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## Technical Knockout: How Mixed Martial Arts Will Change Copyright Enforcement on the Web

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## **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, 2011; B.A., Washington University in St. Louis, 2008.  
Thank you to Professor Olivier Sylvain for his insightful and valuable guidance, and to the editors and staff of the IPLJ for all of their hard work. Thank you to my parents, for everything

# Technical Knockout: How Mixed Martial Arts Will Change Copyright Enforcement on the Web

By Keith Black\*

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\* J.D. Candidate, Fordham University School of Law, 2011; B.A., Washington University in St. Louis, 2008. Thank you to Professor Olivier Sylvain for his insightful and valuable guidance, and to the editors and staff of the IPLJ for all of their hard work. Thank you to my parents, for everything.

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## INTRODUCTION

A unique blend of kickboxing, boxing, judo, Brazilian jiu-jitsu, wrestling and a slew of other combat sports,<sup>1</sup> mixed martial arts is quickly becoming one of the fastest-growing sports—if not the single fastest-growing sport—in the world.<sup>2</sup> Frequent brutal knockouts<sup>3</sup> and bone-breaking submission holds<sup>4</sup> have garnered the sport vast fan support worldwide.<sup>5</sup> In the last year alone, mixed martial arts has aired not only on pay-per-view platforms,<sup>6</sup> but has also been broadcasted on cable channels such as HDNet,<sup>7</sup>

<sup>1</sup> *Mixed Martial Arts*, ATLANTA MARTIAL ARTS, <http://www.atlantamartialarts.com/styles/mma.htm> (last visited Mar. 25, 2011).

<sup>2</sup> Andrew Sharp, *Meeting MMA: An Outsider's Encounter with the World's Fastest Growing Sport*, SB NATION (Feb. 10, 2010), <http://www.sbnation.com/2010/2/10/1300771/meeting-mma-outsiders-encounter>.

<sup>3</sup> *12 Most Brutal MMA Knockouts*, FIGHTERS.COM (Oct. 28, 2009), <http://www.fighters.com/10/28/brutal-mma-ko-knockouts>.

<sup>4</sup> Matt Randall, *Say Uncle: The Top 12 MMA Submissions of All Time*, BLEACHER REP. (Sept. 8, 2009), <http://bleacherreport.com/articles/250693-the-top-12-mma-submissions-of-all-time>.

<sup>5</sup> *Fedor's Thrilling KO Seen by Over 25 Million Worldwide*, FIGHT NETWORK (Nov. 30, 2009, 9:50 AM), <http://www.thefightnetwork.com/news/5371:fedors-thrilling-ko-seen-by-over-25-million-worldwide>.

<sup>6</sup> *UFC on DIRECTV Pay Per View*, DIRECTV, <http://www.directv.com/DTVAPP/content/sports/ufc> (last visited Sept. 30, 2010).

<sup>7</sup> *HDNet Fights*, HDNET, <http://www.hdnetfights.com/hdnetmmaschedule.php> (last visited Sept. 30, 2010).

Spike TV,<sup>8</sup> Versus,<sup>9</sup> Showtime<sup>10</sup> and MTV2.<sup>11</sup> The sport has even hit national television, being broadcast in primetime on CBS.<sup>12</sup> Despite appearing on major television networks and in primetime timeslots, mixed martial arts has struggled to gain universal mainstream acceptance.<sup>13</sup> Mixed martial arts has received more than its fair share of criticism,<sup>14</sup> and has struggled to become legal in New York<sup>15</sup>—having only recently become legal in Massachusetts.<sup>16</sup> In addition to its struggle to obtain legitimacy and mainstream acceptance, mixed martial arts—and particularly the leading mixed martial arts organization, the Ultimate Fighting Championship and its parent company Zuffa, LLC—faces a unique

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<sup>8</sup> Will Cooling, *UFC 122 to be a Spike TV Special*, INSIDE FIGHTS (Aug. 4, 2010), <http://insidefights.com/2010/08/04/ufc-122-to-be-a-spike-tv-special>.

<sup>9</sup> *UFC Live on Versus 2*, UFC, [http://www.ufc.com/media/UFC\\_Live\\_2](http://www.ufc.com/media/UFC_Live_2) (last visited Sept. 30, 2010).

<sup>10</sup> *MMA Showtime Sports*, SHOSPORTS, <http://sports.sho.com/#/mma> (last visited Feb. 14, 2011).

<sup>11</sup> *MTV2 and Bellator Agree to 3-Year Partnership*, BELLATOR (Dec. 14, 2010, 2:31 PM), [http://www.bellator.com/ViewArticle.dbml?DB\\_OEM\\_ID=23600&ATCLID=205054922](http://www.bellator.com/ViewArticle.dbml?DB_OEM_ID=23600&ATCLID=205054922); *see Bellator 35 Debuts on MTV2 as Good, Hieron, Hawn, and Weedman Advance to Welterweight Semifinals*, BELLATOR (Mar. 6, 2011, 8:18 AM), [http://www.bellator.com/ViewArticle.dbml?DB\\_OEM\\_ID=23600&ATCLID=205110124](http://www.bellator.com/ViewArticle.dbml?DB_OEM_ID=23600&ATCLID=205110124); John Morgan and Dan Stupp, *Bellator 36 Debut Scores 230,000 Viewers; Replay Lands 241,000*, MMA JUNKIE (Mar. 15, 2011, 11:00 AM), <http://mmajunkie.com/news/22838/bellator-36-debut-scores-230000-viewers-replay-lands-241000.mma>.

<sup>12</sup> D.S. Williamson, *MMA Goes Primetime with Strikeforce on CBS*, BETUS (Apr. 14, 2010, 3:32 PM), <http://www.betus.com/sports-betting/ufc/articles/mma-goes-prime-time-with-strikeforce-s-and-cbs-s-saturday-broadcast-14-04-2010>.

<sup>13</sup> *See Sharp, supra* note 2.

<sup>14</sup> *See, e.g., Now Bob Reilly's Just Trying to Piss Everybody Off*, CAGE POTATO, <http://www.cagepotato.com/now-bob-reillys-just-trying-piss-everybody> (last visited Oct. 2, 2010) (New York State Assemblyman Bob Reilly, in a clip shown to mixed martial arts regulars UFC Commentator Joe Rogan, fighter Jason “Mayhem” Miller and owner of HDNet, one of the leading channels for mixed martial arts coverage, Mark Cuban, compared making money from mixed martial arts to making money from dog fighting and prostitution).

<sup>15</sup> N.Y. Unconsol. Law § 8905(a)(2) (McKinney 1997). As of today, mixed martial arts is currently illegal in the state of New York. *See States for Kickboxing or MMA*, INT’L KICKBOXING FED’N, <http://www.ikfkickboxing.com/USASates.htm> (last visited Oct. 2, 2010).

<sup>16</sup> Mass. Gen. Laws Ann. ch. 147, § 32 (West 2010); *see Brett Okamoto, Massachusetts Becomes 42nd State to Regulate MMA*, LAS VEGAS SUN, Nov. 30, 2009, <http://www.lasvegassun.com/news/2009/nov/30/massachusetts-becomes-42nd-state-regulate-mma>.

and increasingly complex problem in protecting its intellectual property, both domestically and internationally, over the Internet.

This Note assesses the recent enforcement of the Digital Millennium Copyright Act (“DMCA”) to predict whether Zuffa will succeed in copyright infringement complaints against various websites that have hosted content that Zuffa claims infringes its copyrights. It then argues that the failure of the DMCA to protect copyrighted works, as well as the DMCA’s failure to ease the burden for copyright holders in policing copyright infringement on the Internet, has created a dire need to reassess the archaic language of the DMCA. This assessment is especially urgent to preventing illegal live streams, Zuffa’s biggest enemy. Because it relies so heavily on proceeds from viewers paying for live video, protecting its live video streams from piracy is of paramount importance to Zuffa. This Note concludes that service providers and copyright owners need to increase communication with one another, especially when the service provider is able to, and actually does, provide live, or nearly live content. Lastly, it supports a legislative scheme that holds websites liable for monetary, equitable and other relief when the websites provide or host illegal live streams, so long as the websites have some knowledge, whether constructive or actual, of the infringing content.

