

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 19 *Volume XIX*
Number 4 *Volume XIX Book 4*

Article 5

2009

Guerrilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content

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Jason J. Lunardi, *Guerrilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content*, 19 *Fordham Intell. Prop. Media & Ent. L.J.* 1077 (2009).
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Cover Page Footnote

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* J.D., Fordham University School of Law, 2009; B.Mus., Berklee College of Music, 2003. An earlier version of this Note was awarded Second Prize in the 2008 Nathan Burkan Memorial Competition at Fordham Law School, sponsored by the American Society of Composers, Authors and Publishers. I would like to thank the editors and staff of the *IPLJ* for their invaluable help and persistence in bringing this Note to publication. I would especially like to thank Prof. Alan Hartnick, Prof. Hugh Hansen, Joan McGivern, Yavar Bathaee, and Adam Block for their inspiration and insight. Finally, I would like to thank my family for their endless support and encouragement.

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INTRODUCTION

Streaming video has become extremely popular with Internet users. Data from comScore show that more than 12.7 billion videos were viewed online in the U.S. in November 2008—a thirty-four percent increase compared to the same time the year

before.¹ Without a doubt, the most popular site of this genre is YouTube,² which allows users to upload and stream video files that are hosted on and delivered from YouTube's servers. YouTube limits the size and quality of videos that it hosts, but many other copycat streaming video sites allow even larger, higher-quality files to be hosted and delivered to viewers.³ As the success of YouTube has shown, people want to view content on demand, and there is a large market for companies who deliver that content. Cable television providers have already seen success with on-demand content. Comcast reported last year that subscribers had bought 6 billion programs through video-on-demand in the four years preceding, with half of those purchases taking place in 2007 alone.⁴ Internet entrepreneurs are now building business models on delivering video content and are obtaining licenses from copyright owners. Hulu.com has partnered with leading content companies, including News Corporation, NBC Universal, FOX, ABC, and Warner Brothers, to let users watch TV and movies for free online.⁵ Joost.com has also thrown its hat in the ring, focusing on delivering free television content.⁶

¹ See Press Release, comScore, Americans View 34 Percent More Online Videos in November 2008 Compared to Year Ago (Jan. 5, 2009), available at <http://ir.comscore.com/releasedetail.cfm?releaseid=357555> [hereinafter comScore Data].

² YouTube, <http://www.youtube.com>. YouTube leads in market share among online video sites. comScore reports that Google-owned sites took forty-percent share of all videos, with YouTube.com accounting for ninety-eight percent of all videos viewed at those Google sites. The closest competitor is Fox Interactive Media with 3.5%. See comScore Data, *supra* note 1.

³ See generally Wikipedia—Comparison of Video Services, http://en.wikipedia.org/wiki/Comparison_of_video_services (last visited Apr. 12, 2009) (comparing the many video hosting sites and the specifications of the size and quality of videos they host).

⁴ Brian Stelter, *Growing Demand for Video on Demand*, TV DECODER BLOG, N.Y. TIMES.COM, Jan. 30, 2008, <http://tvdecoder.blogs.nytimes.com/2008/01/30/growing-demand-for-video-on-demand>.

⁵ Hulu—Media Info, <http://www.hulu.com> (“Hulu brings together a large selection of videos from nearly 190 leading content companies, including FOX, NBC Universal, ABC, Comedy Central, ABC Family, Biography, Lionsgate, Endemol, MGM, MTV Networks, National Geographic, Digital Rights Group, Paramount, PBS, Sony Pictures Television, Warner Bros. and more.”).

⁶ See Press Release, Joost, The Venice Project Code-Named No More (Jan. 16, 2007), available at http://press.joost.com/2007/01/the_venice_project_codened_n.html (“Joost is the first global TV distribution platform, bringing together advertisers, content owners and viewers in an interactive, community-driven environment.”).

Though some entrepreneurs are willing to pay for a license to avoid potential liability, others are attempting to build businesses around providing access to video content without authorization. Many of these sites exploit the fact that a wealth of unauthorized content can be viewed on video sharing sites like YouTube.⁷ While some have already been shut down, such as Peekvid.com and YouTVpc.com,⁸ others emerge to take their place, albeit with a modified structure to attempt to stay within the law. An example of such a site is Surfthechannel.com, which is careful to not stress the availability of unauthorized content, and unlike many other sites, does not embed videos within the site.⁹ All of these sites share one characteristic: instead of hosting videos on their sites like YouTube, they merely link to videos hosted on other sites. Almost all of these videos are television shows and feature-length movies that have been posted to video sharing sites without the permission of the copyright owners. These sites advertise that users can watch TV and movies for free; they allow users to search for content, with many allowing users to then stream the video without leaving the site.¹⁰ Many of these sites have been targeted by the movie industry: most have settled out of court or had consent judgments entered against them;¹¹ few of the cases have actually been decided on the merits. However, the process by which these sites operate raises interesting questions for copyright law, which is an important consideration for these websites who seem to constantly find new ways to facilitate the location of infringing content.

⁷ See Jeremy W. Peters, *Viacom Sues Google over YouTube Video Clips*, N.Y. TIMES, Mar. 14, 2007, available at <http://www.nytimes.com/2007/03/14/business/14viacom.web.html>.

⁸ See Press Release, Motion Picture Ass'n of Am., *Film Industry Seeks to Stop Copyright Infringement by YouTVpc.com and Peekvid.com* (June 27, 2007), available at http://www.mpa.org/press_releases/peekvid%20and%20youtvpc%20release%20final_2_.pdf [hereinafter MPAA Press Release on YouTVpc.com & Peekvid.com].

⁹ See generally SurfTheChannel—About SurfTheChannel, <http://www.surfthechannel.com/about.html> (last visited Oct. 29, 2009).

¹⁰ See OVGuide—About OVGuide, <http://www.ovguide.com> (last visited Oct. 29, 2009) (offering a guide to other indexing websites).

¹¹ See Posting of David Kravets to Wired.com Threat Level Blog, *MPAA Reining In Illicit Movie Sites, Downloading Unabated*, <http://www.wired.com/threatlevel/2008/12/mpaa-reining-in> (Dec. 17, 2008, 4:50 P.M.).

All of the major video streaming sites, including YouTube, allow their files to be embedded in other websites, most commonly as an Adobe Flash object.¹² In fact, YouTube encourages this practice and automatically generates a code that the user can simply add into his or her own page.¹³ The code that embeds an object is merely text: it is an instruction that tells the computer's Internet browser where to find the specified file when the page loads. "Embedding" in this context is synonymous with "in-line linking," whereby an element from a third-party website is displayed seamlessly as part of the linking site.¹⁴ Video hosting sites generally enable users to embed videos so they can share them via blogs and social networking sites. YouTube also allows users, if they choose, to disable the embedding feature on videos they post.¹⁵

Much of the content on YouTube is short home video clips or user-created video commentary. If a certain video is uploaded by the same person who created it, the copyright owner, or an authorized third party, there likely is an implied license for others to link to it,¹⁶ or there may be an explicit license as per the terms of service on the video sharing site.¹⁷ For many of the other videos, the linking site could make a strong fair-use defense if it is posting the content for criticism, comment, education, or news reporting—for example, a news site posting a breaking news story,

¹² See Web Design Group—OBJECT, Embedded Object, <http://htmlhelp.com/reference/html40/special/object.html> ("The OBJECT element is used to include objects such as images, audio, videos, Java applets, and Flash animations."); StephenJungels.net—The Flash Video Howto, <http://stephenjungels.com/jungels.net/articles/flash-video-howto.html> ("Macromedia Flash has become ubiquitous (97% of Internet users have the Flash Player installed) and introduced support for a video format, Flash Video.").

¹³ YouTube—Sharing YouTube Videos, <http://www.youtube.com/sharing> (last visited Apr. 12, 2009) ("Copy and paste this HTML snippet into your website to insert the video player directly into your page. This way visitors will be able to play the video without leaving your site.").

¹⁴ See discussion *infra* Part I.C and note 60.

¹⁵ YouTube—Learn More: Disabling Embedding Option, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=74648> (last visited Nov. 14, 2009).

¹⁶ See discussion *infra* Part I.C.

¹⁷ See YouTube—Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 14, 2009) (granting a non-exclusive license for Youtube and every user of the site to further reproduce, distribute, display and perform the user-submitted material).

a political blog embedding a video of a presidential candidate's speech, or a pop culture website embedding a music video for criticism.¹⁸

However, sometimes the videos uploaded are clips from copyrighted broadcasts, or even whole television programs or entire movies.¹⁹ This situation raises issues regarding infringement of the copyright owner's exclusive rights under the 1976 Copyright Act.²⁰ It seems obvious that the act of uploading content to the video hosting site is a copyright infringement. After all, an unauthorized copy must be created in the process of the upload.²¹ But, if a site merely links to content that is already available on the Internet elsewhere, is a website operator directly liable for, inter alia, the resulting distribution and any infringement of the public performance right when a user clicks to start the video playback?

This Note focuses on the issues presented when websites embed copyrighted video through in-line links where the actual video file is delivered from a third-party server unaffiliated with the site embedding the content. These sites will be referred to collectively as "indexing websites,"²² and the sites that deliver the video content from their servers will be referred to interchangeably

¹⁸ See 17 U.S.C. § 107 (2006) (fair use provision); Press Release, Pub. Knowledge, Public Knowledge Statement on Viacom Suit Against Google and YouTube (Mar. 13, 2007), available at <http://www.publicknowledge.org/node/860> ("There are limitations to copyright law, known as fair use, that do not require the copyright owner's permission before use of a work. Many of the users of YouTube who have posted short clips of main-stream media's works have done so using their fair use rights, for reasons of criticism, comment, education, and news reporting.").

¹⁹ See, e.g., Posting of Greg Sandoval to CNET News Blog, *Watchdog Group Flags Top Pirated Films on Google Video*, http://news.cnet.com/8301-10784_3-9741728-7.html (July 10, 2007, 11:16 A.M. PDT).

²⁰ 17 U.S.C. § 106 (2006) ("Exclusive rights in copyrighted works.").

²¹ See *id.* § 106(1) ("[Copyright owner] . . . has the exclusive rights . . . to reproduce the copyrighted work in copies . . ."). A video hosting site necessarily makes a copy of any video uploaded so that it can stream the videos from its servers to users. See discussion *infra* Part II.A.

²² These sites have also been called "guerilla video sites." See Kevin J. Delaney, *Threat for Big Media: Guerilla Video Sites*, WALL ST. J., Apr. 17, 2007; Posting of Xeni Jardin to BoingBoing.net, *MPAA Sues "Guerilla Video" Nets, AKA "Indexing Websites"*, <http://www.boingboing.net/2007/06/27/mpaa-sues-guerilla-v.html> (June 27, 2007, 9:52 A.M.).

as either “video streaming sites” or “video hosting sites.” This Note examines whether indexing websites should be viewed as information-location services such as Google, which seems to get much leeway in infringement suits,²³ or as sites more like Grokster, which was found liable for inducing copyright infringement by the United States Supreme Court.²⁴ For entrepreneurs looking to build viable businesses on facilitating access to information, including copyrighted content, these comparisons are paramount.

This Note is divided into four parts. Part I will discuss the background of movie and television piracy, the potential liability of YouTube for copyright infringement, the mechanics of Internet linking, and the specific issue of indexing websites. Part II will explain how copyright law can be interpreted to apply to the act of streaming video and to the liability of sites that embed streaming video content. This includes a discussion of the distribution right, the public performance right, and secondary liability. Part III explains how the safe harbor for online service providers under the Digital Millennium Copyright Act affects the liability of both video streaming sites and movie linking sites. Finally, in Part IV, there is a discussion of a possible solution and suggestion that video hosting sites take more proactive measures to block sites that they discover have linked to infringing content, and that they implement reasonable filtering methods to prevent infringing content from being uploaded.

I. BACKGROUND

A. *The Threat of Movie and Television Piracy*

It is no secret that recent advances in technology have put pressure on companies that are detrimentally affected by the exploitation of copyrighted content. The threat of piracy exists from increasingly diversified methods. When the music industry began to feel the effects of widespread infringement over the

²³ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

²⁴ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Internet because music files are relatively small and easy to download,²⁵ Hollywood film studios did not yet see much piracy from the Internet because digital movie files are much larger and would require a substantial amount of time to download.²⁶ Additionally, access to broadband Internet was limited, so the threat from illicit movie downloads was minimal. In the past few years, however, the number of people worldwide with access to high-speed Internet connections has multiplied.²⁷ With this new capacity for data transmission, websites are eager to take advantage of the Internet users' desire to transfer large media files, including video.²⁸ In 2007, *The Hollywood Reporter* featured a study by the Paris-based Organization for Economic Co-operation and Development ("OECD")²⁹ which cited piracy as largely to blame for "declining royalties, a drop in the number of performers kept under contract and job losses in the entertainment industry's production, manufacturing and retailing arms."³⁰

The movie business is especially harmed when copies of pre-release movies are circulated to the public. Usually this occurs because someone has used a camcorder to secretly tape the film in a movie theater³¹ or has ripped a copy from a DVD screener.³²

²⁵ See *Piracy on Fast-Forward*, CORP. COUNSEL, Sept. 7, 2007, at 24, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1189069353022> [hereinafter *Piracy on Fast-Forward*]. In the article, David Hechler interviews Greg Goeckner, general counsel of the MPAA, who said: "Consider, for example, the [smaller] file size of a song, as opposed to the [much larger] file size of a motion picture. That meant that there was a lot more online piracy of music early on than there was of motion pictures . . ." *Id.*

²⁶ See *id.*

²⁷ *Id.* ("One of the things you've seen over the last couple of years is the dramatic expansion of broadband both here and in other countries, and we have seen a lot more online piracy of movies and television.").

