright Holder brings suit against an alleged infringer, followed by the alleged infringer asserting that his or her use is a protected fair use.²⁰³ However, as the ruling in *Lenz* reveals, it is not entirely accurate to think of fair use only as a defense.²⁰⁴

As discussed in Part II.A.3, Universal argued that it did not have to consider fair use when filing a takedown notice because fair use was a defense to infringement, and therefore Universal did not need to consider fair use until it was raised by the alleged infringer.²⁰⁵ In rejecting this argument, the court ruled that the use of copyrighted material in a new work is either fair use or not, regardless of when the issue of fair use is raised.²⁰⁶ Fair use is an inherent quality of a work; it is either present when the work is created or it is not.²⁰⁷ In a normal copyright infringement case, this distinction is usually of little importance as the parties’ arguments regarding fair use will be addressed during the course of the case, but within the DMCA context, this distinction proves to be

²⁰² See *supra* Part II.A.3.

²⁰³ See *Chuang*, *supra* note 201, at 172.

²⁰⁴ See *supra* Part II.A.3.

²⁰⁵ See *supra* Part II.A.3.

²⁰⁶ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 n.4 (“The Supreme Court also has held consistently that fair use is not infringement of a copyright.”). *But see* *Chuang*, *supra* note 201, at 173–74 (“Users cannot apply fair use principles until after their content is removed and the copyright holder alleges infringement.”).

²⁰⁷ See *Lenz*, 572 F. Supp. 2d at 1154.

significant as it determines which party has the burden of assessing whether a use constitutes fair use.²⁰⁸ Because the Takedown Notice Procedure gives Copyright Holders the power to have the works of Users removed from OSPs without any judicial review,²⁰⁹ and because the costs involved in a User seeking to have his or her work reinstated are substantial,²¹⁰ a key question in considering how the DMCA should be implemented is whether there should be meaningful fair use review before material is removed or disabled by an OSP, or if fair use only should be analyzed once raised as a defense in response to a takedown notice request.

B. Inappropriate Application of Copyright Law Under Section 512(c) of the DMCA

The takedown provisions provide Copyright Holders with a more immediate and less expensive way to address infringement than the alternative of pursuing infringement claims in the courts against individual Users. When a User posts a five-minute clip from a movie or a television series, without adding any new element that could be considered a creative contribution, use of the DMCA Takedown Notice Procedure may serve its intended purpose for the Copyright Holder. But this function does not satisfactorily address the concerns of Users posting non-infringing works or those who are being improperly targeted by claimants who are not actually the Copyright Holder of a work.

A recent example of the negative effect on an individual User receiving DMCA takedown notices is the case of online film critic Kevin B. Lee.²¹¹ Lee writes film essays that he posts on his

²⁰⁸ See *id.* at 1154–56.

²⁰⁹ See *supra* Part I.C. Potential judicial review only comes after alleged infringing work is taken down under the DMCA review system, and then only in the event that (1) an alleged infringer files a counter-notice, and (2) the copyright holder responds to the counter-notice by deciding to pursue judicial enforcement of their infringement claim. See *supra* Part I.C.

²¹⁰ See Chuang, *supra* note 201, at 174 (“UGC creators will likely not have the resources to petition a record company for permission.”).

²¹¹ On his website, Shooting Down Pictures, Lee has undertaken the task of viewing and discussing the “1,000 Greatest Films” as compiled by the website, They Shoot Pictures, Don’t They?. See They Shoot Pictures, Don’t They?, <http://www.theyshootpictures.com/> (last visited Nov. 13, 2009); Shooting Down Pictures, <http://alsolikelife.com/shooting/> (last visited Aug. 2, 2009).