## I. BACKGROUND

### A. *Zuffa, LLC and the Pay-Per-View Business*

Zuffa, LLC is the parent company of the Ultimate Fighting Championship (“UFC”), the world’s largest mixed martial arts organization.<sup>17</sup> In 2010, the UFC put on twenty-four separate events on pay-per-view and live television.<sup>18</sup> In the prior year, approximately 8 million people purchased pay-per-views from the

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<sup>17</sup> See Nick Caron, *Todd Duffee: UFC Buying Strikeforce will Help MMA Gain Respect*, BLEACHER REP. (Mar. 15, 2011), <http://bleacherreport.com/articles/636602-todd-duffee-ufc-buying-strikeforce-will-help-mma-gain-respect>.

<sup>18</sup> *Past Events*, UFC, [http://uk.ufc.com/event/Past\\_Events?year=2010](http://uk.ufc.com/event/Past_Events?year=2010) (last visited Jan. 25, 2010).

UFC<sup>19</sup> over the course of thirteen events at approximately \$44.95 per purchase.<sup>20</sup> Zuffa recently merged its “World Extreme Cagefighting” (“WEC”) with the UFC, making the UFC, under the banner of Zuffa, the biggest and arguably the most important mixed martial arts organization in the world.<sup>21</sup> Additionally, Zuffa recently purchased its closest rival, Strikeforce MMA.<sup>22</sup> Zuffa is unquestionably the biggest player in mixed martial arts today.

Zuffa’s foray into the pay-per-view market has been quite lucrative, skyrocketing the company’s worth to \$2.5 billion, up from the \$2 million that Zuffa paid for UFC only ten years ago.<sup>23</sup> At approximately 8 million buys at \$44.95 per buy,<sup>24</sup> the UFC earned Zuffa about \$359.6 million in pay-per-view purchases alone last year.<sup>25</sup> This figure does not include sponsorships, nor does it include commercial advertising on free cards<sup>26</sup> presented on national television.<sup>27</sup> Despite Zuffa’s handsome pay-per-view

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<sup>19</sup> Dave Meltzer, *UFC Remains King of PPV Hill*, YAHOO!SPORTS (Feb. 15, 2010, 4:33 PM), <http://sports.yahoo.com/mma/news?slug=dm-ppvbiz021510>. Pay-per-view is a service provided by cable or satellite television providers charging viewers a fee (on top of monthly subscription fees for the cable or satellite subscription) to watch special events. See *What is Pay-Per-View Television?*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/pay-per-view-PPV-television.html> (last visited Apr. 3, 2011).

<sup>20</sup> Steve Barry, *UFC Files Lawsuit Against Site Selling Unauthorized [sic] Pay-Per-View Streams*, MMA CONVERT (Feb. 19, 2010), <http://www.mmaconvert.com/2010/02/19/ufc-files-lawsuit-against-site-selling-unauthorized-pay-per-view-streams>.

<sup>21</sup> See Mike Whitman, *UFC, WEC to Merge in 2011*, SHERDOG (Oct. 28, 2010), <http://www.sherdog.com/news/news/UFC-WEC-to-Merge-in-2011-27812>.

<sup>22</sup> Ariel Helwani, *Zuffa Purchases Strikeforce*, MMA FIGHTING (Mar. 12, 2011, 1:13 PM), <http://www.mmafighting.com/2011/03/12/zuffa-purchases-strikeforce>.

<sup>23</sup> *How Much is the UFC Worth?*, MMAMANIA.COM (Sept. 23, 2010, 11:47 PM), <http://www.mmamania.com/2010/9/23/1707472/how-much-is-the-ufc-worth>.

<sup>24</sup> A “buy” is the term for purchasing a pay-per-view. See *InDemand Pay Per View*, BUCKEYE CABLE SYS., <http://www.buckeyecablesystem.com/payperview/index.html> (last visited Jan. 25, 2010).

<sup>25</sup> This number is an estimate based on the eight million buys multiplied by \$44.95 per buy.

<sup>26</sup> A “card” is the set of fights scheduled to be put on at any one particular event. See Eric Cohen, *Card*, ABOUT.COM, <http://prowrestling.about.com/od/wrestlingterminology/g/glocard.htm> (last visited Jan. 25, 2010).

<sup>27</sup> See, e.g., Cooling, *supra* note 8; Ray Hui, *UFC 120 to Air Free on Spike TV*, MMAFIGHTING.COM (July 29, 2010, 11:04 AM), <http://www.mmafighting.com/2010/07/29/ufc-120-to-air-free-on-spike-tv>; Mari Shapiro, *TUF 11 Finale Preview: Undercard*, SPIKE TV (June 17, 2010), <http://www.spike.com/blog/tuf-11-finale/96748>;

revenues, its profits have been put in a guillotine choke<sup>28</sup> by those streaming Zuffa's pay-per-view fights live over the Internet for free.<sup>29</sup>

As the world's largest pay-per-view vendor,<sup>30</sup> Zuffa will likely be at the forefront of pay-per-view legislation and litigation in today's Internet-heavy world.<sup>31</sup> In response to increasing piracy of their pay-per-view events, Zuffa and the UFC filed suit against streaming websites such as Justin.TV, UStream.TV and RageStreams.net.<sup>32</sup> While Zuffa has set its sights on taking down illegal and infringing streams of its pay-per-views, its efforts to date have been of little or no avail; Zuffa finds that the more illegal streams it successfully orders taken down, the more illegal streams are uploaded to replace them.<sup>33</sup>

Zuffa faces a unique problem that has remained unaddressed by the current copyright regime. Much of Zuffa's revenue stream

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Brendhan Conlon, *UFC on Versus 2—Previews and Predictions*, FIVE OUNCES OF PAIN (July 31, 2010, 6:46 PM), <http://fiveouncesofpain.com/2010/07/31/ufc-on-versus-2-previews-and-predictions>. All of these cards aired or will air for free on cable television and did not require a special pay-per-view purchase to be viewed by the public. See *Fighter Salaries for UFC Fight Night 6*, MMA WEEKLY (Aug. 28, 2006), <http://mmaweekly.com/fighter-salaries-for-ufc-fight-night-6>.

<sup>28</sup> A guillotine choke is a common chokehold in mixed martial arts used to cut off either air or blood flow to the head. *Learn the Guillotine Choke for Mixed Martial Arts*, MMA-TRAINING.COM (Aug. 2, 2007), <http://www.mma-training.com/guillotine-choke>.

<sup>29</sup> Darren Rovell, *Sports Organizations Fighting Live Streaming Piracy*, CNBC (Dec. 16, 2009), [http://www.cnn.com/id/34450541/Sports\\_Organizations\\_Fighting\\_Live\\_Streaming\\_Piracy](http://www.cnn.com/id/34450541/Sports_Organizations_Fighting_Live_Streaming_Piracy).

<sup>30</sup> Dann Stupp, *UFC Continues Anti-piracy Campaign, Subpoenas Justin.tv and Ustream.tv*, MMA JUNKIE (July 23, 2010, 4:35 PM), <http://mmajunkie.com/news/20035/ufc-continues-anti-piracy-campaign-subpoenas-justin-tv-and-ustream-tv.mma>.

<sup>31</sup> UFC President Dana White has made his intentions clear about using the Internet to his full advantage to expand the UFC into all global markets. See Dann Stupp, *UFC President Dana White Expects Web to Serve as Global UFC Television Channel*, MMA JUNKIE (Mar. 29, 2010, 3:15 PM), <http://mmajunkie.com/news/18498/ufc-president-dana-white-expects-web-to-serve-as-global-ufc-television-channel.mma>.