²⁸ *Id.*

²⁹ Organisation for Economic Co-operation and Development, <http://www.oecd.org>. The OECD represents the world's thirty richest countries, collecting data, monitoring trends, and researching social changes. See ORG. FOR ECON. CO-OPERATION & DEV., OECD ANNUAL REPORT 8 (2009), available at <http://www.oecd.org/dataoecd/38/39/43125523.pdf>.

³⁰ Leo Cendrowicz, *Piracy Derailed Biz Growth, Report Says*, HOLLYWOOD REPORTER, Oct. 30, 2007, available at http://www.adweek.com/aw/national/article_display.jsp?vnu_content_id=1003665063.

³¹ Michael Geist, *The Fact and Fiction of Camcorder Piracy*, BBC NEWS, Feb. 6, 2007, available at <http://news.bbc.co.uk/2/hi/technology/6334913.stm> ("As of August 2006, the MPAA documented 179 camcorder movies as the source for infringing DVDs

The major film studios, represented by the Motion Picture Association of America (“MPAA”),³³ have responded by seeking to shut down new technologies that enable piracy, including peer-to-peer software³⁴ and the digital distribution of pre-release movies on “top sites.”³⁵ For the past few years, the MPAA and other copyright industry trade groups have seen success in their efforts to shutter many widely-used BitTorrent “tracker” sites.³⁶ Though these tracker sites do not host files, they provide information to enable a user’s computer to automatically download the files from other sources.³⁷ In a press release, the MPAA noted that it “has been successful in bringing down more than 90% of the BitTorrent type sites it has filed lawsuits against.”³⁸ Other sites of the kind won’t disappear so easily, as evidenced by the Pirate Bay’s refusal

since 2004. During that time, its members released approximately 1,400 movies, suggesting that approximately one in every 10 movies is camcorder and sold as infringing DVDs.”).

³² See Pirating the 2008 Oscars (Now with 6 Years of Data), http://waxy.org/2008/02/pirating_the_20_2 (Feb. 4, 2008).

³³ The MPAA is the advocate of the American motion picture, home video, and television industries and also represents distributors of programming for television, cable, home video, and any future delivery systems. See MPAA—About Us, <http://www.mpa.org/AboutUs.asp> (last visited Nov. 14, 2009).

³⁴ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). MGM was successful in shutting down the peer-to-peer file sharing site. See *id.*

³⁵ See MPAA—Internet Piracy, http://www.mpa.org/piracy_internet.asp (last visited Nov. 14, 2009) (“The primary source of newly released pirated movies comes from thieves who camcord films in theaters. Illegally recorded movies are then sold to individuals who distribute them around the world through computer servers known as ‘Topsites.’ The extraordinary speed and power of a Topsite triggers the avalanche that is global Internet piracy.”).

³⁶ See Press Release, Motion Picture Ass’n of Am., *Illegal BitTorrent Site That Carried Star Wars Is Shut Down* (May 25, 2005), available at http://mpaa.org/press_releases/2005_05_25b.pdf [hereinafter MPAA Press Release on BitTorrent Sites] (noting that the “Elite Torrents” site and “Loki Torrents” site had been shut down); Thomas Mennecke, *EliteTorrents.org Hacked*, SLYCK NEWS, May 25, 2005, <http://www.slyck.com/news.php?story=801> (“Sites like LokiTorrent, UK-Torrents, sOnikfreak, TVTorrents and YouceffTorrents have all felt the pressure of the MPAA.”).

³⁷ See About.com—What Is a Bit Torrent Tracker?, <http://compnetworking.about.com/od/bittorrent/f/bttracker.htm> (last visited Apr. 12, 2009) (“The tracker notifies the client of the P2P file location (that is normally on a different, remote server).”).

³⁸ MPAA Press Release on BitTorrent Sites, *supra* note 36.

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to cease operations³⁹ even after a guilty verdict in a Swedish court and a jail sentence for its operators.⁴⁰

B. YouTube and Other Streaming Video Hosting Sites

Since YouTube allows its users to contribute content, the company does not have total control of what is shown to viewers. Google, the owner of YouTube, had said that it “hopes technology will be in place in September [2007] to stop the posting of copyright-infringing videos on its YouTube site.”⁴¹ In March of 2007, Viacom filed suit against YouTube, alleging that YouTube hosts Viacom-owned movies and television shows.⁴² The suit, alleging “massive copyright infringement,” seeks damages in excess of \$1 billion.⁴³

Viacom argues in its complaint that YouTube has “built an infringement-driven business by exploiting the popularity of [Viacom’s] copyrighted works . . . to draw millions of users to its website” and that the company “derives advertising revenue directly attributable to the infringing works because advertisers pay YouTube to display banner advertising to users whenever they log on to, search for, and view infringing videos.”⁴⁴ The Viacom complaint notes that Viacom has been attempting to license its

³⁹ See Greg Sandoval, *Hollywood Hunts The Pirate Bay; Site Down Again*, CNET NEWS, Oct. 5, 2009, http://news.cnet.com/8301-1023_3-10367767-93.html (antipiracy groups are issuing orders for ISPs to block access to The Pirate Bay, but the site continues to resurface).

⁴⁰ See Eric Pfanner, *File-Sharing Site Violated Copyright, Court Says*, N.Y. TIMES, Apr. 18, 2009, http://www.nytimes.com/2009/04/18/world/europe/18copy.html?_r=1; see also Press Release, Stockholm District Court, *Guilty Verdict in Pirate Bay Case* (Apr. 17, 2009), available at <http://www.ifpi.org/content/library/Pirate-Bay-verdict.pdf>.

⁴¹ *For YouTube, a System to Halt Copyright-Infringing Videos*, N.Y. TIMES, July 28, 2007, at C6, available at <http://www.nytimes.com/2007/07/28/business/28google.html>.

⁴² See Peters, *supra* note 7 (“Viacom said today that nearly 160,000 clips of its programming have been available on YouTube and that they had been viewed more than 1.5 billion times.”).

⁴³ See Miguel Helft & Geraldine Fabrikant, *Whose Tube? Viacom Sues Google over Video Clips*, N.Y. TIMES, Mar. 14, 2007, at C1, available at <http://www.nytimes.com/2007/03/14/technology/14viacom.html>.

⁴⁴ Complaint at 13, *Viacom Int’l, Inc., v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2007) (No. 07 Civ. 2103), 2007 WL 775611, available at <http://www.lessig.org/blog/archives/vvg.pdf>.

content for Internet streaming and download through legitimate outlets such as the iTunes Music Store and Joost.⁴⁵

In its terms of service, YouTube makes it clear that the content on the site is for streaming only and should not be downloaded or stored on a user's computer.⁴⁶ Video uploaders must agree to a non-exclusive worldwide license in order for both YouTube and its users to "use, reproduce, distribute, display and perform" the user-submitted videos as permitted by the functionality of the site.⁴⁷ The terms also expressly prohibit the uploading of copyrighted content without permission.⁴⁸ YouTube reserves the right to terminate the accounts of users who repeatedly violate their terms of service.⁴⁹

YouTube and similar sites are large; they may have a difficult time patrolling each user upload for infringing materials.⁵⁰ In addition, the users who are uploading the content may deliberately mislabel the video description and title attached to the file, thereby hindering efforts to track down copyrighted content quickly.⁵¹ A third-party website, however, can easily link directly to the content and provide an accurate description of what the hosted file actually

⁴⁵ See *id.* at 7; see also Apple—iTunes Store, <http://www.apple.com/itunes/store> (last visited Nov. 14, 2009) ("Buy or rent movies and watch them in minutes Keep up with your TV shows."); Joost, <http://www.joost.com>.

⁴⁶ YouTube—Terms of Service, <http://www.youtube.com/t/terms> (last visited Nov. 14, 2009) ("Content on the Website is provided to you AS IS for your information and personal use only and may not be downloaded, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners.").

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ Posting of Greg Sandoval to CNET News Blog, *YouTube's Filtering Issues Still Not 'Moot,'* http://news.cnet.com/8301-10784_3-9921916-7.html?tag=nefd.led (Apr. 18, 2008, 4:00 A.M. PDT) ("Identifying video is not easy, YouTube execs have long said. About 10 hours of video is uploaded to the site every minute.").

⁵¹ Some users create code words to tag their videos when uploading specific file types. One example is with videos of professional wrestling television broadcasts, in which users indicate an upload of a World Wrestling Entertainment video by tagging it with the term "cheese soufflé." See Chris Ayers, *TV Networks Tune in to the Appeal of Internet Video Clips*, *TIMES ONLINE* (London), July 20, 2006, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article690088.ece. These users mislabel the videos to circumvent YouTube's attempt at locating and removing the illegal files. *Id.*

contains.⁵² Regarding infringing materials on its site, YouTube relies on the safe harbor provision in Title II of the Digital Millennium Copyright Act (“DMCA”).⁵³ This provision exempts from liability online service providers who passively host content and comply with a set of statutory rules, including compliance with takedown notices from copyright owners.⁵⁴

C. *The Internet and Linking*

The World Wide Web is useful because it provides an easy way to locate information. “The Web is data: a vast collection of documents containing text, visual images, audio clips and other information media that is accessed through the Internet.”⁵⁵ The linking of related documents to facilitate access to data is a central feature of the World Wide Web.⁵⁶ Web pages are written in HyperText Markup Language (“HTML”), which instructs a viewer’s web browser to display programmed text and formatting, as well as other embedded media.⁵⁷ Computers known as “servers” store documents on the Web and make them available to viewers over the Internet.⁵⁸ When a server receives a request from a user, it prepares the document and sends the information to the user’s computer. A web page author can code links into the page to enable a reader to cross-reference information by jumping to a different section within the page or to outside sources.⁵⁹ Many times when a user views a web page, the images, music and video

⁵² See, e.g., Meelu, <http://www.meelu.com> (last visited Apr. 5, 2009). The site’s description meta tag reads: “All Meelu does is link or embed content that was uploaded to popular Online Video hosting sites like Veoh.com / Megavideo.com / Youtube.com / Google Video.” See *id.*

⁵³ Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2000) (Title II of the DMCA); see also discussion *infra* Part III.

⁵⁴ 17 U.S.C. § 512 limits the liability of online service providers in four situations: § 512(a) (transitory digital network communications); § 512(b) (system caching); § 512(c) (“Hosting” services); and § 512(d) (information location tools). See CRAIG JOYCE, COPYRIGHT LAW 514–18 (7th ed. 2006). YouTube’s DMCA defense would likely rely on section 512(c) since it hosts user-submitted content. See discussion *infra* Part III.B.

⁵⁵ *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 501 (S.D.N.Y. 2001).

⁵⁶ See MADELEINE SCHACHTER, LAW OF INTERNET SPEECH 667 (2d ed. 2002).

⁵⁷ See *id.* at 667–68.

⁵⁸ See *DoubleClick*, 154 F. Supp. 2d at 501.

⁵⁹ See World Wide Web Consortium—12 Links, <http://www.w3.org/TR/html401/struct/links.html>.

displayed on the page are not hosted on the same server as the web page itself. A web page author can use “in-line links” to display external content as if it were seamlessly integrated with his or her own website.⁶⁰ A web page can also provide “deep links”—a way to allow users to bypass a site’s “front door” to access content on an internal page.⁶¹ Since it is the user’s web browser that processes the linking code, the user is generally unaware that content may be coming from an external site.⁶²

Observers say that the nature of the Internet itself implies the existence of users’ license to link to any material that has already been made available to the public.⁶³ The creator of the World Wide Web, Tim Berners-Lee,⁶⁴ has said that “the Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks.”⁶⁵ Even if academics and technology enthusiasts prefer an absolute right to link on the Internet, the business world has an interest in regulating what information is shared.⁶⁶ Businesses will protest free linking to their materials if it interferes with their sales or marketing messages.⁶⁷ If a website operator

⁶⁰ SCHACHTER, *supra* note 56, at 668 (“‘In-line links’ bring an image contained in a separate file within the text and onto the page the user is viewing.”); Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1297 (2001), available at <http://www.law.berkeley.edu/journals/btlj/articles/vol16/sableman/sableman.pdf> (“The viewer will not know that the graphic comes from another site; rather, to the viewer, it appears that the inlined graphic is a seamless part of the webpage he is viewing.”).

⁶¹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 324–25 (S.D.N.Y. 2000), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); Sableman, *supra* note 60, at 1291 (“[D]eep linking is enabling others to bypass the website’s front door and go to the subsidiary page of interest.”).

⁶² Sableman, *supra* note 60, at 1291.

⁶³ See Tim Berners-Lee, *Realising the Full Potential of the Web* (Dec. 3, 1997), <http://www.w3.org/1998/02/Potential.html>.

⁶⁴ Steve Lohr, *His Goal: Keeping the Web Worldwide*, N.Y. TIMES, Dec. 18, 1995, at D2. Berners-Lee invented the technical Web standards for things like URLs (universal resource locators), HTML (hypertext mark-up language), and HTTP (hypertext transfer protocol). See *id.* These standards enable addressing, linking, and transferring multimedia documents over the World Wide Web. *Id.*

⁶⁵ Berners-Lee, *supra* note 63.