website, Shooting Down Pictures.²¹² For many of the films he reviews, Lee also creates “video essays” to accompany his written essays.²¹³ These video essays utilize excerpts from the films being reviewed that Lee obtains by “ripping” DVDs.²¹⁴ Lee takes clips from the films, edits the footage together, adds narration that provides his critical perspective on the film, and in some cases, adds complementary footage that he has created himself.²¹⁵ In most instances, these video essays are between five and ten minutes long.²¹⁶ Lee would upload the videos to YouTube in order to stream the video and then embed them on his own website so Internet users could view them.²¹⁷ The use of copyrighted material in the video essays almost certainly qualifies as protected fair use since the essays are commentary or criticism.²¹⁸

Despite the apparent clarity that Lee’s video essays are non-infringing works, Lee received takedown notices and was not aware of the best way to defend his work.²¹⁹

Lee had occasionally received DMCA takedown notices via YouTube and not knowing any better, had chosen not to contest them. On January 12th, however, he received his third and final notice and in accordance with YouTube’s “three strikes” policy, his account was locked and all 140 of his video essays were made instantly unavailable.²²⁰

²¹² Shooting Down Pictures, *supra* note 211.

²¹³ *See id.*

²¹⁴ Posting of Matt Zoller Seitz to The House Next Door, <http://www.thehousenextdooronline.com/2009/01/copy-rites-youtube-vs-kevin-b-lee.html> (Jan. 13, 2009, 02:45 EST).

²¹⁵ *See* Shooting Down Pictures, *supra* note 211. Lee has posted approximately fifty video essays on the website which reveal the use of a variety of techniques to create the essays. *Id.*

²¹⁶ *Id.*

²¹⁷ *See* Zoller Seitz, *supra* note 214.

²¹⁸ *See* Jayasuriya, *supra* note 173 (contending that Lee’s video essays should have been protected under fair use because the video essays were criticism or commentary on existing works and therefore the use of clips from existing works would not be infringing).

²¹⁹ *See id.*

²²⁰ *See id.*

It appears that some of Lee's work was flagged by an automated system used by Copyright Holders to screen for their works online.²²¹ These automated systems are not capable of making fair use determinations, but under the DMCA, it makes sense for the Copyright Industries to use this type of automated screening system because it efficiently identifies copyrighted video online.²²² The companies can then generate takedown notices that will have the video disabled for at least ten to fourteen days, and in the unlikely event that the receiver of a takedown notice files a counter-notice, the company can then have a human review the work to determine whether it is actually non-infringing and whether the company should pursue further legal action.²²³ Despite the potential liability a Copyright Holder may incur under § 512(f) for misrepresenting whether a use is infringing,²²⁴ it is still in the interest of the Copyright Industries to use such technologies when most of the alleged infringers are individual content creators such as Lee who are unlikely to contest the takedown notices they receive.

In most instances, a User like Lee will not act on his or her right to file a counter-notice. In the event that a User does file a counter-notice, the Copyright Holder can allow the video to be reinstated,²²⁵ at which point the Copyright Holder will probably not face further challenge of its abusive use of the initial takedown notice (the *Lenz* case being a rare exception). Additionally, a Copyright Holder can continue with legal proceedings knowing that the cost and expense will likely be overwhelming to an individual creator of User-Generated Video Content.

²²¹ *Id.* ("While it's not entirely clear, the assumption is that the DMCA takedown notice that YouTube received was generated by an automated system, not a human.").

²²² *See supra* notes 137–40 and accompanying text.

²²³ *See supra* notes 125–29 and accompanying text; Jayasuriya, *supra* note 173 ("[A] human at the studio will likely review the content in question, to determine whether or not it's worth pursuing some sort of legal action.").

²²⁴ *See* Jayasuriya, *supra* note 173 ("In theory, however, behaving in such a manner could land a copyright owner in hot water. Section 512(f) of the DMCA states that anyone who 'knowingly materially misrepresents' that 'material or activity is infringing' will be 'liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer.'").

²²⁵ *See supra* notes 128–29 and accompanying text.