<sup>32</sup> Stupp, *supra* note 30; Kevin Iole, *Zuffa Sues for Infringement*, YAHOO!SPORTS (Feb. 20, 2010), <http://sports.yahoo.com/mma/news?slug=ki-zuffasues021910>.

<sup>33</sup> See Steven Marrocco, *After Latest Action, UFC Counsel Hopeful for "Decided Downturn" in Illegal PPV Streaming*, MMA JUNKIE (Feb. 19, 2010, 7:40 PM), <http://mmajunkie.com/news/18013/ufc-counsel-hopeful-for-decided-downturn-in-illegal-pay-per-view-streaming.mma>.



is based on pay-per-view sales,<sup>34</sup> as UFC gate receipts<sup>35</sup> sometimes do not even cover the fighter payrolls.<sup>36</sup> These pay-per-view events are broadcast live on television and via “streaming video” over the Internet. “Streaming” is the ability to watch or listen to a video or a radio station while “progressive[ly] download[ing]” the video and sound, without making a copy of it on the recipient’s computer.<sup>37</sup> However, anyone with a laptop and a webcam can broadcast streaming video in addition to receiving it. Websites such as Justin.TV provide users the ability to broadcast live video off of their own computer screens.<sup>38</sup> As a result, it is fairly easy for someone to pay Zuffa to watch a fight and then to illegally stream the fight on Justin.TV.<sup>39</sup>

One user this past year uploaded illegal streams of two UFC pay-per-views and drew a total of 114,000 non-paying viewers for the two events.<sup>40</sup> While this is just one example, UFC executives have alleged there were over 160,000 illegal *streams* of one of its events, drawing countless numbers of illegal viewers.<sup>41</sup> Using these numbers as a guide, it can be estimated that Zuffa could potentially lose as much as \$409,944,000 per event because of unauthorized streams.<sup>42</sup> UFC President Dana White has stated that

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<sup>34</sup> Dave Meltzer, *Another Record Year for UFC on PPV*, YAHOO!SPORTS (Jan. 11, 2011, 10:18 AM), <http://sports.yahoo.com/mma/news?slug=dm-ppvbiz011111>.

<sup>35</sup> “Gate receipts” refers to the amount of money made by selling tickets to a live event. See *Gate Receipts*, ALLWORDS.COM, <http://www.allwords.com/word-gate+receipts.html> (last visited Jan. 25, 2010).

<sup>36</sup> See, e.g., Nat Detroit, *Fighter Paydays, Bonuses and Gate Receipts from UFC on Versus*, SQUABBLES (Mar. 27, 2010), <http://www.squabbles.com/2010/03/fighter-paydays-bonuses-and-gate-receipts-from-ufc-on-versus>.

<sup>37</sup> Sam Costello, *What is Streaming?*, ABOUT.COM, [http://ipod.about.com/od/glossary/g/streaming\\_def.htm](http://ipod.about.com/od/glossary/g/streaming_def.htm) (last visited Feb. 4, 2011).

<sup>38</sup> *Share Your Desktop*, JUSTIN.TV, [http://www.justin.tv/broadcast/adv\\_desktop](http://www.justin.tv/broadcast/adv_desktop) (last visited Feb. 4, 2011).

<sup>39</sup> Additionally, some customers plug their cable or satellite receivers into their home computers and upload the video live onto the Internet that way. See *How to Connect Cable Television to a Computer Monitor*, VIDEOJUG (Dec. 15, 2008), <http://www.videojug.com/article/how-to-connect-cable-television-to-a-computer-monitor-2>.

<sup>40</sup> See Stupp, *supra* note 30.

<sup>41</sup> See Rovell, *supra* note 29.

<sup>42</sup> Last year, a single unauthorized stream drew a combined total of 114,000 viewers over two UFC events, averaging 57,000 unauthorized viewers per event. See Stupp, *supra* note 30. A 2009 UFC event appeared on over 160,000 such illegal streams. See Rovell, *supra* note 29. Assuming that these numbers are typical, multiplying them together

“[t]he criminal theft of pay-per-views has resulted in the loss of millions of dollars of revenue to not only the UFC and its fighters, but has also deprived federal, state and local government of their rightful entitlement to significant tax revenue.”<sup>43</sup>

### B. *The Digital Millennium Copyright Act*

Copyright law provides protection for original works of authorship “fixed in a tangible medium of expression.”<sup>44</sup> Audiovisual works are considered works of authorship.<sup>45</sup> Though live television is not technically “fixed” in a tangible medium—because the event is happening in that moment and thus cannot technically be “fixed” at the time of broadcast—copyright law allows for a work to be considered “fixed” if there is fixation simultaneous with transmission.<sup>46</sup> Therefore, because Zuffa produces a live audiovisual product that is simultaneously fixed upon transmission, Zuffa’s fights and pay-per-view production are protected under copyright law.

The Digital Millennium Copyright Act (“DMCA”)<sup>47</sup> was passed in 1998 to strike a critical balance between the rights and interests of copyright holders and the protection of Internet service providers (“ISPs”), and to enable copyright law to keep pace with the expansion of the Internet.<sup>48</sup> For purposes of the DMCA, an Internet service provider (also called an Online Service Provider) is defined as “a provider of online services . . . including an entity offering the transmission, routing or providing of connections for

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yields a potential audience of 9,120,000 non-paying viewers for any given UFC event. Assuming further that each of these viewers would have paid full price (\$44.95) to watch the event had it not been available for free, Zuffa loses approximately \$409 million per event. While this is a rough estimate, it is nevertheless a staggering one.

<sup>43</sup> John Morgan, *White Says Future is Here with UFC.tv, Online Pirates Should Prep for Jail Time*, MMA JUNKIE (Feb. 9, 2011, 9:50 AM), <http://mmajunkie.com/news/22397/white-says-future-is-here-with-ufc-tv-online-pirates-should-prep-for-jail-time.mma>.

<sup>44</sup> 17 U.S.C. § 102 (2006).

<sup>45</sup> *Id.* § 102(a)(6).

<sup>46</sup> *Id.* § 101.

<sup>47</sup> *Id.* § 512.

<sup>48</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) (quoting S. Rep. No. 105-190 (1998)).

digital online communications.”<sup>49</sup> Congress, in passing the DMCA, was concerned with fostering technological innovation and expanding the Internet while protecting the rights of copyright holders.<sup>50</sup> This critical balance between fostering innovation and protecting copyright holders animates the DMCA and drives much of DMCA-related litigation today.<sup>51</sup>

Under the DMCA, a copyright holder has the ability to inform a service provider of any infringing content that appears on that service provider’s website, by issuing a “takedown notice.”<sup>52</sup> The DMCA requires that a takedown notice contain the copyright holder’s physical or electronic signature, the exact location of the infringing work, the work it allegedly infringes, and a statement that the copyright holder has a reasonable belief that the allegedly infringing work is actually infringing.<sup>53</sup>

Fair use is an affirmative defense to copyright infringement.<sup>54</sup> In assessing whether a particular item on a website is infringing, the copyright owner must evaluate whether the allegedly infringing work constitutes a fair use of the source material.<sup>55</sup> A mixed question of law and fact, fair use relies on analyzing four factors: (1) the purpose and character of the allegedly infringing use (educational and non-profit uses are more likely to be fair use than commercial uses); (2) the nature of the copyrighted work (works that are original are more likely to be infringed than works that are factual compilations or the like); (3) the amount and substantiality of the portion used (assessing both how much of the plaintiff’s work was used in the defendant’s infringing work as well as how much of the defendant’s infringing work is made up of the plaintiff’s protectable work); and (4) the effect of the defendant’s infringing use on the market for the plaintiff’s goods (evaluating

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<sup>49</sup> *Online Service Providers*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/onlinesp> (last visited Apr. 3, 2011).

<sup>50</sup> *Viacom*, 718 F. Supp. 2d at 519.

<sup>51</sup> *See generally id.*

<sup>52</sup> 17 U.S.C. § 512(c)(3).