⁶⁶ See Sableman, *supra* note 60, at 1340.

⁶⁷ *Id.*

desires to restrict certain content from being linked to or integrated in another site, the operator can require a password to view the site or can technically disable outside sites from in-line linking to images or media hosted by the site.⁶⁸

Only in certain situations can merely linking to available material pose a problem for the site operator. One such situation is illustrated in *Universal City Studios, Inc. v. Reimerdes*. Reimerdes, an operator of a website, provided a direct “deep link” to a download of a computer program that allowed users to disable copy-protection measures on DVDs.⁶⁹ The court held that by merely linking to this file, Reimerdes “trafficked” in copy-protection circumvention technology in violation of a statutory prohibition.⁷⁰ At the same time, the *Reimerdes* court stated:

Links are what unify the [World Wide] Web into a single body of knowledge, and what makes the Web unique. . . . They often are used in ways that do a great deal to promote the free exchange of ideas and information that is a central value of our nation. Anything that would impose strict liability on a Web site operator for the entire contents of any Web site to which the operator linked therefore would raise grave constitutional concerns, as Web site operators would be inhibited from linking for fear of exposure to liability.⁷¹

This observes that the freedom to link on the Internet may implicate First Amendment free speech rights; however, it is well-

⁶⁸ *Id.* at 1341 (noting that simple technical measures may be taken to prevent linking, and that these technical solutions, rather than legal ones, should be preferred); *see also* Nicole Manktelow, *Net Lawyers Ponder the Right to Link*, *THE AGE* (Melbourne), Sept. 10, 2002, *available at* <http://www.theage.com.au/articles/2002/09/08/1031115958852.html>.

⁶⁹ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁷⁰ *See Reimerdes*, 111 F. Supp. 2d at 340; *see also* 17 U.S.C. § 1201(b)(1) (2006) (“No person shall . . . traffic in any technology . . . that is primarily designed or produced for the purpose of circumventing protection . . .”).

⁷¹ *Reimerdes*, 111 F. Supp. 2d at 340 (internal citations and quotations omitted).

established that the right to free speech is not absolute, and there are specific exceptions—one of which is copyright infringement.⁷²

D. Indexing Websites and Lawsuits Against Them

Film industry lawsuits have targeted the practice of compiling indexes of movie files hosted on streaming video sites. In September 2007, the MPAA filed a suit against Ssupload.com alleging that the site facilitated copyright infringement.⁷³ Prior to that, in July 2007, ShowStash.com was sued under the same theory.⁷⁴ And even earlier, a suit was filed in June 2007 against the websites Peekvid.com and YouTVpc.com.⁷⁵

YouTVpc.com and Peekvid.com stream various amounts of media; however, videos appear to be their main focus. YouTVpc.com is the more daring of the two, as it readily streams theatrical titles such as *Pirates of the Caribbean 3* and *Shrek the Third*. YouTVpc's videos are streamed from servers located throughout the world, as it does not host any files.⁷⁶

Numerous other sites serve the same purpose but have yet to be sued or shut down.⁷⁷ Though each use slightly different methods

⁷² See *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring) (holding that copyright protects only the form of expression and not the ideas expressed, and therefore copyright laws are not restrictions on freedom of speech); *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 53 (D.D.C. 2003) (“It is . . . clear that the First Amendment does not protect copyright infringement.”). The Supreme Court has decided that the First Amendment provides no protection to obscenity, child pornography, or “fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁷³ See Jacqui Cheng, *MPAA Continues War on Illicit Online Video, Sues Cinematube, Ssupload*, ARS TECHNICA, Sept. 28, 2007, <http://arstechnica.com/tech-policy/news/2007/09/mpaa-continues-war-on-illicit-online-video-sues-cinematube-ssupload.ars>.

⁷⁴ Press Release, Motion Picture Ass'n of Am., Film Industry Seeks to Stop Copyright Infringement by Showstash.com (July 17, 2007), available at http://www.mpa.org/press_releases/showstash%20release%207.12.pdf.

⁷⁵ See MPAA Press Release on YouTVpc.com & Peekvid.com, *supra* note 8.

⁷⁶ *Id.*; see also Thomas Mennecke, *MPAA Sues Two Movie Streaming Sites*, SLYCK NEWS, June 27, 2007, http://www.slyck.com/story1513_MPAA_Sues_Two_Movie_Streaming_Sites [hereinafter Mennecke, *MPAA Sues*].

⁷⁷ See, e.g., alluc.org, <http://s12.alluc.org>.

to organize their content, they all share the characteristic of allowing popular movies and television shows to be streamed as embedded media within the site's own pages.⁷⁸ Nearly all of the sites also attempt to generate revenue, usually by hosting advertisements or soliciting donations.⁷⁹

Several websites actually list and track which indexing websites are most popular among users.⁸⁰ For example, Online Video Guide (www.ovguide.com) claims to be the *TV Guide* of web video.⁸¹ It was praised by *Time* magazine as one of its top-ten website picks in December of 2006: "Online Video Guide connects users with video content from YouTube and dozens of other video providers. You can search or browse by provider or category."⁸² One notable characteristic of Online Video Guide is that it does not directly embed any streaming videos, but instead only links to another indexing website's streaming page to view videos. There is no sign that the MPAA has tried to go after the site: perhaps its position as one step further removed from the infringing videos has so far sufficed to keep it free from liability.

These indexing sites arguably skirt the law by cloaking the exchange of illicit materials by way of a technological loophole. In so doing, they find a way to profit from advertisements while facilitating users' access to unauthorized content. MPAA General Counsel Greg Goeckner argued,

It's really just a different style of helping people pirate. Because they organize links to content that's posted elsewhere, they really are pointing people to the content and telling them, 'Go here and you can get it for free.' It's just technologically a little different by comparison to sites like Grokster, which enabled peer-to-peer file sharing.⁸³

⁷⁸ Delaney, *supra* note 22.

⁷⁹ *Id.*

⁸⁰ See, e.g., OVGuide, <http://www.ovguide.com>.

⁸¹ Press Release, OVGuide, OVGuide.com Recently Launched—Promises to be the Next 'TV Guide' for Online Video (Oct. 11, 2006), *available at* <http://www.prweb.com/releases/2006/10/prweb448747.htm>.

⁸² Lee S. Ettleman, *25 Top Ten Lists: Web Sites*, TIME, 2006, <http://www.time.com/time/topten/2006/websites/10.html>.

⁸³ *Piracy on Fast-Forward*, *supra* note 25.

The MPAA noted that Peekvid, located in Texas, “averages over 53,000 unique users per day who view over 184,000 pages of content. YouTVpc—whose servers are located in Scottsdale, Arizona—averages more than 6,000 unique daily visitors who view over 21,000 pages of content per day.”⁸⁴ Peekvid, in a April 2007 *Wall Street Journal* interview describing its business model,⁸⁵ continued to maintain that it is on the right side of the law.⁸⁶ In the article, one of Peekvid’s founders commented on the nature of the small video-indexing websites like his own, that “[i]f one host gets shut down, there are three others that are going to pop up” because it is easy and cheap for anyone to set up links to computer servers around the world.⁸⁷ For this reason, the *Wall Street Journal* article referred to the indexing sites as “guerrilla video” sites.⁸⁸

The MPAA lawsuit campaign goes on. The 2007 suits have since concluded, but more continue to be filed, including that against Pullmylink.com, which the MPAA sued on April 17, 2008.⁸⁹ Many are disturbed by the movie industry’s strategy, suggesting that the movie industry target host sites rather than sites that link to—but do not host—illegal content.⁹⁰ One observer opined that such sites are essentially doing “the same thing that a search engine like Google does. There are plenty of Google searches that will lead you to unauthorized content, but for some

⁸⁴ Mennecke, *MPAA Sues*, *supra* note 76.

⁸⁵ Delaney, *supra* note 22.

⁸⁶ A statement by Peekvid maintains that it “does not contain any content on its site, but is merely an index of available links on the Internet. Peekvid is committed to an industry solution that will provide a mechanism to compensate artists that create the work you enjoy watching. Peekvid would like to be part of the long-term solution.” Posting of Xení Jardin to BoingBoing.net, *MPAA Sues “Guerrilla Video” Nets, AKA “Indexing Websites,”* <http://www.boingboing.net/2007/06/27/mpaa-sues-guerrilla-v.html> (June 27, 2007, 9:52 A.M.) (quoting a statement from Peekvid).

⁸⁷ Delaney, *supra* note 22.

⁸⁸ *Id.*

⁸⁹ See Gina Keating, *MPAA Accuses Pullmylink.com of Aiding Movie Piracy*, REUTERS.COM, Apr. 17, 2008, <http://www.reuters.com/article/technologyNews/idUSN1720278020080418>.

⁹⁰ See *id.*

reason, the entertainment industry believes that if you make a specialized search engine or directory you're somehow liable."⁹¹

II. THE COPYRIGHT LAW APPLIED TO WEBSITES THAT EMBED VIDEOS

American copyright law exists for the purpose of promoting the production of artistic goods.⁹² In the Constitution, the Framers granted Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁹³ The theory underlying this clause is that financial incentives are required to spur the creation of new works by artists.⁹⁴ The Copyright Act represents a balance between the public benefit of enjoying new works and the private financial gain the author enjoys from selling his or her creations.⁹⁵ However, the system only works if the government prevents "free riders" from unfairly profiting from an author's work by copying and selling it at a lower price, thereby driving the creator into a new line of business instead of promoting "progress."⁹⁶

Copyright law grants the following exclusive rights to copyright holders: (1) reproduction; (2) preparation of derivative works based upon the copyrighted work; (3) distribution of copies; (4) public performance; (5) public display; and (6) public performance by digital audio transmission of sound recordings.⁹⁷ To attain a finding of direct infringement, the party alleging the violation must establish ownership of a valid copyright in the work

⁹¹ Mike Masnick, *Is It Copyright Infringement to Embed an Infringing YouTube Video on Your Blog?*, TECHDIRT.COM, <http://techdirt.com/articles/20070627/121427.shtml>.

⁹² See Howard P. Goldberg, *A Proposal for an International Licensing Body to Combat File Sharing and Digital Copyright Infringement*, 8 B.U. J. SCI. & TECH. L. 272, 279 (2002).

⁹³ U.S. CONST. art. I, § 8, cl. 8.

⁹⁴ Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647, 651 (2000).

⁹⁵ See *id.* at 650–56.

⁹⁶ *Id.* at 652.

⁹⁷ See 17 U.S.C. § 106 (2006).

and prove that the defendant copied a protectable element of the work beyond a *de minimis* amount.⁹⁸

There is no statute that explicitly prohibits facilitating the location of infringing copyrighted files.⁹⁹ If a website's linking activity is not a direct infringement of one of the copyright owner's exclusive rights granted by federal copyright law,¹⁰⁰ the linking site could still be liable for a secondary infringement under common law precedent.¹⁰¹ For any secondary liability, there first needs to be a direct copyright infringement by a third party.¹⁰² If the indexing website directs users to a location where a copyrighted video can be downloaded, as in the BitTorrent cases,¹⁰³ the website would likely be liable for secondary infringement because a third party would have created a copy.¹⁰⁴ However, it is unclear what exclusive rights are implicated, if any, when a video streams to a viewer's computer. Under certain circumstances it could be considered a reproduction, distribution, or public performance. The reproduction right is discussed within the section on distribution below.

A. Is In-line Linking an Infringement of the Distribution Right Under 17 U.S.C. § 106(3)?

A copyright owner has the exclusive right under section 106(3) of the Copyright Act to “distribute copies . . . of the copyrighted

⁹⁸ See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137–38 (2d Cir. 1998).

⁹⁹ See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984) (“The Copyright Act does not expressly render anyone liable for [another's] infringement.”).

¹⁰⁰ See 17 U.S.C. § 106 (exclusive rights granted to authors).

¹⁰¹ See *Sony*, 464 U.S. at 434.

¹⁰² See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) (“Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.” (citing *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, F. Supp. 1361, 1371 (N.D. Cal. 1995))).

¹⁰³ See *supra* Part I.A.

¹⁰⁴ See *supra* Part I.A.; see also Ask Dave Taylor—What's the Difference Between BitTorrent, Limewire, and Kazaa?, http://www.askdaveaylor.com/difference_between_bittorrent_limewire_and_kazaa.html (last visited Oct. 29, 2009) (“[E]veryone interested in sharing the file (either providing a copy they already downloaded or getting a copy) can use the tracker to essentially create a network dedicated to sharing just that specific file.”).

work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”¹⁰⁵ From the plain language of the Act, it would appear that digital transmission of a work is not a “distribution” because it is not specifically addressed in the text. However, the Supreme Court in *New York Times v. Tasini* acknowledged that the definition of “distribution” includes electronic transmission.¹⁰⁶ In *Tasini*, the electronic database LexisNexis digitally presented news articles as individual works, instead of as part of a periodical.¹⁰⁷ The Court held that the defendants, “by selling copies of the Articles through the NEXIS database, ‘distribute copies’ of the Articles ‘to the public by sale’”¹⁰⁸ Therefore, distribution in the Internet context may implicate the copyright owner’s exclusive right of reproduction.¹⁰⁹ For example, in the physical “book distribution” model, a copy is initially made, and then it is distributed. Conversely, on the Internet, the distribution happens first; then, a copy can be made on the end-user’s computer. In this sense, if no copy is assembled at its destination, a distribution may occur without any infringement of the reproduction right.