The Lee situation demonstrates that many creators of User-Generated Video Content who would be protected by fair use are simply not aware of their rights and do not have the legal knowledge to effectively defend their non-infringing use of copyrighted works.²²⁶ On the other hand, the Copyright Industries and OSPs have the resources and legal expertise to figure out how to use the Safe Harbor Provisions of the DMCA to their advantage. Thus, because individual creators of User-Generated Video Content are underrepresented in the current system, the Safe Harbor Provisions, and specifically the Takedown Notice Procedure, have a detrimental effect on these Users.

The video essays created by Lee are a powerful example of how new technologies are giving individuals the tools to create and distribute creative works of expression that have been traditionally recognized as protected fair use. Lee took the tools at his fingertips and his passion for film and created critical video essays that commented on pre-existing works.²²⁷ Using YouTube, he was able to distribute these works himself, without the need to have a media company publish or distribute his work.²²⁸ He did not show the films in their entirety, and he used video editing software to cut the films into segments that reflected the critical point he was expressing.²²⁹ In many ways, these critical video essays are precisely the type of work that copyright law is intended to encourage and one of the reasons that the fair use doctrine has been incorporated into American copyright law.²³⁰ From an economic perspective, it is hard to imagine these video essays having anything but a positive effect on the market for these films, as an online viewer will likely be more interested in purchasing or renting a DVD of the film upon watching the video essay. The Lee example shows how, on a practical level, the implementation of DMCA takedown notices actually prevents the goals of copyright

²²⁶ See *supra* notes 219–20 and accompanying text.

²²⁷ See *supra* notes 212–17 and accompanying text.

²²⁸ See *supra* note 217 and accompanying text.

²²⁹ See *supra* notes 215–17 and accompanying text.

²³⁰ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’” (quoting U.S. CONST. art. I, § 8, cl. 8)).

law from being effectively realized by failing to achieve a level of enforcement that adequately balances the rights of Copyright Holders, OSPs, and the Users who create User-Generated Video Content.

III. TWEAKING THE SYSTEM: REVISING THE DMCA IN ORDER TO ACHIEVE A MORE BALANCED REPRESENTATION OF COPYRIGHT HOLDER, OSP AND USER INTERESTS

The Safe Harbor Provisions of the DMCA should be amended so that the Takedown Notice Procedure protects the interests of Copyright Holders, OSPs, and Users in a more balanced fashion. These provisions should ensure that non-infringing User-Generated Video Content is allowed to be distributed through OSPs without being subject to inaccurate or abusive uses of takedown notices. The ultimate goal of these revised provisions should be that takedown notices are used more carefully, in a focused way that involves meaningful review of materials, rather than the catch-all tactics currently used by the Copyright Industries. The provisions should more narrowly focus on protecting Copyright Holders from straight piracy, while creating a more meaningful fair use analysis. As currently constituted, the takedown notice requirements demand too low a threshold for Copyright Holders to have the Users' works disabled or removed from OSPs. Because the Copyright Industries generate takedown notices through automated screening systems that do not consider fair use, and OSPs honor takedown requests without any substantial review, there is currently no consideration of fair use unless a counter-notice is filed.²³¹ In order to achieve the goal of more balanced DMCA provisions, it is essential that (1) Copyright Holders are obligated to apply a higher level of scrutiny and consider fair use in order to submit a takedown notice, (2) OSPs are given greater responsibility for analyzing whether a use constitutes fair use without increasing their liability, (3) alleged infringers are given a less burdensome process for asserting that their works are non-

²³¹ See *supra* Part I.D.

infringing, and (4) greater penalties are in place for abusive use of takedown notices.