<sup>53</sup> *Id.*

<sup>54</sup> 4-13 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender rev. ed. 2010).

<sup>55</sup> *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154–55 (N.D. Cal. 2008).

whether the infringing work operates as a replacement for the plaintiff's work).<sup>56</sup>

Determinations of fair use require an in-depth assessment of the work by a human being because they require an assessment of whether the infringing work took the "heart" and "soul" of the original piece.<sup>57</sup> Under the DMCA, then, the onus of policing the Internet for violations of any particular copyright falls squarely on the copyright owner; the owner of a copyright exclusively possesses critical knowledge and information enabling him or her to more efficiently and accurately assess whether or not any particular content is infringing.<sup>58</sup> Once an ISP obtains a substantially compliant takedown notice pursuant to 17 U.S.C. § 512(c)(3), the website must work expeditiously to either remove or block the infringing content.<sup>59</sup>

In exchange for the ISP's compliance with this task, the statute provides a "safe harbor" freeing it from liability for monetary, injunctive or equitable relief if sued by the owner of the copyright for contributory or vicarious copyright infringement.<sup>60</sup> In order to be protected under the safe harbor, the service provider must not have actual knowledge that its hosted content is infringing, nor can the service provider be aware of facts or circumstances from which infringement would be apparent.<sup>61</sup> Furthermore, if the service provider is aware that it is hosting infringing content (i.e., if it has "actual knowledge" of infringement) the service provider must act expeditiously, on its own, to remove or disable the infringing content.<sup>62</sup> Additionally, if the ISP has the ability to control infringing content on a hosted website, it cannot receive a direct

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<sup>56</sup> 17 U.S.C. § 107; *see also* *Lenz*, 572 F. Supp. 2d at 1154–55.

<sup>57</sup> Michael S. Sawyer, Note, *Filters, Fair-Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 368, 388–90 (2009).

<sup>58</sup> Greg Jansen, Note, *Whose Burden is it Anyway? Addressing the Needs of Content Owners in DMCA Safe Harbors*, 62 FED. COMM. L.J. 153, 172–73 (Jan. 2010). Interestingly, because courts require a copyright holder to assess fair use before issuing a takedown notice, the DMCA demands that potential plaintiffs themselves assess the validity of a potential defendant's defense to infringement.

<sup>59</sup> 17 U.S.C. § 512(c)(1)(C).

<sup>60</sup> *Id.* § 512(c)(1).

<sup>61</sup> *Id.* § 512(c)(1)(A)(i)–(ii).

<sup>62</sup> *Id.* § 512(c)(1)(A)(iii).

financial benefit from the existence of such infringing content.<sup>63</sup> The service provider must also institute a system for terminating repeat infringers, and must adopt and not interfere with “standard technical measures” used by copyright owners to police the service provider’s website.<sup>64</sup> A “standard technical measure” might be a “watermark”<sup>65</sup> or other technological means to prevent copying.<sup>66</sup> These “standard technical measures” are only required to the extent that they do not impose a substantial financial burden upon the service provider.<sup>67</sup>

### 1. The “Red Flag” Test

Of critical importance, and of some measure of debate, is the question of when a service provider is aware of facts or circumstances making infringement “apparent.”<sup>68</sup> Congress, upon passing the DMCA, called the test for whether or not a service provider is “aware of facts or circumstances making infringement apparent” a “red flag” test.<sup>69</sup> The question, as stated by the Senate Judiciary Committee, should be whether a reasonable person, in the same or similar circumstances, would find that there was infringing activity.<sup>70</sup>

The “red flag” test has proven difficult to overcome for content owners. For example, in *Perfect 10, Inc. v. CCBill LLC*,<sup>71</sup> plaintiff Perfect 10, a publisher of adult magazines and websites, sued another website for posting photographs copied from the plaintiff’s

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<sup>63</sup> *Id.* § 512(c)(1)(B).

<sup>64</sup> *Id.* § 512(i)(1).

<sup>65</sup> A watermark is digital information inserted into a file in order to identify the source of the file. Watermarks are frequently used to digitally protect copyrights. *Digital Watermark*, WEBOPEDIA, [http://www.webopedia.com/TERM/D/digital\\_watermark.html](http://www.webopedia.com/TERM/D/digital_watermark.html) (last visited Apr. 3, 2011).

<sup>66</sup> *Public Law 105-304: Digital Millenium Copyright Act*, UNIV. OF CINCINNATI INTELL. PROP. OFFICE, <http://www.ipo.uc.edu/index.cfm?fuseaction=policies.dmca> (last visited Feb. 4, 2011).

<sup>67</sup> 17 U.S.C. § 512(i)(2)(C).

<sup>68</sup> *Id.* § 512(c)(1)(A)(ii).

<sup>69</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519–20 (S.D.N.Y. 2010) (quoting H.R. Rep. No. 105-551, at 53–54 (1998); S. Rep. No. 105-190, at 44–45 (1998)).

<sup>70</sup> *Id.* at 520.

<sup>71</sup> 488 F.3d 1102 (9th Cir. 2007).

magazines and websites.<sup>72</sup> Despite Congress's determination that site names that included the words "pirate" and "bootleg"<sup>73</sup> constituted "red flags," the Ninth Circuit found that CCBill's links to sites called "illegal.net" and "stolencelebritypics.com" did *not* constitute red flags of infringement.<sup>74</sup> The Ninth Circuit reasoned that because the nature of the images was pornographic, the use of words like "illegal" and "stolen" in the names of several sites hosted by CCBill may simply have been an attempt to boost the pictures' appeal to the targeted audience, and enhance their salacious appeal.<sup>75</sup>

*Perfect10* has been read to hold that "if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'"<sup>76</sup> It is unclear, then, how the standard of "actual knowledge" differs from the "constructive knowledge" standard articulated in separate sections of the DMCA<sup>77</sup> after *Perfect 10*. If, in order for a service provider to have seen "red flags" of infringement, the service provider must not have been required to conduct any investigation in order to determine that the hosted content was infringing, it becomes unclear how the "red flag" standard differs in any discernible way from an actual knowledge standard of infringement.

In fact, some courts and commentators have run counter to Congress's specified intent, stating that the standard "is not what a reasonable person would have deduced given all the

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<sup>72</sup> See generally *id.*

<sup>73</sup> *Viacom*, 718 F. Supp. 2d at 522 (quoting H.R. Rep. No. 105-551, at 57-58 (1998); S. Rep. No. 105-190, at 48-49 (1998)).

<sup>74</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

<sup>75</sup> *Id.*

<sup>76</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009); see also *id.* ("The question is not 'what a reasonable person would have deduced given all the circumstances.' . . . Instead, the question is 'whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.'" (citation omitted)).

<sup>77</sup> See 17 U.S.C. § 512(c)(1)(A)(i)-(ii) (2006). Notice that there is one clause for "actual knowledge" and one clause for "facts or circumstances from which infringing activity is apparent." Congress clearly intended to draw a distinction between these two standards: a distinction that has become nearly non-existent.

circumstances.”<sup>78</sup> This skewed reading of the statute assumes that Congress intended to shield from infringement liability any service provider that reasonably deduces from the circumstances that it is hosting infringing material. These courts and commentators read the word “apparent” to mean that the infringement must be so obvious that if any deduction, however slight, or if any investigation, however trivial, was necessary to conclude that the content was infringing, then the facts and circumstances that lead to the investigation were not red flags of infringement.<sup>79</sup> This reading collapses the “knowledge of facts and circumstances” standard articulated in § 512(c)(1)(A)(ii) of the DMCA into the “actual knowledge” standard articulated in § 512(c)(1)(A)(i) of the statute, a result Congress clearly could not have intended. Indeed, failure under *either* standard should remove a service provider from safe harbor protection, because the “knowledge of facts and circumstances” standard expressly applies “in the *absence* of . . . actual knowledge.”<sup>80</sup> Congress could not have meant for both standards to be essentially the same. Moreover, this construction of the statute places the burden of policing copyright infringement even more squarely on the shoulders of owners of the copyright.<sup>81</sup>

## 2. “Direct Financial Benefit” from and the “Right and Ability to Control” Content

Also unclear from the text of the statute is the intended interpretation of § 512(c)(1)(B) of the DMCA, which provides that in order to be eligible for the safe harbor, service providers must not “receive a financial benefit directly attributable to the

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<sup>78</sup> *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.04[A][1], at 12B-49 (Matthew Bender rev. ed. 2010)); *cf.* H.R. Rep. No. 105-551, at 57–58 (1998) (“[I]f the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.”); S. Rep. No. 105-190, at 48–49 (1998).