1. Is a Reproduction of the Work Required for Digital Distribution?

To infringe an owner’s right to distribution, one must actually disseminate copies of the owner’s copyrighted work.¹¹⁰ It would seem, then, that one who distributes copies must first have physical possession of those copies. Someone who merely provides the HTML code that instructs a user’s browser to begin streaming a video file through an in-line link never possesses a copy of the work that is disseminated. Furthermore, under some

¹⁰⁵ 17 U.S.C. § 106(3).

¹⁰⁶ See generally *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001).

¹⁰⁷ See *id.* at 488.

¹⁰⁸ *Id.* at 498.

¹⁰⁹ See 17 U.S.C. § 106(1).

¹¹⁰ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007); *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (citing MELVILLE NIMMER & DAVID NIMMER, 2-8 NIMMER ON COPYRIGHT § 8.11[A] (1993) [hereinafter NIMMER ON COPYRIGHT]).

interpretations, the user who views the streamed video may not ever possess a copy, either.

“Copies” as defined by the Copyright Act are “material objects . . . in which a work is fixed by any method . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹¹¹ Since the statute defines “copies” as material objects, distribution of “copies,” therefore, must mean the distribution of material objects. In the motion picture industry, movies are commonly fixed first in the medium of film stock (or hard drive, if filmed digitally); later, the movie can be transferred to other formats and distributed via VHS tape, DVD, Blu-ray, or purely as digital files for download on iTunes, for example. These formats all fit the definition of a “material object . . . in which the work is first fixed.”¹¹² An HTML link, by contrast, is not an object in which a work can be fixed. As such, a link is not itself a copy. A link is simply a line of text, an HTML instruction, that can direct an Internet web browser to connect to a different location, that perhaps might host or search for a “copy.” The distribution of links is not synonymous with distribution of copies.

The indexing websites do more than merely link to other pages; they present streaming video as embedded media within their own pages. Whether or not streaming video creates a “fixed copy” within the definition of the Copyright Act is subject to dispute. In regards to broadcast media, such as the telecast of live sports, a transmission may sometimes result in a fixation, but a work is not fixed solely by the act of transmission. The transmission would only meet the fixation requirement “if [the] fixation of the work [were] made simultaneously with its transmission.”¹¹³ In *Agee v.*

¹¹¹ 17 U.S.C. § 101.

¹¹² *Id.*

¹¹³ See *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 668 (7th Cir. 1986) (holding that telecasts that are broadcast and videotaped concurrently are fixed in tangible form), *cert. denied*, 480 U.S. 941 (1987); *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731–32 (8th Cir. 1986) (“[T]he legislative history [of the Copyright Act] demonstrates a clear intent on the part of Congress to ‘resolve, through the definition of ‘fixation’ . . . the status of live broadcasts,’ using—coincidentally but not insignificantly—the example of a live football game.”).

Paramount Communications, Inc.,¹¹⁴ the Second Circuit considered a claim for violation of the distribution right arising from the satellite transmission of a television commercial incorporating plaintiff's music in the soundtrack.¹¹⁵ The Second Circuit held that a transmission of the work was a public performance and not a distribution, stating "distribution is generally thought to require transmission of a 'material object' in which the sound recording is fixed: a work that is of 'more than transitory duration.'"¹¹⁶

In the Report of the House Judiciary Committee on the 1976 Copyright Act, the Judiciary Committee stated: "[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the 'memory' of a computer."¹¹⁷ It is possible for a computer to momentarily capture transient data by storing it in "random access memory" ("RAM"). RAM is a temporary data storage mechanism that computers must utilize to process digital information. RAM requires electricity to function: when the power is on, data in RAM can be "perceived, reproduced, or otherwise communicated," but when the power is turned off, the data in RAM disappears.

Notwithstanding the House Judiciary Committee definition, in *MAI Systems Corp. v. Peak Computer, Inc.*, the Ninth Circuit held that digital information temporarily stored in a computer's RAM is sufficiently fixed to constitute a copy for the purposes of the reproduction right in 17 U.S.C. § 106(1).¹¹⁸ Subsequent cases also tend to support this view.¹¹⁹ The specific holding in *MAI* was overruled by statute via the DMCA, but the view of RAM copies

¹¹⁴ *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317 (2d Cir. 1995).

¹¹⁵ *Id.* at 319–20.

¹¹⁶ *Id.* at 325 (citing 17 U.S.C. § 101 (defining "copy")); 2 NIMMER ON COPYRIGHT, *supra* note 110, § 8.11[A] ("[The distribution right is the right to] publicly . . . sell, give away, rent or lend any material embodiment of copyrighted work.").

¹¹⁷ H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess., at 53 (1976).

¹¹⁸ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517–18 (9th Cir. 1993).

¹¹⁹ *See, e.g., Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999) (holding that browsing of infringing websites is itself an infringement).

as being sufficiently fixed to meet the definition in the Act has survived.¹²⁰ In fact, because Congress specifically made an exemption for certain kinds of RAM copies, they implicitly acknowledged that RAM copies violate the reproduction right as a general rule.¹²¹ If, according to *MAI Systems*, a transitory copy is sufficiently fixed for purposes of distribution, reproduction by way of the indexing websites—which essentially facilitate such reproduction—should be a violation of section 106(3). A telling analogy would be a merchant on a street corner with a dubbing machine and a copyrighted work on tape; common sense would suggest that allowing customers to make recordings on the machine would be both the customer violating the reproduction right and the merchant violating the distribution right.

Still, case law exists that indicates that in the context of streaming media, a RAM copy would not suffice for an infringement of the distribution right. The Southern District of New York, in *United States v. ASCAP*, distinguished the situation in which there is a transitory RAM copy of a streamed music file but no permanent copy retained in the user's computer.¹²² The court looked to the specific physical processes involved in online audio streaming and determined that in a pure Internet stream, distribution does not take place.¹²³ Video streaming is technologically similar to music streaming. Sites such as YouTube provide streaming video without offering the option of saving a permanent copy.¹²⁴ However, other video hosting sites provide

¹²⁰ Title III of the DMCA modified 17 U.S.C. § 117, overturning the specific holding of *MAI* “with respect to individual service providers, leaving the underlying holding with respect to temporary copies intact.” U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 31 (2001).

¹²¹ See 17 U.S.C. § 117 (2006).

¹²² *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438, 444 (S.D.N.Y. 2007) (“[T]here cannot be both a distribution and a public performance of a sound recording unless the end user is provided with a so-called hybrid stream—one that both plays the recording and downloads a permanent file to the end user’s computer.”).

¹²³ *Id.*

¹²⁴ See Wikipedia—Comparison of Video Services, *supra* note 3.

this option.¹²⁵ Distinguishing whether an indexing website sends users to a stream or a download may determine whether there has been any “distribution” at all.

2. Is Merely “Making Available” a Copyrighted Work a Distribution?

The argument that copyright owners have the exclusive right of making their works available to the public has been advanced by many groups, most recently by major record labels and their trade group, the RIAA,¹²⁶ who are concerned about music file-sharing over peer-to-peer networks.¹²⁷ In the recent file-sharing case *Capitol Records v. Thomas*,¹²⁸ the record label plaintiffs were successful in getting a jury instruction which stated: “The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners’ exclusive right of distribution, regardless of whether actual distribution has been shown.”¹²⁹ The jury returned a verdict in favor of the plaintiffs and found that the defendant had “distributed” copyrighted songs just by placing them in a publicly available folder on her computer.¹³⁰ This was controversial among copyright scholars and practitioners, many of whom argue that there is no “making-available” right in United States law and that currently there are only a few court decisions that deal directly with the issue—and

¹²⁵ See *id.* Some video hosting companies used to provide users with the option of saving videos, but have since disabled that feature. See, e.g., Veoh, <http://veoh.com>.

¹²⁶ See Recording Industry Association of America—Who We Are, <http://www.riaa.com/aboutus.php> (last visited Nov. 14, 2009) (“The Recording Industry Association of America (RIAA) is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members’ creative and financial vitality.”).

¹²⁷ See, e.g., *Virgin Records Am., Inc. v. Thomas* (*Capitol Records v. Thomas*), No. 06-CV-1497, 2007 WL 2826645 (D. Minn. Oct. 1, 2007).

¹²⁸ *Id.*

¹²⁹ Jury Instructions at 18, *Thomas*, 2007 WL 2826645 (No. 06-82), available at http://blog.wired.com/27bstroke6/files/jury_instructions.pdf; see also Posting of Fred von Lohmann to EFF Deeplinks Blog, *Capitol v. Thomas: The Key Appeal Issue*, <http://www.eff.org/deeplinks/2007/10/capitol-v-thomas-key-appeal-issue> (Oct. 9, 2007).

¹³⁰ Eric Bangeman, *RIAA Trial Verdict Is In: Jury Finds Thomas Liable for Infringement*, *ARS TECHNICA*, Oct. 4, 2007, <http://arstechnica.com/news.ars/post/20071004-verdict-is-in.html>.

those decisions are in conflict.¹³¹ In decisions issued on the same day, the District of Massachusetts held that making available a copyrighted song on a peer-to-peer network *is not* a distribution,¹³² and the Southern District of New York held that it *is* a distribution.¹³³ *Thomas* subsequently resulted in a mistrial because of its faulty jury instruction.¹³⁴

The United States is a signatory country to the 1996 WIPO Copyright Treaty (“Copyright Treaty”), and is therefore bound by its obligations.¹³⁵ The Copyright Treaty requires all signatory countries to prohibit the unauthorized “making available to the public” of copyrighted material by means of digital networks.¹³⁶

¹³¹ See Posting of William Patry to the Patry Copyright Blog, *The Recent Making Available Cases*, <http://williampatry.blogspot.com/2008/04/recent-making-available-cases.html> (Apr. 3, 2008, 10:29 P.M.).

¹³² See Posting of Fred von Lohmann to EFF Deeplinks Blog, *Making Available is Not Distribution, Says Court in London-Sire v. Doe*, <http://www.eff.org/deeplinks/2008/04/making-available-distribution-says-court-london-sire-v-doe> (Apr. 2, 2008); *London-Sire v. Doe*, No. 04cv12434-NG (D. Ma. Mar. 31, 2008), available at http://www.eff.org/files/filenode/riaa_v_people/London-Sire%20v%20Does.pdf (holding making available is *not* distribution). Other courts have also taken this side. See Order Denying Summary Judgment, *Atlantic Recording Corp. v. Howell*, No. CV-06-02076-PHX-NVW, at 10 (D. Ariz. Apr. 29, 2008), available at http://www.ilrweb.com/viewILRPDF.asp?filename=atlantic_howell_080429Decision (“Unless a copy of the work changes hands in one of the designated ways, a ‘distribution’ under § 106(3) has not taken place.”). In 2008, the *Thomas* case went to a second jury, and they again returned a guilty verdict. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

¹³³ See Posting of Fred von Lohmann to EFF Deeplinks Blog, *Making Available is Not Distribution, Says Court in London-Sire v. Doe*, <http://www.eff.org/deeplinks/2008/04/making-available-distribution-says-court-london-sire-v-doe> (Apr. 2, 2008); *Elektra Entm’t Group, Inc. v. Barker*, No. 05-CV-7340 (S.D.N.Y. Mar. 31, 2008), available at http://www.eff.org/files/filenode/elektra_v_barker/Elektra%20v%20barker_080331Decision.pdf (holding that making available *is* distribution—“distribution” and “publication” are synonyms under the Copyright Act).

¹³⁴ See \$222,000 Peer-to-Peer Music File Sharing Infringement Award, JUDICIAL VIEW, [https://www.judicialview.com/Court-Cases/Technology/\\$222-000-Peer-to-Peer-Music-File-Sharing-Infringement-Award/Record-Company-Must-Show-Actual-Dissemination/15/4827](https://www.judicialview.com/Court-Cases/Technology/$222-000-Peer-to-Peer-Music-File-Sharing-Infringement-Award/Record-Company-Must-Show-Actual-Dissemination/15/4827).

¹³⁵ WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, available at <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm>.

¹³⁶ *Id.* art. 8 (“[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of

Title I of the DMCA was enacted in 1998 to implement the Copyright Treaty.¹³⁷ The treaty was not self-executing, yet the DMCA did not make any modifications to section 106—evidence that Congress may have believed that a making-available right was included in the Copyright Act.¹³⁸ Other signatory countries have modified their laws to accommodate a new making-available right. The European Union issued the “Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society,”¹³⁹ which requires European member countries to provide for a new exclusive right in compliance with the Copyright Treaty.¹⁴⁰

In fact, the legislative history of the DMCA shows the intention to include digital transmissions within the ambit of “distribution.”¹⁴¹ Courts have held that an individual engages in distribution when he or she makes a collection of unauthorized copies available for public access.¹⁴² In *Hotaling v. Church of*

the public may access these works from a place and at a time individually chosen by them.”).

¹³⁷ Title I of the DMCA was entitled the “WIPO Copyright Treaties Implementations Act,” and it was designed to implement the World Intellectual Property Organization–sponsored copyright agreements signed by the United States. *See* H.R. REP. NO. 105-551(I), 1998 WL 261605, at 1 (1998).

¹³⁸ The Register of Copyrights assured Congress prior to the Copyright Treaty ratification that there was “no need to alter the nature and scope of the copyrights and exceptions, or change the substantive balance of rights embodied in the Copyright Act” in order to provide a making available right. *Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the H. Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 43 (1997) (statement of Marybeth Peters, Reg. of Copyrights, WIPO).