An updated Takedown Notice Procedure should strengthen the language in § 512(c)(3)(A)(v), which requires “a good faith belief that use of the material in the manner complained of is not authorized,”²³² by specifying that this statement must include a consideration of fair use. This revised provision should include language that obligates the claimant to consider and distinguish between (1) the reproduction of entire or substantial portions of copyrighted works in unedited form, and (2) materials that include substantial editing of the copyrighted material and the inclusion of additional materials (such as content from other sources or narration). This proposed revision would have the effect of requiring the claimant to make a declaration of whether he or she believes the material is straight piracy or a more complicated question of infringement. Forcing the Copyright Holder to make a good faith distinction between whether he or she considers the material straight piracy or another unauthorized use, will have the effect of making the review process more accurate and efficient by requiring greater analysis by the Copyright Holder.

When a takedown notice is requested, the OSP will notify the User that a takedown request has been filed, and, in addition, the OSP would be obligated to more fully explain the User’s rights, including fair use. At this point, rather than initiating the ten to fourteen day period of disabling or removing the material,²³³ the OSP would be responsible for performing a basic analysis of the material. If the Copyright Holder asserts that the material in question is straight piracy, then the OSP will be obligated to review the material within a short time period (one to two days), and if the OSP agrees with the Copyright Holder, the material will be removed. The User will be notified that his or her material has been removed because the OSP considers the material infringing, and the User will be given the opportunity to request further review (“Second Tier Review”). If the OSP disagrees with the Copyright Holder’s assertion and believes that the use is non-

²³² 17 U.S.C. § 512(c)(3)(A)(v) (2006).

²³³ See *supra* note 128 and accompanying text.

infringing, then the material will remain online, and the Copyright Holder will be informed and given the opportunity to request Second Tier Review. Similarly, if the Copyright Holder acknowledges that the use is not straight piracy, but still believes the use infringes his or her rights, the material will undergo a Second Tier Review.

Second Tier Review would be a more nuanced review by the OSP that analyzes whether the alleged infringing material had a strong possibility of being considered fair use. As the OSPs are clearly not courts of law, the analysis would be focused on identifying very strong elements that suggest the material fits within categories such as “criticism, comment, news reporting, teaching . . . scholarship,”²³⁴ or transformative, non-commercial use.²³⁵ Should the OSP determine the material is likely fair use, the material would remain online and the Copyright Holder would have the option of pursuing judicial review against the alleged infringer. In the event that the OSP determined that the material was infringing, the material would be disabled and the User would have the option of initiating the current counter-notice procedure. At this point, whether the Second Tier Review deemed the material infringing or non-infringing, a User could always opt to allow the material to be taken down rather than continue on to judicial proceedings. This review process, though, would at least ensure that a substantive fair use review is applied to the material before a User must decide whether to expend the time and resources that a court proceeding would demand. Under this revised system, the OSPs would be given greater responsibility for judging fair use, but assuming that they act in good faith, the OSPs would remain protected from liability, as all the parties involved would understand that any unresolved disputes between Copyright Holders and Users would ultimately be decided in court.

The intent of this proposed system is to create a filtering process that separates basic straight copying piracy claims from more complicated potential fair use claims before the Second Tier Review stage is ever reached. Copyright Holders are primarily

²³⁴ 17 U.S.C. § 107.

²³⁵ See *supra* text accompanying note 169.

concerned with preventing piracy of their work, and this system would more effectively identify material that is likely to be deemed straight copying and therefore more clearly infringing. Users who upload a substantial amount of infringing material to a Video-Sharing Website, such as fans posting portions of their favorite TV shows or movies without adding any creative expression, would be less likely to challenge this material being taken down. Copyright Holders thus would have an effective tool for addressing piracy and would be given a strong incentive not to file erroneous takedown claims. At the same time, the public would be guaranteed that a more substantial review process is at work than under the current system.

The Second Tier Review will also serve as a filtering process that allows for instances of likely fair use, such as Kevin B. Lee's video essays, to be reviewed and allowed to remain online. By demanding that both the Copyright Holders and OSPs take on more responsibility for review, this system should effectively filter out most of the more obvious instances of both infringing (i.e., piracy) and non-infringing (i.e., fair use) uses of copyrighted material. This system would leave a much smaller number of cases unresolved, and these unresolved cases could be more quickly and effectively moved into the court system where they would receive the judicial review necessary for complicated fair use determinations.