<sup>79</sup> *UMG Recordings*, 665 F. Supp. 2d at 1108 (“[I]f investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’”).

<sup>80</sup> 17 U.S.C. § 512(c)(1)(A)(ii) (2006) (emphasis added).

<sup>81</sup> *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (noting that the DMCA places the burden of policing copyright infringement on the owners of the copyright).

infringing activity, in a case in which the service provider has the right and ability to control such activity.”<sup>82</sup> There is some confusion specifically as to the meaning of the terms “financial benefit directly attributable” and “right and ability to control” the content.<sup>83</sup>

If a service provider obtains a direct financial benefit from infringing content that the service provider has the “right and ability to control,” the service provider loses the safe harbor.<sup>84</sup> The Ninth Circuit has implied that a website’s use of infringing material to build or expand its user base would be considered a “financial benefit directly attributable to” the infringing content.<sup>85</sup> When a business attracts fees from subscribers using infringing materials as bait, it has been said that the service provider is attaining a direct financial benefit.<sup>86</sup>

Even if direct financial benefit is proven, the service provider retains the protection of the DMCA’s safe harbor unless it also has the right and ability to control the content.<sup>87</sup> Having the “right and ability to control” the content requires more than the mere practical ability to take down content, but the ability to locate specifically infringing content at will.<sup>88</sup> For example, the Northern District of California has held that a video sharing service lacked the practical ability to control infringing content on its site where the names of the videos at issue may have been misleading.<sup>89</sup>

In light of the above, the DMCA appears to provide a high standard of protection for Internet service providers while placing a heavy burden upon copyright owners. It appears, then, that while Zuffa may be able to attack end-users of the content, and perhaps even individual uploaders, sites like Justin.TV, UStream.TV and

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<sup>82</sup> 17 U.S.C. § 512(c)(1)(B).

<sup>83</sup> *See id.*

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

<sup>85</sup> *See Sawyer, supra note 57, at 372–73.*

<sup>86</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2003) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)).

<sup>87</sup> *See* 17 U.S.C. § 512(c)(1)(B); *Sawyer, supra note 57, at 374.*

<sup>88</sup> *See Sawyer, supra note 57, at 374–75.*

<sup>89</sup> *See Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1153 (N.D. Cal. 2008).



Rage-Streams.net might be free from any sort of copyright liability.

## II. LEGAL ANALYSIS

### A. *The Viacom v. YouTube Decision*

Several recent cases have addressed an Internet service provider's liability under the DMCA when copyright violations were rampant on the service provider's website. In 2007, media conglomerate Viacom International brought suit against Internet service provider YouTube.<sup>90</sup> YouTube is the world's most popular video community, with over two billion videos viewed per day and approximately twenty-four hours worth of video uploaded to the website every minute.<sup>91</sup> Viacom<sup>92</sup> claimed that YouTube was not subject to the DMCA's safe harbor provisions<sup>93</sup> because it had actual knowledge and was aware of facts and circumstances that would make infringement apparent.<sup>94</sup> Zuffa, in fact, joined the proceedings filing an amicus brief on behalf of Viacom, urging the court to take a narrower view of the DMCA safe harbor provisions.<sup>95</sup> Zuffa urged the court to find YouTube, and other service providers, to be outside of the safe harbor if they intentionally and knowingly provided copyright infringement capabilities.<sup>96</sup> Ultimately, Zuffa and Viacom failed in their efforts as the court held that YouTube was subject to the safe harbor provision because it did not have the requisite level of knowledge, did not have control over the videos at issue, and had acted

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<sup>90</sup> *Viacom v. YouTube*, BENEDICT.COM, <http://www.benedict.com/Digital/Internet/YouTube/YouTube.aspx> (last visited Apr. 3, 2011).

<sup>91</sup> *YouTube Fact Sheet*, YOUTUBE, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Feb. 4, 2010).

<sup>92</sup> For information on Viacom and the Viacom networks, see Viacom's website: <http://www.viacom.com>.

<sup>93</sup> *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010).

<sup>94</sup> *Id.*

<sup>95</sup> Justin Klein, *Zuffa's Piracy Fight—Winning the Battle, But Can it Win the War?*, MMA PAYOUT (Nov. 10, 2010), <http://mmapayout.com/2010/11/zuffa%E2%80%99s-piracy-fight%E2%80%93winning-the-battle-but-can-it-win-the-war>.

<sup>96</sup> *See id.*

expeditiously to remove the videos once it knew the videos were infringing.<sup>97</sup>

The court framed the question in *Viacom* as whether the language of the DMCA safe harbor relating to “actual knowledge” and “knowledge of circumstances from which infringement is apparent” was to be read as a general awareness of infringing activity or as requiring actual or constructive knowledge of specific and identifiable infringement of particular copyrights.<sup>98</sup> The court emphasized that YouTube had a day’s worth of content uploaded to its site every minute<sup>99</sup> and noted that the infringing content on the website may represent only a tiny fraction of what is actually uploaded to the website.<sup>100</sup> In light of these facts, the court found that YouTube had no duty to police and monitor its website, reasoning that the website cannot easily tell whether the use is authorized by the provider, or whether the infringing use is a fair use.<sup>101</sup> In other words, millions of users could be posting the same exact work many millions of times over. In theory, it is very difficult for a website to determine which of these millions of postings are licensed, which are infringing and which are fair uses.

The court went on to find that so long as YouTube took down any allegedly infringing video when it received a takedown notice, it was protected from liability by the DMCA safe harbor provisions.<sup>102</sup> The court rejected Viacom’s argument that once a takedown notice was provided to YouTube, YouTube was under a further obligation to look for additional similar infringement.<sup>103</sup> Indeed, the court was satisfied that the DMCA safe harbor protections and the notice-and-takedown procedures were sufficient to protect Viacom, noting that within one business day of sending 100,000 notices, YouTube had taken down most of the videos in question.<sup>104</sup>

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<sup>97</sup> See *id.*; see also *Viacom*, 718 F. Supp. 2d at 514.

<sup>98</sup> See *Viacom*, 718 F. Supp. 2d at 519.

<sup>99</sup> *Id.* at 518.

<sup>100</sup> *Id.* at 524.

<sup>101</sup> *Id.* at 523–24.

<sup>102</sup> *Id.* at 526–27.

<sup>103</sup> See *id.* at 528–29.

<sup>104</sup> *Id.* at 523–24.

The court also acknowledged that YouTube employed other measures to protect copyright owners, which entitled it to the safe harbor protections. YouTube blocks repeat offenders via a “three-strikes” system. A user who receives either (1) a DMCA notice against him or her for multiple videos or (2) multiple DMCA takedown requests against him or her within two hours receives a “strike”; YouTube blocks users with three strikes from uploading more content.<sup>105</sup> The court was not confronted with the question of how to deal with users who receive a single takedown notice for a single video, or those who receive a takedown notice every two-hours-and-one-minute multiple times a day. It is also unclear from the court’s holding whether YouTube must block a particular IP address<sup>106</sup> from posting again, or whether it can simply block the individual’s user name to remain eligible for the safe harbor. If a website must block only a username, any potential pirate can simply create a new username with new information and resume streaming and uploading infringing content within minutes. YouTube also provides a “claim your content” system, whereby copyright owners can submit their content to the site preemptively. YouTube then checks its uploaded content against these “fingerprints” submitted by the content’s owner.<sup>107</sup> If the content matches the submitted sample, it is automatically removed from the website.<sup>108</sup> However, YouTube does not consider infringing content that is taken down under the “fingerprint” system as a “strike” under its “three-strikes” system.<sup>109</sup>

The court also applied quite stringent criteria in determining whether YouTube received a direct financial benefit from the infringing content on its site.<sup>110</sup> The court acknowledged that there could be an argument made that YouTube benefits from the advertising revenue it generates while hosting infringing content

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<sup>105</sup> *Id.* at 527–28.