¹³⁹ Council Directive 2001/29/EC, 2001 O.J. (L 167) 10, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>.

¹⁴⁰ *Id.* art. 3(1), at 16.

¹⁴¹ *See* JOYCE *supra* note 54, § 7.04[C] (“The legislative history of the 1998 Digital Millennium Copyright Act is replete with references making clear the shared assumption of all involved that digital transmission to the public *does* constitute ‘distribution’ within the meaning of § 106(3).”). *But see* Zohar Efroni’s Blog, *Jury Instruction No. 15*, <http://cyberlaw.stanford.edu/node/5566> (Oct. 8, 2007, 3:45 P.M.) (“[T]he making-available right to my knowledge has no trace in the main legislative history documents leading to the enactment of Title I of the DMCA. I once heard Marybeth Peters from the Copyright Office . . . lamenting about it, saying that not enacting a making-available right was a mistake.”).

¹⁴² *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997).

Jesus Christ of Latter-Day Saints, a church library had an unauthorized copy of the plaintiff's copyrighted work in the form of microfiche, which it "made available" to the public.¹⁴³ "When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public."¹⁴⁴

Courts have agreed with *Hotaling* and have extended its reasoning to the context of the Internet.¹⁴⁵ Most of the copyrighted video aggregated as links on the indexing website are likely uploaded to a hosting site without authorization from the copyright owner.¹⁴⁶ A collection of links or embedded videos in a site can be analogized to a library containing unauthorized content; that is, under *Hotaling*, the site would be liable for infringing the distribution right.

Nevertheless, some recent court decisions are in disagreement with *Hotaling* on whether simply listing a file in a directory constitutes a distribution, including *In re Napster, Inc. Copyright Litigation*.¹⁴⁷ In *Napster*, the district court held that "merely listing a work in a directory does not result in the actual transfer of a copy of the work and thus does not violate the copyright owner's distribution right."¹⁴⁸ The presiding judge, Judge Patel, stated "[t]here is no dispute that merely listing a copyrighted musical composition or sound recording in an index of available files falls

¹⁴³ See *id.* at 201–02.

¹⁴⁴ *Id.* at 203.

¹⁴⁵ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiff's distribution rights."); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398 (S.D.N.Y. 2002) ("[W]hen a webpage goes live on the Internet, it is distributed and 'published' . . . [for the purposes of the Copyright Act.]; *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997) (holding that the distribution right is infringed by making available digital image files on a computer bulletin board system).

¹⁴⁶ There has been a push by some television networks to license their copyrighted content for viewing on YouTube in exchange for a share of ad revenue; however, major motion pictures are generally not featured as authorized content on these video hosting sites. See, e.g., Press Release, YouTube, Sony BMG Music Entertainment Signs Content License Agreement with YouTube (Oct. 9, 2006), available at http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA.

¹⁴⁷ See *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796 (N.D. Cal. 2005).

¹⁴⁸ *Id.* at 802.

short of satisfying these ‘actual dissemination’ or ‘actual transfer’ standards.”¹⁴⁹ On appeal, the Ninth Circuit court stated in dictum that the distribution was the act of the Napster users uploading file titles to indexes, not the act of Napster listing the titles in an index.¹⁵⁰

Further illustrating the controversy, in *Capitol Records v. Thomas*,¹⁵¹ the RIAA attorney cited a letter from Marybeth Peters as support for his claim that section 106(3) distribution includes making the work available.¹⁵² Peters took the position that “[m]aking the work available in this context [of peer-to-peer network uploads] constitutes an infringement of the exclusive distribution right as well as of the reproduction right (where the work is uploaded without the authorization of the copyright holder).”¹⁵³

3. The Ninth Circuit’s Approach: *Perfect 10 v. Amazon.com* and the Server Test

Under the “server test,” only the owner of a copy who makes the copy available to the public may be deemed to have distributed the copy.¹⁵⁴ But, if the copy is not transmitted from the defendant’s server, the defendant is not directly liable for infringing the exclusive right of distribution under section 106(3).

¹⁴⁹ *Id.*

¹⁵⁰ See *A&M Records*, 239 F.3d at 1014.

¹⁵¹ *Virgin Records Am., Inc. v. Thomas (Capitol Records v. Thomas)*, No. 06-CV-1497, 2007 WL 2826645 (D. Minn. Oct. 1, 2007).

¹⁵² Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145, 1149 (2008).

¹⁵³ Plaintiffs’ Response in Opposition to Defendants’ Motion for Judgment on the Pleadings at 6–7, *Atlantic Recording Corp. v. Njuguna*, No. 4:06-CV-02341-CWH (D.S.C. Nov. 15, 2007), available at http://www.ilrweb.com/viewILRPDFfull.asp?filename=atlantic_njuguna_071115MotDisComplaintOppos. The letter argued against the testimony submitted by Gigi Sohn, on behalf of Public Knowledge, for a hearing on “Piracy of Intellectual Property on Peer-to-Peer Networks” before the Subcommittee on Internet, Courts and Intellectual Property, that “U.S. copyright law does not give copyright owners a separate exclusive right of ‘making available.’” Kasunic, *supra* note 152, at 1149–50 & n.16.

¹⁵⁴ The “server test” is also sometimes referred to as the “deemed distribution” rule. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 716, 718–19 (9th Cir. 2007); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

In *Perfect 10, Inc. v. Amazon.com, Inc.*, the Ninth Circuit applied the server test and held that Google did not infringe the distribution right by displaying search results in-line linking to full-sized images of Perfect 10's copyrighted photos.¹⁵⁵ Google Image Search ("GIS") is the pertinent Internet search engine providing results in the form of images, rather than web addresses.¹⁵⁶ The full-sized images in the search results page were in fact not stored in Google's own database.¹⁵⁷ Rather, the images were in-line linked images that appeared on other websites.¹⁵⁸ In other words, the GIS results did not show the user what was stored on Google's server, but rather what was stored and displayed on other websites.¹⁵⁹ Perfect 10 argued that, under the reasoning in *Hotaling*, GIS infringed Perfect 10's rights under section 106(3) because merely making images available violates the copyright owner's distribution right.¹⁶⁰ The court disagreed and held that because Google did not own a collection of Perfect 10's full-size images and GIS did not communicate those images to the computers of people, Google did not infringe the section 106(3) right of distribution.¹⁶¹

Although *Perfect 10* dealt with photographic images, the decision's reasoning could be applied to any digital transmission, including video files. As long as indexing websites do not communicate any files from their own servers, they may escape direct liability for infringement of the distribution right under the server test. It is the user that actually starts the digital transmission

¹⁵⁵ *Perfect 10*, 487 F.3d at 716–19.

¹⁵⁶ See Google—Image Search Help, http://www.google.com/help/faq_images.html (last visited Nov. 14, 2009).

¹⁵⁷ *Perfect 10*, 487 F.3d at 717.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ("Providing these HTML instructions is not equivalent to showing a copy. . . . The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen.").

¹⁶⁰ *Id.* at 718.

¹⁶¹ *Id.* at 719. On the issue of thumbnail images, the court found that Google actually stored copies of the images and communicated via use of those copies, and could therefore be liable for infringing the display right under section 106(5) of the Copyright Act. *Id.* at 716–17. However, the court then found that the display of thumbnail images was a fair use. *Id.* at 725.

by clicking on the link, and it is the video streaming site that responds to the user's request by sending the data. The data never are routed through the linking site.

4. Argument Against the Server Test

Perfect 10 was unsuccessful in arguing that the court should adopt an "incorporation test."¹⁶² If the court had done so, simply incorporating a copyrighted element in a web page would implicate a copyright owner's exclusive rights, regardless of whether the element was hosted by the website itself or a third party. Using in-line links and embedded video creates the appearance of a seamless presentation: the viewer may not be aware that the media is being streamed from an outside source. In addition, the embedding site is able to take advantage of page views by selling advertisements to show alongside the streaming video. However, copyright law does not protect against consumer confusion: consumer confusion is a concept of trademark law.¹⁶³

The impetus for the creation of the server test was to protect a search engine's ability to catalog thumbnail images, which significantly improves information-gathering techniques online.¹⁶⁴ Similarly, a site that catalogs links and facilitates a search of those links to find video content improves information-gathering in the same way a search engine does. The principal difference lies in the methods used to generate a searchable index: search engines like Google use "spidering," which is an automated process that "crawls" the Internet and assembles a directory of websites,¹⁶⁵ while the so-called indexing websites rely on user submissions of links. If a website operator does not wish his site to be automatically indexed by Google, he can opt out of the spidering process by simple measures.¹⁶⁶ However, there is no simple way

¹⁶² See *id.* at 716.

¹⁶³ *Id.* at 717; 15 U.S.C. § 1114(1) (2006) (trademark law).

¹⁶⁴ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820–21 (9th Cir. 2003).

¹⁶⁵ Lee Underwood, *The Inner Workings of Robots, Spiders, and Web Crawlers*, WEBREFERENCE.COM, <http://www.webreference.com/authoring/robots>.

¹⁶⁶ By including a "robots.txt" file in the top-level directory of a website's server, a website can tell search engine spiders to avoid indexing certain directories. See *The Web Robots Pages—About /robots.txt*, <http://www.robotstxt.org/robotstxt.html> (last visited Nov. 14, 2009) (describing how to block web robots using a robots.txt file). A similar

to prevent users from manually submitting a link to an indexing website, especially if the link would otherwise be accessible by typing the URL into a web browser by hand. Still, most videos linked in the sites' indexes were uploaded without authorization from the copyright owner. So, even if a copyright owner could possibly prevent a search engine from indexing its own site, a site hosting unauthorized content may still be included in searches. This was the exact problem that *Perfect 10* addressed, and the court held that Google could escape liability. Nevertheless, unlike using a Google search in *Perfect 10*, the user of a video-indexing website simply has to click on the link provided to view the selected video. When these user-selected links represent a collection of unauthorized video streams, the sites seem less like a neutral search engine and more like an infringement tool.

Moreover, the Ninth Circuit's server test should be discarded or limited only to search engines because it violates the spirit of the Constitution. The Copyright Clause of the Constitution grants Congress the power to make laws to promote the progress of the useful arts and sciences.¹⁶⁷ This constitutional mandate is fulfilled by copyright laws, which give authors exclusive control over the sale and commercial use of their work.¹⁶⁸ The Ninth Circuit's server test focuses on the technicalities of the Internet, and instead of examining whether a user ultimately perceives the copyrighted material, it conditions liability on whether a website's servers actually host the copyrighted data. It can be argued that the server test erodes the exclusive property right that represents the spirit of the Copyright Clause, as it allows otherwise infringing acts to escape liability.

In light of the Copyright Act's overarching regulatory scheme, the server test could be viewed as contrary to congressional intent. Since 1976, there have been frequent amendments to the Act to

effect can be obtained for individual pages by using a special HTML <META> tag to tell robots not to index the content of a page and/or not scan it for links to follow. *See* The Web Robots Pages—About the Robots <META> Tag, <http://www.robotstxt.org/meta.html> (last visited Nov. 14, 2009) (describing how to block web robots using a meta tag). Most legitimate search engine spiders are designed to respect such requests; however, malware robots and spammers routinely ignore them. *See id.*

¹⁶⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁶⁸ *See* Goldstein v. California, 412 U.S. 546, 555 (1973).

ensure that its goals would not be frustrated by new developments in technology. For example, in 1995, Congress added a new exclusive right to section 106, covering digital transmissions of sound recordings.¹⁶⁹ In 1998, Congress added a provision prohibiting the circumvention of technological measures meant to control access to copyrighted works.¹⁷⁰ These amendments indicate a clear congressional intent to prevent loopholes from springing up in the Copyright Act due to the emergence of new technology.¹⁷¹ In-line links allow Internet users to play videos from indexing websites without those sites actually hosting any videos on their servers. Congress likely did not intend to have courts apply a test that would permit the circumvention of liability simply by adding additional steps to the streaming process.

B. Is Streaming Internet Video a “Public Performance” That Implicates the Author’s Exclusive Right in 17 U.S.C. § 106(4)?

Movies are a form of entertainment traditionally experienced in a public setting: theatres. Television has always been a more private viewing experience, but since the advent of VHS technology, movies increasingly have been enjoyed at home, in a private setting. Both movies and television programs have become available for purchase or rental in both physical and digital formats, so viewers have more choices than ever for watching content in their homes.¹⁷² Since the delivery of content is shifting to online methods, many groups are concerned that the law needs to be clarified in the area of streaming media. Those who contribute work to the production of a video get paid with residual income from performances. For example, a major issue behind the recent Writers Guild of America strike was to obtain fair residual payments to writers from online distribution and performances.¹⁷³ Musicians who compose background music for a movie also collect additional money when the show is aired in a different

¹⁶⁹ 17 U.S.C. § 106(6) (2006).

¹⁷⁰ *Id.* § 1201(a)(1)(A).

¹⁷¹ See *L.A. News Serv. v. Conus Comm’ns Co.*, 969 F. Supp. 579, 583–84 (C.D. Cal. 1997).

¹⁷² See Sara K. Stadler, *Performance Values*, 83 NOTRE DAME L. REV. 697, 743 (2008).