In addition, penalties would be established for instances where abusive use of takedown notices could be established. Presently, § 512(f) provides that liability may be found against "[a]ny person who knowingly materially misrepresents . . . (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification."²³⁶ The language in this section would be expanded to specify that Copyright Holders are subject to additional penalties in instances where they issue mass takedown notice requests²³⁷ that lead to the inaccurate identification of multiple non-infringing works. This new penalty would be designed to discourage the practice of issuing mass

²³⁶ 17 U.S.C. § 512(f).

²³⁷ See Lombardi, *supra* note 50.

takedown notices and then worrying about what is infringing later—so called “shoot first, ask questions later” tactics. These penalties would also apply to instances where individuals improperly submit takedown notices for works in which they do not actually hold the copyright. This would combat instances where non-copyright holders employ takedown notices simply because they want to see the content removed.²³⁸ These additional penalties would help encourage more judicious use of takedown notices, by holding parties responsible for using the Takedown Notice Procedure improperly.

Under this proposal, the additional costs imposed upon Copyright Holders to pursue takedown notices would have the effect of ensuring that they use the provisions more judiciously. At the same time, a significant amount of the burden of review would shift to the OSPs, which makes logical sense because the OSPs are the middle point between Copyright Holders and Users.

In sum, the proposed system would protect Users from having their work removed from OSPs without substantial review, and would provide greater protection for the non-infringing use of copyrighted material. Under the proposed system, Copyright Holders would be compelled to use discretion in utilizing the Takedown Notice Procedure and make substantive fair use determinations when submitting a takedown notice; OSPs would shoulder a greater amount of responsibility for analyzing the merit of takedown notice requests, and Users would be provided with a less confusing and less costly process that would give them incentive to assert their legitimate rights under copyright law.

²³⁸ See, e.g., *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (finding that manufacturer of electronic voting machines knowingly misrepresented that online commentators had infringed the company’s copyrights). “Though the court in *Diebold* certainly gave some teeth to § 512(f) . . . no other § 512(f) cases have dealt such a blow to the complainant.” Urban & Quilter, *supra* note 154, at 629–30. For further discussion of this case, see Electronic Frontier Foundation, *Online Policy Group v. Diebold*, <http://www.eff.org/cases/online-policy-group-v-diebold> (last visited Nov. 27, 2009).

CONCLUSION

Significant changes in technology and the marketplace have occurred since the DMCA was enacted in 1998. The way in which the Safe Harbor Provisions of the DMCA are currently applied through use of the Takedown Notice Procedure leads to a significant amount of User-Generated Video Content being improperly identified as work that infringes copyright. The DMCA must be revised in a substantive way that more strongly incorporates fair use into the process of reviewing whether materials should be removed from an OSP. Although this new system will create increased monitoring costs and shift some of that burden from Copyright Holders to OSPs, it is preferable to the present system, under which the public at large is underrepresented. Therefore it is essential, for public policy reasons, that this defect in the current system be addressed. In order to address the defects in the system, fair use cannot be considered merely an afterthought in the statutory requirements of the DMCA simply because fair use has traditionally been considered a defense to copyright infringement claims.²³⁹

This Note proposes a solution that seeks to effectively address the defects in the current system and more effectively balance the representation of Copyright Holders, OSPs, and Users. This proposal seeks a more equitable representation of these three constituencies by revising the Safe Harbor Provisions of the DMCA. Specifically, the Takedown Notice Procedure would be revised to require that Copyright Holders take fair use into consideration when filing a takedown notice, OSPs are given more responsibility to review the merits of takedown notices, and Users are provided with a less arduous process to assert their rights under the law. The new proposal would help reform the legislation to protect the public's interest and more accurately reflect the goals of copyright law in the digital realm.

²³⁹ See *supra* text accompanying note 189.