<sup>106</sup> An IP address is a unique user-identification number that is automatically assigned to the user. There are two types of IP addresses, dynamic and static. R. Kayne, *What is a Static IP Address*, WISEGEEK, <http://www.wisegeek.com/what-is-a-static-ip-address.htm> (last visited Oct. 9, 2010).

<sup>107</sup> *Viacom*, 718 F. Supp. 2d at 528.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at 527.

on the site, thus collecting revenues that “are ‘directly attributable to’ infringements.”<sup>111</sup> However, the court stated that the website owner must know of the particular infringement in order to be receiving a direct financial benefit from it.<sup>112</sup> The *Viacom* decision thus strongly favors service providers and cuts largely against copyright owners.

Ultimately, *Viacom* stands for the proposition that a service provider’s knowledge of a particular type of infringement of a particular work does not constitute constructive knowledge of infringement sufficient to require a service provider to investigate further instances of similar (or the same) infringement.<sup>113</sup>

### B. *Justin.TV and UStream.TV*

Justin.TV is a host of live streaming video.<sup>114</sup> It advertises that users can show the world what they are doing using only a webcam at all times of the day.<sup>115</sup> UStream.TV presents itself similarly.<sup>116</sup> Zuffa has filed a copyright infringement suit against Justin.TV,<sup>117</sup> and also has subpoenaed Justin.TV and UStream.TV for the IP addresses of individuals who have uploaded streams of its pay-per-views.<sup>118</sup>

The goal of Zuffa’s subpoenas, according to UFC President Dana White, is to put people in jail for their illegal viewing of the pay-per-views,<sup>119</sup> which he hopes will put a stop to the illegal

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<sup>111</sup> *Id.* (quoting 17 U.S.C. § 512(c)(1)(B) (2006)).

<sup>112</sup> *Id.*

<sup>113</sup> *See id.*

<sup>114</sup> *About Us—Justin.tv*, JUSTIN.TV, [http://www.justin.tv/p/about\\_us](http://www.justin.tv/p/about_us) (last visited Oct. 9, 2010).

<sup>115</sup> *Id.*

<sup>116</sup> *See About Us*, USTREAM.TV, <http://www.ustream.tv/about> (last visited Oct. 9, 2010).

<sup>117</sup> *Pirates Beware! Zuffa Files Lawsuit Against Justin.tv for Alleged Illegal UFC Video Uploading*, MMAWEEKLY.COM (Jan. 21, 2011), <http://mmaweekly.com/pirates-beware-zuffa-files-lawsuit-against-justin-tv-for-alleged-illegal-ufc-video-uploading> [hereinafter *Pirates Beware!*].

<sup>118</sup> Stupp, *supra* note 30; *see also* Complaint, Zuffa, LLC v. Justin.tv, Inc., 2:2011 cv 00114 (D. Nev. 2011).

<sup>119</sup> This suit is similar to the suit filed by the producers of *The Hurt Locker*, who sued some 5,000 John Does for downloading illegal copies of the movie. *See As Hurt Locker Producers Sue Thousands for File Sharing . . . They Claim Free Speech Rights to Copy*

viewing altogether.<sup>120</sup> White threw the proverbial hammer down on those illegally viewing the content, stating: “I can’t wait to go after thieves who are stealing our content. This is a fight we will not lose.”<sup>121</sup> White said that pirates “are going to jail.”<sup>122</sup>

Apart from advancing Zuffa’s campaign to appear steadfast and determined in at least taking a stand against piracy, mass litigation likely will not be helpful in putting a stop to illegal downloading, uploading and streaming, if the experience of the recording industry serves as any indication.<sup>123</sup> Between 2003 and 2008, the Recording Industry of America (“RIAA”) launched 35,000 suits against illegal downloaders.<sup>124</sup> However, the RIAA abandoned a majority of its litigation against individual users to partner with Internet service providers in order to cut Internet access to users who repeatedly uploaded and shared videos in violation of copyright.<sup>125</sup> Even Zuffa’s counsel admits that in the face of sending out a bevy of takedown notices and threatening litigation, Zuffa is seeing more and more illegal streams of its pay-per-views across the Internet.<sup>126</sup> It is not entirely clear whether mass litigation against pirates will have a significant effect on the rate of piracy.

Even if Zuffa elects to conduct mass litigation against viewers of illegal streams, it is not clear that such litigation will be successful. In a recent case decided by the Second Circuit, the court ruled that streaming content did not constitute copyright infringement because there was no fixation in a tangible medium of expression.<sup>127</sup> That is, the buffering of the video that was occurring and streaming live was fixed for only a transitory

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*Story of Soldier*, TECHDIRT, <http://www.techdirt.com/articles/20100614/1841189815.shtml>.

<sup>120</sup> Stupp, *supra* note 30.

<sup>121</sup> *Id.*

<sup>122</sup> See Morgan, *supra* note 43.

<sup>123</sup> See Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. TECH BLOG (Dec. 19, 2008), <http://online.wsj.com/article/SB122966038836021137.html>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See Marrocco, *supra* note 33.

<sup>127</sup> *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129–30 (2d Cir. 2008).

duration—literally second-to-second—and could not constitute fixation sufficient to be declared making a “copy.”<sup>128</sup> The court did admit, however, that the fixation inquiry must be “fact-specific,” and did not seek to make a general ruling as to whether buffering and streaming video necessarily involves copying.<sup>129</sup> The court thus articulated a murky standard—or perhaps no standard at all—as to whether the buffering of streaming video in RAM can ever constitute the making of a “copy.” Still, if this case is any indication, Zuffa could face an uphill battle in attacking at least the end-users watching the streams, despite having settled 500 cases with defendants accused of streaming their pay-per-views.<sup>130</sup> Importantly, however, while it is likely that buffering video in RAM might not be found to constitute copying, if a court found that it did, such copying would likely fail a fair use analysis because most streams provide a viable replacement for the pay-per-views themselves and the infringing content consists entirely of the copyrightable material.<sup>131</sup>

Against this backdrop, Zuffa recently filed suit against Justin.TV for violations under the DMCA.<sup>132</sup> Zuffa alleges that despite its consistent efforts to work with Justin.TV to prevent piracy, Justin.TV has persistently turned a blind eye to the problem.<sup>133</sup> In addition, Zuffa claims that Justin.TV has induced copyright violations on its website.<sup>134</sup> Zuffa will almost certainly

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<sup>128</sup> See generally *id.* at 130.

<sup>129</sup> See *id.*

<sup>130</sup> See Stupp, *supra* note 30.

<sup>131</sup> Justin Klein, *My Analysis Re Liability for Viewing an Illegally Streamed Event*, FIGHT LAWYER BLOG (Aug. 6, 2010, 2:47 PM), <http://www.fightlawyerblog.com/2010/08/my-analysis-of-liability-for-viewing.html>. It should be noted that Klein posits, and Zuffa has stated, that illegally viewing a stream could subject the viewer to liability under the Federal Communications Act for illegally intercepting cable television broadcasts. This argument is focused on end-user liability as opposed to Internet service provider liability and as such is beyond the scope of this Note. It is possible that Zuffa could achieve some recourse using 17 U.S.C. § 501(c), which provides liability for secondary transmissions of copyrighted work. However, because it applies to cable systems as opposed to Internet websites, it is likely that it does not apply. Still, this might be an area for Zuffa to consider in formulating its argument, especially if the Internet websites are being accessed or transmitted via cable Internet services.