¹⁷³ See Michael Cieply, *Both Sides in Writers’ Strike See New-Media Future at Stake*, N.Y. TIMES, Dec. 1, 2007, at C1.

format, such as television.¹⁷⁴ For this reason, they sometimes agree to take less money up front.¹⁷⁵ The American Society of Composers, Authors and Publishers (“ASCAP”) seek to solidify authors’ rights to public performance royalties from streaming media. If these residual income streams were to somehow disappear, those who should be benefiting from the royalties would be unfairly deprived of them.¹⁷⁶

Under the Copyright Act, copyright owners have the exclusive right to perform their works publicly.¹⁷⁷ The rights of public performance may be implicated by streaming audio and video.¹⁷⁸ As opposed to downloading, streaming displays the work as it is being transmitted, and a copy of the work is not necessarily made as a result of the transmission.¹⁷⁹

The various indexing websites all allow users to view streaming movies as embedded video files without the users’ leaving the indexing site that links to the files. However, the streams are technically served to the viewers by the video hosting sites, not the linking site. Therefore, even if a court would hold that streaming video is a public performance, the argument remains that to hold that the facilitation of access to video streams is a section 106(4) violation distorts the definition of direct infringement to include far more than Congress intended.

¹⁷⁴ Interview with Joan McGivern, Gen. Counsel & Senior Vice President, ASCAP, in N.Y., N.Y. (Apr. 7, 2008) (notes on file with author).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 17 U.S.C. § 106(4) (2006). The public performance right is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. *Id.*

¹⁷⁸ Bruce P. Keller & Jeffrey P. Cunard, *Copyright in the Digital Age*, in SEVENTH ANNUAL INTERNET LAW INSTITUTE, at 293, 307 (PLI Patents, Copyrights, Trademarks, & Literary Property, Course Handbook Series No. 754, 2003).

¹⁷⁹ *Id.* (“[L]istening to streaming audio, or playing an excerpt from a film, implicates the public performance or display right, but not the right of reproduction, unless the user ‘stores’ the streamed data. Similarly, streaming television programming over the Internet may implicate the public performance or display rights, although, again, not the right of reproduction.”); see also *Nat’l Football League v. TVRadioNow Corp.*, 53 U.S.P.Q. 2d (BNA) 1831 (W.D. Pa. 2000), 2000 U.S. Dist. LEXIS 11670, 2000 WL 255989 (holding re-transmission of broadcast television was a public performance in violation of section 106(3)).

1. Is a Performance by Streaming Video “Public”?

While private home viewing may not seem very “public,” the Copyright Act explicitly provides for such home performances. Under the Copyright Act, “[t]o ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process.”¹⁸⁰ Public performance of a work includes “acts that transmit or otherwise communicate a performance or display of the work to the public.”¹⁸¹ To “transmit” a performance or display is “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”¹⁸²

The House Report to the 1976 Copyright Act suggests that the concept of public performance should be interpreted broadly.¹⁸³ The Report defined “transmission” to include “[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed.”¹⁸⁴ It states that “[t]he definition of ‘transmit’ . . . is broad enough to include all conceivable forms and combinations of wired or wireless communications media.”¹⁸⁵ Notably, it defines public performance as including “any . . . act by which [a] rendition or showing is transmitted or communicated to the public” and “include[s] all conceivable forms and combinations of wired or wireless communication.”¹⁸⁶ This broad wording seems to anticipate the development of new means of communication and implies the intent that copyright protection be extended to any new outlets.

For copyright infringement, the performance must also be “public.” The Copyright Act defines “public” in 17 U.S.C. § 101:

(1) to perform or display it at a place open to the public or at any place where a substantial number of

¹⁸⁰ 17 U.S.C. § 106.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 758 (S.D.N.Y. 1988) (examining the House Report to the 1976 Copyright Act).

¹⁸⁴ H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 63–64.

persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.¹⁸⁷

There is evidence that Congress originally intended to prohibit only performances “in such public places as concert halls, theaters, restaurants, and cabarets,”¹⁸⁸ but courts have consistently construed the word “public” to include more private places and smaller groups of people. In *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, the Third Circuit held that a company that rented individual viewing rooms to customers for the purpose of viewing videocassettes had violated the copyright owner’s public performance rights.¹⁸⁹ The court held that even though the company itself did not perform the copyrighted work, it authorized the public performance of the videocassettes by its customers.¹⁹⁰

Clause (2) of the definition of public performance, discussing the right “to transmit . . . by means of any device or process . . .” is most applicable to the discussion of performance over the Internet. Although there are differing interpretations of “transmit,” “one must conclude that under the transmit clause, a public performance at least involves sending out some sort of signal . . .”¹⁹¹ Thus, to have violated the right of public performance, an alleged infringer must, at the very least, send out some form of a signal.¹⁹²

¹⁸⁷ 17 U.S.C. § 101 (2006).

¹⁸⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975) (citing H.R. REP. NO. 60-2222 (1909)); *see also* H.R. REP. NO. 60-2222, at 4 (1909) (noting that section (d) of the 1909 Copyright Act was intended to give adequate protection to the proprietor of a dramatic work whose compensation comes solely from public representation of the work).

¹⁸⁹ *Colum. Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986).

¹⁹⁰ *Id.* at 64.

¹⁹¹ *Colum. Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989).

¹⁹² *See id.*

The issue of streaming music was taken up by the Southern District of New York in *United States v. ASCAP*.¹⁹³ The court decided that streaming music over the Internet was in fact a public performance.¹⁹⁴ The court pointed to the House Report and the definition of “publicly” in the Copyright Act to hold that the definition of “transmit” . . . is broad enough to include all conceivable forms and combinations of wired and wireless communications media, including but by no means limited to radio and television broadcasting as we know them,” and if that transmission reaches the public, then an author’s rights under section 106(4) are implicated.¹⁹⁵ The court defined streaming as “the real-time (or near real-time) playing of the song [A] constant link is maintained between the server [streaming the song] and the client until the playing of the song is completed, at which replay of the song is not possible without streaming it again.”¹⁹⁶

There seems to be little question whether a movie streamed from a site like YouTube is a public performance. The media is hosted on its servers and streamed to viewers with data transmitted in one continuous delivery, allowing a computer user to experience media in seemingly real-time as it is being transferred from a server through a constant link.¹⁹⁷ Similar to a television broadcast, and fitting into the definition under the transmit clause, streaming video may be received by members of the public in the same place or in separate places and at the same time or at different times.¹⁹⁸

Assuming that a Youtube video stream qualifies as a public performance, is an in-line link or an embedded video a method by which a performance is transmitted publicly? There are generally two views: the Ninth Circuit’s “server test” and the Second Circuit’s “every-step-in-the-process test.”

¹⁹³ *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

¹⁹⁴ *Id.* at 445.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 442.

¹⁹⁷ *See id.*

¹⁹⁸ *See* 17 U.S.C. § 101 (2006) (clause 2 of the definition of performing “publicly”).

2. Ninth Circuit: Server Test

To aid in the determination of whether a website has sent out some form of signal, the Ninth Circuit has adopted the server test, as articulated by the Central District of California.¹⁹⁹ As discussed in Part II.A.3, under this test, the transmitting website must actually host and store the digital format of the copyrighted material for there to be direct liability.²⁰⁰ Although the sever test was originally applied to a copyright owner's display rights, the test is equally applicable to the public performance rights.

“From a technological perspective, one could define ‘display’ as the act of serving content over the web—i.e., physically sending ones and zeroes over the Internet to the user’s browser.”²⁰¹ When a computer owner stores a copyrighted work as electronic information and serves that electronic information to the user by physically transmitting object code over the Internet to the user’s computer, in which the work then becomes perceptible, they have violated the copyright holder’s public display or public performance right.²⁰² The Ninth Circuit held that Google did not engage in public performance (or display) since their servers did not store copies of the full-sized images but only provided directions for the end-user’s web browser to access the full-sized image from third party servers.²⁰³

Like Google in *Perfect 10*, an indexing website does not host any infringing content; they merely provide computer instructions for an end-user to view content hosted elsewhere. Under the server test, the indexing websites do not perform the videos publicly. The *Perfect 10* court reasoned that “this test is based on what happens at the technological-level as users browse the web, and thus reflects the reality of how content actually travels over the Internet.”²⁰⁴ This may be a wise stance to take to preserve the freedom of the Internet, because to hold otherwise might mean that

¹⁹⁹ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 715–16 (9th Cir. 2007).

²⁰⁰ See *id.*

²⁰¹ *Perfect 10, Inc. v. Google, Inc.*, 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006), *aff’d in part, rev’d in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701.

²⁰² *Amazon.com*, 487 F.3d at 715–16.

²⁰³ *Id.* at 716.

²⁰⁴ *Google*, 416 F. Supp. 2d at 839.

any site posting a mere link would be strictly liable for infringement.

3. Second Circuit: Every-Step-in-the-Process Test

It is not a stretch to analogize an embedded video on a website to a cable re-transmission of television content. In the context of cable re-transmission, the Second Circuit fashioned a test for determining if an intermediary has publicly performed the content. In *National Football League v. PrimeTime 24 Joint Venture*, the National Football League (“NFL”) alleged that PrimeTime had performed its copyrighted football broadcasts by uplinking the transmissions to a satellite for viewing by subscribers in Canada without permission.²⁰⁵ In its holding that PrimeTime had infringed the NFL’s exclusive right of public performance, the Second Circuit stated, “the most logical interpretation of the Copyright Act is to hold that a public performance or display includes ‘each step in the process by which a protected work wends its way to its audience.’”²⁰⁶ The court denied Primetime’s argument that only the final downlink to customers was a public performance.²⁰⁷ Instead, the court noted that “a transmission need not be made directly to the public in order for there to be a public performance or display.”²⁰⁸

The analogy between satellite broadcasts and Internet linking is not perfect. Even though the *NFL* court said that any intermediate transmission is a performance, to consider a link a “transmission” is a stretch. The court relied on several other cases, each relating to transmissions and re-transmissions of signals, but none involving any other “steps” in terms of plain uses of technology without the actual transmission of a signal.²⁰⁹ A recent case,

²⁰⁵ *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 12.

²⁰⁹ *See WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624–25 (7th Cir. 1982) (holding retransmission of altered material was a public performance). Other Internet cases have been cited on the issue of “retransmission” in the past, but are equally deficient to explain in-line linking because they all involve a copy being transmitted from defendant’s possession. *See, e.g., Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp.

though, has more explicitly held that direct linking to streaming media is a public performance. In *Live Nation Motor Sports, Inc. v. Davis*,²¹⁰ the defendant operated a website and directly linked to an audio webcast from the plaintiff's site.²¹¹ The court held that although the same audio webcast link was freely distributed by ClearChannel, the defendant "violated SFX's copyrights by providing a link of its webcasts without authorization"²¹² So, clearly under the Second Circuit's reasoning, an indexing website would be violating a copyright owner's public performance right by linking directly to an infringing video stream without authorization.

More recently, the Second Circuit has distinguished *National Football League v. PrimeTime 24 Joint Venture*, and clarified the scope of performance right in the streaming video context. *Cartoon Network LP v. CSC Holdings Inc.*²¹³ held that there is no public performance when there is a 1-to-1 transmission of a copyrighted work from a remote digital video recording service to the customer.²¹⁴ It remains to be seen what exactly the ramifications of this case will be, but it probably does not effect user-generated video sites like YouTube, who serve the same video to a mass audience. Cablevision Systems Corp., the defendant-appellant in *Cartoon Network*, implemented a system architecture for its remote digital video recording service that stored a unique

543, 550–51 (N.D. Tex. 1997) (holding the defendant directly liable for re-transmitting copyrighted images because he operated a website that downloaded images from newsgroups, stored them, then transmitted them to his site's visitors); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 505 (N.D. Ohio 1997) (holding defendant directly liable as the operator of an electronic bulletin board in which users could upload copyrighted works and the bulletin board would re-transmit the works to interested users).

²¹⁰ *Live Nation Motor Sports, Inc. v. Davis*, No. 3:06-CV-276-L, 2007 WL 79311, at *2 (N.D. Tex. Jan. 9, 2007).

²¹¹ *Id.* at *2.

²¹² *Id.* at *3–5.

²¹³ *Cartoon Network LP v. CSC Holdings Inc.*, 536 F.3d 121 (2d Cir. 2008); see Seth Gilbert, *Cablevision Wins Remote Storage DVR Case—Consumers Win Too*, SEEKING ALPHA, Aug. 06, 2008, <http://seekingalpha.com/article/89425-cablevision-wins-remote-storage-dvr-case-consumers-win-too>.

²¹⁴ *Cartoon Network*, 536 F.3d at 131 (holding that remote digital video recorders hosted on the cable company's servers were not "sufficiently distinguishable from a VCR" to find the company liable).

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copy of a recorded video for playback to only the same cable subscriber who initiated the recording.²¹⁵ The same video was never streamed to multiple subscribers, so the performance was not sufficiently “public” to directly infringe the exclusive rights in section 106(4).²¹⁶

C. Secondary Liability of Sites That Link to Streaming Video

Several court decisions have imposed liability for posting links to prohibited or illegal content. The first such United States decision was *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*²¹⁷ In the case, the defendant operated a website and had posted copyrighted Mormon writings without permission.²¹⁸ After a court granted a temporary restraining order, he removed the materials from his site, but then posted direct links to the documents hosted on third-party websites.²¹⁹ On his own site, he publicized the Mormon writings enthusiastically and provided instructions on how to reach the forbidden material.²²⁰

The court held that the third-party sites had clearly infringed the plaintiff’s copyright, but found that the defendant could not be held vicariously liable because “there is no direct relationship between the defendants and the people who operate the three websites. The defendants did not provide the website operators with the plaintiff’s copyrighted material, nor are the defendants receiving any kind of compensation from them.”²²¹

Some argue that this case is distinguishable from other linking scenarios because the court viewed the linking as an attempt to circumvent a court-ordered injunction on posting the infringing

²¹⁵ *Id.* at 124–25.

²¹⁶ *Id.* at 140.

²¹⁷ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1292 (D. Utah 1999).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See David Carney, *Judge Enjoins Contributory Infringement by Website*, *TECH L. J.*, Dec. 13, 1999, <http://www.techlawjournal.com/intelpro/19991213.htm>.

²²¹ *Intellectual Reserve*, 75 F. Supp. 2d at 1293.

material.²²² In other cases where links appeared to be designed to evade court orders, the courts have similarly sanctioned or enjoined hyperlinks.²²³

Although “[t]he Copyright Act does not expressly render anyone liable for [another’s] infringement,”²²⁴ secondary liability has emerged as a common law doctrine and is established law.²²⁵ Secondary liability comes in a few different varieties: contributory infringement, vicarious infringement, and inducement. “One infringes contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”²²⁶ Under the inducement theory, one who promotes the use of a tool to infringe copyright “as shown by clear expression or other affirmative steps taken to foster infringement” is liable for the resulting infringement of their users.²²⁷

1. Contributory Infringement

A party “who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer.’”²²⁸ According to *Religious Technology Center v. Netcom On-line Communication Services, Inc.*,²²⁹ for contributory infringement, a plaintiff must demonstrate that the defendant had knowledge of the

²²² T.R. Halvorson, *How to Start an Urban Legend: the Reporting of Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, LLRX.COM, March 15, 2000, http://www.dvd-copy.com/documents/1066-www.llrx.com_features_urban.html.

²²³ See, e.g., *Jeri-Jo Knitwear, Inc. v. Club Italia, Inc.*, 94 F. Supp. 2d 457 (S.D.N.Y. 2000) (ordering that links basically intended to circumvent the court’s prohibition on trademark use by the defendant be removed).

²²⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

²²⁵ See, e.g., *id.* at 486.

²²⁶ *Perfect 10, Inc. v. Google, Inc.*, 487 F.3d 701, 725 (9th Cir. 2007) (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)).

²²⁷ *Grokster*, 545 U.S. at 936–37.

²²⁸ *Gershwin Publ’g Corp. v. Colum. Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); 3-12 NIMMER ON COPYRIGHT, *supra* note 110, § 12.04[A][3].

²²⁹ *Religious Tech. Ctr. v. Netcom On-line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) (holding defendant must have knowledge of the infringing activity if plaintiff is to sustain a claim for contributory copyright infringement).

infringing activity on the defendant's site. In addition, a plaintiff must show substantial participation by the defendant to further the infringement.²³⁰ If the defendant knows or has reason to know of the presence of infringing materials on his system, yet does not remove them, he has satisfied this test.²³¹ The Ninth Circuit fashioned a slightly different test in *Perfect 10*, holding "a computer system operator can be held contributorily liable if it has actual knowledge that specific infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works."²³² Under this formulation of the test, an indexing website operator must have actual knowledge of specific links to infringing material, yet does not remove the links from the website. This seems to be the situation for the majority of indexing sites, which are specifically designed to facilitate access to copyrighted content.

2. Vicarious Infringement

Vicarious infringement occurs when there has been a direct infringement and the defendant is able to control the direct infringer and also benefits financially from the infringement. In *Fonovisa, Inc. v. Cherry Auction*, a flea market operator was found to be a vicarious infringer because counterfeit recordings were being sold in his market.²³³ The Ninth Circuit reasoned that the operator could have policed the vendors but did not.²³⁴ He also profited directly from renting the booths and charging the attendees admission fees.²³⁵

²³⁰ *Id.* at 1374; see *Gershwin Publ'g*, 443 F.2d at 1162 (holding defendant liable if he induces, causes, or materially contributes to the infringing conduct of the infringer); *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616, 625 (N.D. Cal. 1993), *aff'd*, 35 F.3d 1435 (9th Cir. 1994) (holding participation must be substantial); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 294 (S.D.N.Y. 1988).

²³¹ *Religious Tech. Ctr.*, 907 F. Supp. at 1374.

²³² *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007) (internal citations and emphasis omitted).

²³³ *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

²³⁴ *Id.*

²³⁵ *Id.*

Indexing websites that benefit financially from banner ads on the website placed alongside the streaming video or by donations solicited for on their page may be in danger of vicarious liability. Indeed, most indexing websites make money in these ways. However, the indexing websites have room to argue whether they have control over the direct infringement—which only occurs when a user clicks on the link or uploads a video to a hosting site. Unless there is a system to block users from clicking on the links, it does not seem as if they have “control.”

3. Inducement

Many indexing websites encourage visitors to upload content to third-party video hosting sites and then post the location of those files in the index.²³⁶ Under the test in *MGM v. Grokster*,²³⁷ this could make the indexing websites liable for their users’ infringements. The *Grokster* court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”²³⁸

The high percentage of links to infringing content on the indexing websites is comparable to the situation in *Grokster*. The Court pointed to the fact that out of all the materials the service allowed users to download, the vast majority was copyrighted material.²³⁹ As discussed *supra*, users probably violate an author’s copyright by streaming videos, and definitely infringe it by uploading content to a hosting site without authorization. So, the indexing websites seem to actively encourage infringement by collecting links to copyrighted content and specifically requesting

²³⁶ See, e.g., LegalmoviesTV—Link Submission Page, <http://www.legalmovies.tv/addamovieall.php?format=any> (last visited Nov. 14, 2009) (instructing a user to copy and paste the HTML code generated automatically by a video streaming site). On the page is also a small notice that reads, “Your IP has been logged. Dont [sic] abuse this service!” *Id.*

²³⁷ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

²³⁸ *Id.* at 919.

²³⁹ *Id.* at 922 (“MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download . . . were copyrighted works.”).

their users to submit links to movies and television programs that they have uploaded.²⁴⁰ Some sites even honor the users who post the most content.²⁴¹

III. THE IMPACT OF THE DMCA SAFE HARBOR PROVISIONS ON VIDEO SHARING SITES AND LINKING SITES

Title II of the DMCA is called the “Online Copyright Infringement Liability Limitation Act” and was designed to exempt online service providers from liability caused by their users’ infringing acts.²⁴² For this “safe harbor” from liability, the service provider must adhere to certain guidelines, discussed below. There are two policy goals of Title II: first, to create incentives for copyright owners and online service providers to work together to deal with copyright infringements over digital networks; second, to allow the service providers to be able to do business without the uncertainty of liability hanging over them from possible copyright infringements.²⁴³ The DMCA has been both criticized and lauded in its efforts to balance the two interests.²⁴⁴

The sections of the DMCA that apply in the immediate situation are sections 512(c) and (d). Section 512(c), which is at issue in the *Viacom v. YouTube* lawsuit, provides safe harbor for “Information Residing on Systems or Networks at Direction of Users.”²⁴⁵ The section that applies to links and indexing websites

²⁴⁰ See *joox.net*—(F)requently (A)sked (Q)uestions, <http://joox.net/faq> (last visited Apr. 1, 2009) (“[To add a video, y]ou need to upload it to www.messagefromme.com first and then paste the messagefromme blog code into the ADD page here on joox.”).

²⁴¹ See, e.g., *alluc.org*—Top Poster, <http://s14.alluc.org/top-poster.html> (last visited Nov. 14, 2009).

²⁴² See Pub. L. No. 105-304, 112 Stat. 2860, 2877 (codified at 17 U.S.C. § 512) (1998).

²⁴³ See H.R. REP. NO. 105-551, at 49–50 (1998).

²⁴⁴ See, e.g., Matt Richtel, *EBay Says Law Discourages Auction Monitoring*, N.Y. TIMES, Dec. 10, 1999 (criticizing the DMCA for giving an unfair advantage to non-OSPs); Mark E. Harrington, *On-Line Copyright Infringement Liability for Internet Service Providers: Context, Cases & Recently Enacted Legislation*, 1999 B.C. INTELL. PROP. & TECH. F. 60499 (1999) (maintaining the DMCA provides benefits to ISPs as well as copyright holders).

²⁴⁵ 17 U.S.C. § 512(c) (2006) (“A service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material

is section 512(d): “Information Location Tools.”²⁴⁶ Basically, both sections have the same requirements.

A. Requirements for Safe Harbor Under 17 U.S.C. § 512

For safe harbor from liability, one must first qualify as an “online service provider” (“OSP”), which is defined broadly as “a provider of online services or network access, or the operator of facilities therefor.”²⁴⁷ Next, the OSP must follow rigid guidelines for dealing with content that traverses its service. The OSP must not have knowledge of infringing user activity or materials hosted on its site—either by actual knowledge or by apparent circumstances giving constructive notice.²⁴⁸ Once an OSP has notice of an infringement, it must promptly block access to allegedly infringing material or remove such material from their systems.²⁴⁹ Another requirement is that when the OSP has “the right and ability to control” infringing activity, it must not profit directly from that activity.²⁵⁰ Finally, the OSP must designate an agent to receive takedown notices, publish that contact info, and respond to notices that comply with the statute’s requirements by removing indicated material.²⁵¹

Notably, the statute expressly states that the OSPs *are not* required to monitor their service in order to qualify for safe harbor.²⁵² They must, however, terminate the accounts of users who repeatedly infringe copyrights.²⁵³

that resides on a system or network controlled or operated by or for the service provider . . .”).

²⁴⁶ *Id.* § 512(d) (“A service provider shall not be liable . . . for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link . . .”).

²⁴⁷ *Id.* § 512(k)(1)(B).

²⁴⁸ *Id.* § 512(c)(1)(A)(i)–(ii).

²⁴⁹ *Id.* § 512(c)(1)(A)(iii).

²⁵⁰ *Id.* § 512(c)(1)(B).

²⁵¹ *Id.* § 512(c)(2)–(3).

²⁵² *See id.* § 512(m)(1) (emphasis added).

²⁵³ *See id.* § 512(i)(1)(A).

B. The Safe Harbor's Effect on YouTube and Other Video Sharing Sites

It is hard to argue that YouTube and similar sites do not have “the right and ability to control” the activity on their sites because they are in fact hosting their videos. Thus, in order to fully qualify for the safe harbor, these video hosting sites must not profit directly from the infringement.²⁵⁴ YouTube generates revenue from advertisements on its homepage and from some user-submitted videos if the user has chosen to participate in the Partners Program.²⁵⁵

Jonathan Purow suggests that there is a possibility that YouTube may potentially still be open to liability under the inducement theory, even if it is found to qualify for the safe harbor.²⁵⁶ When the safe harbor was crafted to protect OSPs, the theories of contributory liability and vicarious liability already existed, so they were incorporated into the statute.²⁵⁷ However, the inducement theory was only recently handed down by the Supreme Court in 2005, using language that did not coincide with the statutory language relating to contributory and vicarious liability.²⁵⁸ Purow posits that the Supreme Court did not intend the inducement theory to fall within the safe harbor.²⁵⁹

The DMCA safe harbor has since been put to the test in the context of video hosting sites in dual lawsuits against Veoh Networks. So far, in both cases, Veoh has emerged the winner, escaping liability through the DMCA shield. In the case of *UMG*

²⁵⁴ See *id.* § 512(c)(1)(B).

²⁵⁵ See Duncan Riley, *YouTube Launches Revenue Sharing Partners Program, but no Pre-Rolls*, TECHCRUNCH, May 4, 2007, <http://www.techcrunch.com/2007/05/04/youtube-launches-revenue-sharing-partners-program-but-no-pre-rolls>; Posting of Grant Robertson on Download Squad, *YouTube Tries Video Ads*, <http://www.downloadsquad.com/2007/01/23/youtube-tries-video-ads> (Jan. 23, 2007, 3:00PM).

²⁵⁶ Jonathan Purow, *The Copyright Implications of YouTube*, 18-1 N.Y. ST. B.A. ENT., ARTS & SPORTS L.J. 58, 60 n.33 (2007), available at http://docs.google.com/View?docid=dvnhpch_14dz777n (noting that this same argument was made by Stanley Pierre-Louis, RIAA attorney for the *Grokster* case).

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 61.

Recordings, Inc. v. Veoh Networks Inc.,²⁶⁰ Judge Matz of the Central District of California issued a summary judgment in favor of Veoh, holding that the company had made reasonable efforts to comply with section 512(c) of the DMCA. Importantly, the judge clarified what is required of a video hosting site to claim the safe harbor. Specifically, he noted that Veoh followed the prescribed notice-and-takedown procedure expeditiously, even though UMG argued Veoh was too slow.²⁶¹ Furthermore he noted Veoh had even implemented a standard content filtering system—something that is not specifically required by law.²⁶²

Veoh had previously proved its DMCA claim in *Io Group, Inc. v. Veoh Networks, Inc.*²⁶³ in the Northern district of California.

The record presented demonstrates that, far from encouraging copyright infringement, Veoh has a strong DMCA policy, takes active steps to limit incidents of infringement on its website and works diligently to keep unauthorized works off its website. In sum, Veoh has met its burden in establishing its entitlement to safe harbor for the alleged infringements here.²⁶⁴

Since both of the Veoh cases are in California, they do not directly affect the proceedings in the *Viacom v. YouTube*²⁶⁵ case in the New York district court. They may, though, provide guidance and a glimpse at a likely outcome.