<sup>132</sup> *Pirates Beware!*, *supra* note 117.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

attempt to prove these assertions at trial to overcome the “financial benefit directly attributable to” the infringing content and the “right and ability to control” said content standards articulated in the DMCA, which, if overcome, would deny the website the statutory safe harbor protections.<sup>135</sup> In its defense, Justin.TV is likely to rely heavily on the *Viacom* decision discussed above.<sup>136</sup>

Both Justin.TV and UStream.TV, of course, claim compliance with the DMCA’s safe harbor requirements.<sup>137</sup> Justin.TV, like YouTube, has in place a system whereby it bans repeat infringers and does not prohibit or impede copyright owners from policing infringement via standard technical measures such as routinely searching the site for videos with particular titles.<sup>138</sup> Justin.TV also disclaims any responsibility for or profit from the videos posted,<sup>139</sup> presumably to help it counter any claims of knowledge and control, which could cost it the protection the DMCA safe harbor.<sup>140</sup>

UStream.TV similarly disclaims any control over the videos posted on its site,<sup>141</sup> and, like Justin.TV, reserves the right to delete any and all videos without any prior notification.<sup>142</sup> Like Justin.TV and YouTube, UStream.TV also provides information on its website about supplying notice to have UStream.TV take down any allegedly infringing video.<sup>143</sup> UStream.TV also provides information about responding to and appealing the takedown.<sup>144</sup>

It appears, then, that both Justin.TV and UStream.TV are compliant with the DMCA safe harbor provisions. Therefore,

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<sup>135</sup> 17 U.S.C. § 512(c)(1)(B) (2006).

<sup>136</sup> See *supra* Part II.B.

<sup>137</sup> See *Copyright Policy*, USTREAM.TV, <http://www.ustream.tv/copyright-policy> (last visited Oct. 9, 2010); *Digital Millennium Copyright Act Notification Guidelines*, JUSTIN.TV, <http://www.justin.tv/user/dmca> (last visited Oct. 9, 2010).

<sup>138</sup> *Terms of Service* ¶ 5, JUSTIN.TV, [http://www.justin.tv/user/terms\\_of\\_service](http://www.justin.tv/user/terms_of_service) (last visited Mar. 12, 2009).

<sup>139</sup> *Id.* ¶ 15.

<sup>140</sup> For a discussion of the DMCA safe harbor requirements, see *supra* Part I.B.

<sup>141</sup> *Terms of Service*, *supra* note 138, ¶ 5(c)(iii), USTREAM.TV, <http://www.ustream.tv/terms> (last visited Oct. 12, 2010).

<sup>142</sup> *Id.* ¶ 3(a).

<sup>143</sup> See *Copyright Policy*, USTREAM.TV, <http://www.ustream.tv/copyright-policy> (last visited Oct. 12, 2010).

<sup>144</sup> See *id.* (describing the procedure to file a counter notice).

unless Zuffa could prove that either (or both) website(s) actually knew about *specific* cases of infringement, Zuffa likely would neither be able to prove actual knowledge nor that the defendant websites had failed the “direct financial benefit test.”<sup>145</sup>

Additionally, even if a video stream was titled *UFC Pay-Per-View*, it would still be unlikely, under the *Perfect 10* standard,<sup>146</sup> that Justin.TV or UStream.TV would be considered to have actual or constructive knowledge of infringing actions. This is because some degree of investigation, whether it be clicking on the link and watching it, or seeing if the user had repeatedly uploaded streams that Zuffa had complained about in the past, would be necessary to determine whether any particular stream infringed Zuffa’s copyright.<sup>147</sup> Indeed, the *Perfect 10* standard provides a perverse incentive for Justin.TV and UStream.TV *not* to police their respective websites as carefully as they could, because if they investigated and attained actual knowledge of particular infringement, they would lose the benefit of the safe harbor provisions. It pays, then, for Justin.TV and UStream.TV to remain as ignorant as possible as to what is being uploaded onto their respective websites and to argue that because some degree of inquiry would have been necessary to discover the infringing content, the infringement was not “apparent.” Any investigation or increased knowledge of videos on the website would at least trend towards the site being liable for monetary and equitable relief.

Even employing the “red flags” test might not create liability for Justin.TV or UStream.TV. For example, if a hosted video stream were called *Illegal UFC Stream* or *Banned UFC Stream*, a court following *Perfect 10* might believe that those adjectives simply add to the salaciousness of the streams.<sup>148</sup> It is clear that mixed martial arts is not entirely accepted by mainstream

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<sup>145</sup> See 17 U.S.C. § 512(c)(1)(A) (2006).

<sup>146</sup> 488 F.3d 1102 (9th Cir. 2007). For discussion on this topic, see *supra* Part I.B.

<sup>147</sup> See generally *id.* at 1114.

<sup>148</sup> See, e.g., *Perfect 10*, 488 F.3d at 1114 (“When a website traffics in pictures that are titillating by nature, describing photographs as ‘illegal’ or ‘stolen’ may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.”).



society.<sup>149</sup> The violent nature of the sport could, to observers not familiar with the sport, cause any court to believe that terms like “illegal” or “banned” might describe the event itself, rather than the stream. Thus, even though Justin.TV and UStream.TV allegedly traffic heavily in and are major conduits for illegal and infringing content, Zuffa will almost certainly have a hard time proving constructive knowledge on the part of the defendants. Both sites are likely to be protected under the DMCA safe harbor.

### C. Current Litigation

#### 1. Gandu and Rage-Streams

While UStream.TV, up to this point, has only been subpoenaed for user information, Zuffa has actually commenced litigation, at least in part under the DMCA, against a few sites that have allegedly streamed Zuffa’s pay-per-views without authorization.<sup>150</sup> One such site is Rage-Streams.net,<sup>151</sup> a site appearing to be an “Internet forum.”<sup>152</sup> Zuffa filed suit against Rage-Streams’ operator Moazzam Gandu in February 2010 for various violations of copyright law.<sup>153</sup> For membership on this forum and access to the broadcasts, members pay a fee of \$6.99.<sup>154</sup> The forum hosts live streams of various videos, including UFC pay-per-views.<sup>155</sup>

Zuffa asserts that Rage-Streams entices members to pay a fee in exchange for access to streaming video of UFC pay-per-

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<sup>149</sup> See *supra* note 14 and accompanying text.

<sup>150</sup> See Steve Green, *UFC Sues Web Site Operator Over Alleged Pirated Broadcasts*, LAS VEGAS SUN (Feb. 19, 2010), <http://www.lasvegassun.com/news/2010/feb/19/ufc-sues-web-site-operator-over-alleged-pirated-br>.

<sup>151</sup> The website <http://www.rage-streams.net> has been taken down as of the writing of this Note.

<sup>152</sup> See Complaint for Damages and Injunctive Relief at Ex. 2, *Zuffa, LLC v. Gandu*, No. 10 CV 00228 (D. Nev. Feb. 18, 2010), 2010 WL 739422 [hereinafter *Zuffa-Gandu Complaint*]. An “Internet forum” is a message board wherein people can have discussions about a variety of topics. See *What Is an Internet Forum?*, WISEGEEK, <http://www.wisegeek.com/what-is-an-internet-forum.htm> (last visited Oct. 22, 2010).

<sup>153</sup> Steve Green, *UFC Sues Web Site Operator over Alleged Pirated Broadcasts*, LAS VEGAS SUN (Feb. 19, 2010), <http://www.lasvegassun.com/news/2010/feb/19/ufc-sues-web-site-operator-over-alleged-pirated-br>.

<sup>154</sup> See *Zuffa-Gandu Complaint*, *supra* note 152 ¶ 16.