²⁶⁰ *UMG Recordings, Inc. v. Veoh Networks Inc.*, No. CV 07-5744 AHM (AJWx), 2009 WL 3422839 (C.D. Cal. Sept. 11, 2009).

²⁶¹ In complying with § 512(c)(1)(A), Veoh removed videos as soon as it had “actual knowledge” of the infringing materials on its servers via an adequate notice by the copyright owner. *See id.* at *7–9. The court also struck down the argument that Veoh had constructive knowledge of infringing material, following the decision in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), which held that “red flags” are not enough to shift the burden to the service provider to determine what content is illegal. *See id.* at 1114.

²⁶² *UMG Recordings*, at *9 (“UMG has not established that the DMCA imposes an obligation on a service provider to implement filtering technology at all . . .”).

²⁶³ *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

²⁶⁴ *Id.* at 1155.

²⁶⁵ *Viacom Int’l, Inc., v. YouTube, Inc.*, 540 F. Supp. 2d 461 (S.D.N.Y. 2007).

C. *The Safe Harbor's Effect on Indexing Websites*

Depending on the specific facts relating to the structure and operation of an indexing website, it could qualify for a safe harbor, or it could not. If an index in the United States is run purely by a user-community and it is not the website's sole purpose to link to copyrighted material, then it may qualify for safe harbor under section 512(d)—as long as it complies with takedown notices.²⁶⁶ For example, Digg.com, which is a “social news site,” allows users to post links to videos that can be streamed within the page.²⁶⁷ Digg.com most likely falls under the safe harbor category because it has a legitimate use other than infringement and the users control the content in good faith. Digg has a “Terms of Use” page that professes its compliance with the DMCA.²⁶⁸ In the past, Digg has responded to section 512(d) takedown notices.²⁶⁹ The Chilling Effects Clearinghouse explains:

Someone who posts hyperlinks to online material may benefit from the DMCA safe harbor in section 512(d), “information location tools.” If you linked to materials without knowing they were infringing,

²⁶⁶ See Chilling Effects Clearinghouse—Frequently Asked Questions (and Answers) about DMCA Safe Harbor Provisions, <http://www.chillingeffects.org/dmca512/faq.cgi#QID862> [hereinafter Chilling Effects Clearinghouse—DMCA Safe Harbor FAQ] (“Question: Can a hyperlinker be protected by the DMCA safe-harbor? Answer: Someone who posts hyperlinks to online material may benefit from the DMCA safe harbor in section 512(d), ‘information location tools.’”).

²⁶⁷ Digg—Videos, <http://digg.com/videos> (when visited on Apr. 21, 2008, the page displayed various popular videos of copyrighted content including an episode of South Park, a clip from MadTV, a Richard Pryor comedy video, and a clip of an NBA basketball game—all but the Richard Pryor video links have since been disabled as of Nov. 14, 2009).

²⁶⁸ Digg—Terms of Use, <http://digg.com/tou> (last visited Nov. 14, 2009) (“Upon receipt of notices complying or substantially complying with the DMCA, Digg may . . . disable access to any material claimed to be infringing or claimed to be the subject of infringing activity . . . Digg will terminate access for subscribers and account holders who are repeat infringers.”).

²⁶⁹ See Chilling Effects Clearinghouse, *Farworks Doesn't Dig Digg Link to Far Side Video*, <http://www.chillingeffects.org/linking/notice.cgi?NoticeID=11241#FAQID21077> (last visited Nov. 14, 2009) (exhibiting a takedown notice alleging that Digg.com linked to a video of “The Far Side.”). Interestingly, the notice also says “[w]e have also sent a notice of infringement to Google Video, the site from which your link to this video is sourced.” *Id.*

but then receive a notice of claimed infringement, you can claim the statutory immunity if you remove the link expeditiously.²⁷⁰

Other sites focus exclusively on linking to copyrighted material, such as the majority of indexing websites, including the now-defunct YouTVpc.com, ShowStash.com, Ssupload.com, and Pullmylink.com. Unlike Digg.com, these sites probably could not have claimed that they did not know they were linking to infringing material. Additionally, if such a site were to truly comply with takedown notices in good faith, then there would be no reason to keep the site running, because virtually all of its links would have to be removed. In other words, takedown notices alone could force the site to close down.²⁷¹

The indexing websites violate the safe harbor requirements because they directly profit from infringing content over which the sites have control. Although users submit links to these sites, the indexing websites exercise control by selectively deleting links that do not work, links that point to content that has been removed by the hosting site. The indexing sites accomplish this task by asking users to report “broken links,” and the end result is that almost every link on the site leads to infringing content. As was Purow’s argument regarding YouTube, if indexing websites are found to be inducing copyright infringement, it is unclear whether the safe harbor provision in section 512 on the DMCA will apply.²⁷²

IV. WHO SHOULD BE LIABLE? PROPOSED SOLUTIONS

In reality, the parties responsible for the presence of unauthorized copyrighted video content on the Internet are those who upload the content and the video sharing sites that host it. But under the current legal system, YouTube and other hosts may be able to escape liability just by adhering to DMCA takedown provisions. A user who uploads content may have her account

²⁷⁰ See Chilling Effects Clearinghouse—DMCA Safe Harbor FAQ.

²⁷¹ Chris Tew, *Linking to Infringing Content Is Probably Illegal in the US*, WEB TV WIRE, Dec. 9, 2006, <http://www.webtvwire.com/linking-to-infringing-content-is-probably-illegal-in-the-us>.

²⁷² See Purow, *supra* note 256, at 59.

terminated, but she may still find a way to return under a new user name.

Indexing websites, on one hand, provide a valuable service of organizing information and can actually help legitimate hosting sites increase traffic. From a different perspective, most video indexing websites appear to be the “black hats” in the affair, existing solely to exploit a legal loophole and build a business by free-riding on other individuals’ intellectual property. As Justice Souter said in *Grokster*, “The unlawful objective is unmistakable.”²⁷³ The same declaration could be made regarding indexing websites. YouTube, at least, has a good faith claim that it does not encourage infringement, or that it has no actual knowledge of infringing material due to the vast number of videos uploaded every day. Nevertheless, the most effective solution will have to come from the video hosting sites. The linking sites are simply too non-permanent for them to bear the brunt of liability for infringing content: they could just as easily close operations or transfer ownership to an overseas company.²⁷⁴

In order to qualify for the DMCA safe harbor, video hosting sites should have to implement reasonable filtering. Some sites have already put filtering technology into operation, including DailyMotion.com.²⁷⁵ YouTube has also unveiled a system to identify copyrighted content, which puts the burden on copyright owners to opt-in by supplying copies of the content they would like filtered.²⁷⁶ This might require an amendment to § 512 to allow for active monitoring of content without losing the benefit of being classified as simply a passive conduit. Practically speaking,

²⁷³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005).

²⁷⁴ See Chris Tew, *TV Show Directory QuickSilverScreen.com Threatened by Fox*, WEB TV WIRE, Dec. 7, 2006, <http://www.webtvwire.com/tv-show-directory-quicksilverscreencom-threatened-by-fox> (discussing how QuickSilverScreen was threatened by Fox for posting links to its copyrighted content, and instead of shutting the site down, the owner essentially donated it to a new owner in Malaysia so that it would continue uninterrupted beyond the reach of U.S. copyright law).

²⁷⁵ See Press Release, Audible Magic, *Dailymotion Selects Audible Magic’s Fingerprinting Solution for Detecting Copyrighted Video* (May 10, 2007), available at <http://www.audiblemagic.com/news/press-releases/pr-2007-05-10.asp>.

²⁷⁶ See Posting of Elinor Mills to the CNET News Blog, *Google Unveils YouTube Antipiracy Tool*, http://www.news.com/8301-10784_3-9797622-7.html (Oct. 15, 2007, 1:13 P.M. PDT).

though, amending the DMCA is a tall order considering the effort required to initially pass it.

Another solution would be to selectively block sites that are found to be repeatedly linking to infringing videos. For example, if YouTube received a takedown notice from a copyright owner, any IP addresses that had been sending traffic to that video would be flagged. And if a certain site gets flagged too often, it should be blocked from any further linking to any video hosted on YouTube. It is technologically possible to know which sites are posting videos from the video streaming sites: “Whenever you follow a link, or download an embedded or off-site resource, your browser sends a referer header (sic) that tells the web site what web page you came from.”²⁷⁷ Whenever a particular embedded video is played, information is sent that may describe the site posting the content and include the IP address of the user viewing the content.²⁷⁸ It would not be difficult for hosting sites to cut off access to any domain that aggregates infringing links, preventing the domain from streaming its videos.

Of course, there could be problems with this solution. First of all, not all unauthorized posting of content is an infringement—some is fair use.²⁷⁹ Copyright owners could abuse the system by sending takedown notices for their content, thereby blacklisting sites linking to the relevant videos even if such sites principally post non-infringing content, such as Digg.com, and even without considering the linking site’s own safe harbor under the DMCA.

No matter the legality of these sites, important to consider is that the freedom to link on the Internet is what makes it useful, so any solution should balance that factor in favor of the public interest. It is obvious that the problems of indexing sites observed here are merely a symptom of the consumer desire to view video content in their home, on demand. A real solution would involve the content producers moving more quickly to bring newly-released movies and television programs to a streaming video

²⁷⁷ Posting of Seth Schoen to the Electronic Frontier Foundation Deeplinks Blog, *Embedded Video and Your Privacy*, <http://www.eff.org/deeplinks/2008/02/embedded-video-and-your-privacy> (Feb. 26, 2008).

²⁷⁸ *See id.*

²⁷⁹ *See* 17 U.S.C. § 107 (2006); *supra* note 18 and accompanying text.

format. The movie industry has traditionally leaned on a model of “release windows,” whereby content is made available through different distribution platforms over the course of the life of a copyright, so as to maximize revenue. For example, there is typically a thirty day delay between a new DVD release and its availability through video-on-demand.²⁸⁰ However, it would also seem wise to speed up the timeframe that a film is available for viewing at home. The MPAA indicates that it is moving in this direction, but insists that a major roadblock before the materialization of this scenario is making sure the content can be delivered securely, to minimize piracy, and it is pushing for access controls to be implemented first.²⁸¹ The solution may be merely allowing people to access popular newly released content in a more timely fashion—if people can get content when they want it, there will be less incentive to try to get content from unauthorized sources in the first place. Services like Hulu.com and Joost.com have been successful in bringing advertising-supported streaming video that allows Internet users to legally view copyright-protected movies and television programs soon after they are available for broadcast.²⁸² Subscription-based or rental video streaming from iTunes, Blockbuster, Netflix, and Amazon compliment the ad-supported model.²⁸³ The law should clarify that such streaming of videos and movies is a public performance, and possibly a

²⁸⁰ See J. Sperling Reich, *The MPAA's Motive In Upsetting Exhibitors Over Release Windows*, CELLULOID JUNKIE, Nov. 9, 2009, <http://celluloidjunkie.com/2009/11/09/the-mpaas-motive-in-upsetting-exhibitors-over-release-windows>.

²⁸¹ See MPAA, FCC Filing, MB Docket No. 08-82, CSR-7947-Z, available at http://www.mpa.org/press_releases/Letter.pdf (asking for a waiver of the prohibition on the use of selectable output control (“SOC”) technology, a form of digital access control, before authorizing the simultaneous release of films in theatres as well as on DVD and video-on-demand).

²⁸² Hulu, <http://www.hulu.com>; Joost, <http://www.joost.com>.

²⁸³ See Michael Liedtke, *Blockbuster Deal Paves Way for Video Delivery via Internet*, USA TODAY, Jan. 14, 2009, http://www.usatoday.com/tech/news/2009-01-14-blockbuster_N.htm; Dawn Kawamoto, *Amazon Flicks on its Streaming-video Service*, CNET NEWS, Sept. 4, 2008, http://news.cnet.com/8301-1023_3-10032491-93.html; Peter Cohen, *Apple Introduces iTunes Movie Rentals*, MACWORLD, Jan. 15, 2008, <http://www.macworld.com/article/131580/2008/01/itunesmovierentals.html>; Duncan Riley, *Netflix Offers Unlimited Streaming as iTunes Rental Spoiler*, TECHCRUNCH, Jan. 13, 2008, <http://www.techcrunch.com/2008/01/13/netflix-offers-unlimited-streaming-as-itunes-rental-spoiler>.

distribution as well, so that the authors of the content can be fairly compensated.

Since it was announced in October 2009 that the once-free Hulu.com will be transitioning to a paid subscription business model,²⁸⁴ there is a renewed risk that consumers will defect to an unlicensed alternative distributor to get their video-on-demand fix for free. It will be interesting to see whether viewership drops or if people realize they are willing to pay a price for convenience and legitimacy. The effort to stop free-rider sites should continue in the meantime so content owners have time to develop a solution that can gain traction in the marketplace. If companies can work with hosting sites to prevent the illicit uploads in the first place, the “guerrilla” sites would never have an opportunity to exist.

²⁸⁴ Claire Atkinson, *Chase Carey: Hulu to Charge in 2010*, BROADCASTING & CABLE, Oct. 21, 2009, http://www.broadcastingcable.com/blog/ADverse_Atkinson_on_Advertising/23941-Chase_Carey_Hulu_to_Charge_in_2010.php?nid=2228&source=title&rid=6454445