<sup>155</sup> See *id.*

views.<sup>156</sup> Regardless of whether Gandu uploads the streams himself, Zuffa argues, he provides the capability on his website for others to do so, and profits via advertisements.<sup>157</sup> Zuffa further asserts that Gandu either uploads the copyrighted broadcasts himself, or “knows or has reason to know, or has recklessly disregarded the fact that” Zuffa’s copyrights are being infringed on the website.<sup>158</sup>

However, as Gandu may be protected from liability under the DMCA, Zuffa faces an interesting challenge. For one, Zuffa asserts only that Gandu “knows or has reason to know or has recklessly disregarded” knowledge of the infringing videos.<sup>159</sup> The DMCA, however, makes no mention of a “reckless disregard” for information. In fact, the DMCA expressly states that access to the safe harbor will *not* be conditioned upon affirmatively seeking out information of infringement.<sup>160</sup> Moreover, courts have interpreted the DMCA as saying that a website’s generalized knowledge of infringement does not qualify as actual or constructive knowledge of infringement, leaving that website protected under the safe harbor.<sup>161</sup> If Zuffa cannot prove that Gandu had actual knowledge of infringement or that Gandu himself uploaded and streamed the videos,<sup>162</sup> Zuffa would have to show that there were “red flags” of infringement<sup>163</sup> and that Gandu failed to conduct an investigation on a specific link after it became apparent that the link was infringing and thus had constructive knowledge of infringement.<sup>164</sup>

It would be difficult to prove that Gandu had notice of “red flags” (i.e., constructive knowledge) even if he “recklessly disregarded” information that, when researched, would have

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<sup>156</sup> See *id.* ¶¶ 19, 21–22.

<sup>157</sup> See *id.* ¶¶ 19–20.

<sup>158</sup> See *id.* ¶ 21.

<sup>159</sup> *Id.*

<sup>160</sup> 17 U.S.C. § 512(m)(1) (2006).

<sup>161</sup> See *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 520–21 (S.D.N.Y. 2010).

<sup>162</sup> In the complaint, Zuffa alleged that Gandu may indeed have done this. See Zuffa-Gandu Complaint, *supra* note 152.

<sup>163</sup> See *Viacom*, 718 F. Supp. 2d at 520–21.

<sup>164</sup> See *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009).

uncovered infringement. Gandu could argue that on the forum his website hosted, he might have to first read the title of the thread,<sup>165</sup> click on the link to open the thread, read the message, click on the video to begin loading and then watch enough of the video to make sure it is actually an infringing use and not a fair use, which would be difficult for anyone but the content owner to do. Therefore, a not insignificant amount of investigation would be required to determine whether any one particular video or stream was infringing. Because of the amount of investigation required, Gandu would likely be able to satisfy the court that there were no “red flags” of infringement.

A website is not protected under the safe harbor if it receives a direct financial benefit directly attributable to the infringing activity that the website has the right and ability to control.<sup>166</sup> In this respect, the safe harbor contains a paradox of sorts. At some level, a website must be able to delete or block access to infringing content to be protected under the safe harbor but must not receive a direct financial benefit from infringing items it controls.<sup>167</sup> Courts and commentators have reasoned, then, that the “ability to control” standard is higher than the mere “ability to block or delete” a video.<sup>168</sup> Various commentators and scholars have discussed this paradox.<sup>169</sup>

Zuffa has a strong argument that Gandu directly benefits financially from the infringing content via ad revenue, as Viacom had argued that YouTube did in *Viacom*.<sup>170</sup> On this argument, Gandu obtains a benefit by obtaining subscription fees to his forum using infringing material as bait.<sup>171</sup> However, as the *Viacom* court ruled, the DMCA requires that one must know of the *particular*

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<sup>165</sup> A thread is each separate conversation within the forum itself. See *What Is an Internet Forum?*, *supra* note 152.

<sup>166</sup> 17 U.S.C. § 512(c)(1)(B) (2006).

<sup>167</sup> *UMG Recordings*, 665 F. Supp. 2d at 1114.

<sup>168</sup> *Id.*; see also Sawyer, *supra* note 57, at 375.

<sup>169</sup> See, e.g., *id.*; Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008).

<sup>170</sup> 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010).

<sup>171</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2003) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)).

infringing activity to be benefiting from it.<sup>172</sup> Gandu might be able to allege that he had no knowledge of *particular* acts of infringement, even with a generalized knowledge of ubiquitous infringement. In *Ellison v. Robertson*,<sup>173</sup> the Ninth Circuit held that a financial benefit exists when infringing content serves as “a draw” for customers.<sup>174</sup> The *Ellison* court might have decided that Gandu received a direct financial benefit from infringing content because the infringing content was a draw to customers. However, Zuffa still must prove that Gandu loses the safe harbor because Gandu also controls the content.<sup>175</sup>

Gandu could claim that Rage-Streams’ videos are akin to YouTube’s videos, as he does not upload the material himself but merely retains the ability to delete or block the material, entitling him to safe harbor protection. On this argument, Gandu would not lose safe harbor protection even if he had gained a direct financial benefit from infringing content because he did not control the content himself.<sup>176</sup> For a website to lose protection under the safe harbor provision, more than just the ability to block and delete content is required, but this reveals another problem with the *Perfect 10* and *Viacom* courts’ construction of the statute: if Gandu had a more intimate knowledge of the material so as to retain the right and ability to control access to the material and closely investigated the links on his website, he would be disqualified from the safe harbor anyway because he would have attained actual knowledge of infringement.<sup>177</sup> Under the *Perfect 10* court’s constructive knowledge standard, Gandu would be punished more for policing and not acting, as opposed to being punished for not policing his website at all.

Moreover, the *Viacom* court’s finding that YouTube did not retain control over its content even though it retained the ability to

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<sup>172</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527 (S.D.N.Y. 2010).

<sup>173</sup> 357 F.3d 1072 (9th Cir. 2003).

<sup>174</sup> *Id.* at 1078 (quoting *A&M Records*, 239 F.3d at 1023).

<sup>175</sup> *See Viacom*, 718 F. Supp. 2d at 527; *see also Ellison*, 357 F.3d at 1078.

<sup>176</sup> *See* 17 U.S.C. § 512(c)(1)(B) (2006) (“A service provider shall not be liable for monetary relief . . . if the service provider . . . does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity . . .”).

<sup>177</sup> *See Ginsburg, supra* note 169, at 601.

block users and take down content renders the direct financial benefit prong redundant. The *Viacom* court's reading of the "control" standard seems to make it equivalent to the statute's "actual knowledge" standard. If a website has the requisite "control" over content, the website also has "actual knowledge" of the content. If the website has actual knowledge over content, the website loses the DMCA safe harbor anyway. Either way, under the current regime, Gandu might escape liability (if only by the skin of his teeth) through the DMCA safe harbor.

## 2. Current Litigation Success

Zuffa has also filed suit against the owner and operator of two websites, *livevss.net* and *livevss.tv*, which both showed live streaming video of, amongst other television programs and sporting events, Zuffa's pay-per-view events.<sup>178</sup> The central allegation of the complaint is that these two websites derive revenue from the advertisements that pop up for the user while watching the live streams.<sup>179</sup> In this case, Zuffa was able to obtain a temporary restraining order against *livevss*, preventing it from streaming UFC 120, a pay-per-view fight event.<sup>180</sup> The temporary restraining order also demanded the domain hosts to take control of the websites and take them down.<sup>181</sup> Unlike Justin.TV and UStream.TV, which purport to show people's lives and what they

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<sup>178</sup> Justin Klein, *Zuffa Files Lawsuit Seeking to Shut Down livevss.tv & livevss.net*, FIGHT LAWYER (Oct. 11, 2010, 4:53 PM), <http://www.fightlawyerblog.com/2010/10/zuffa-files-lawsuit-seeking-to-shut.html>.

<sup>179</sup> *Id.*

<sup>180</sup> Temporary Restraining Order and Order Setting Hearing on Preliminary Injunction, *Zuffa, LLC v. Wallace*, No. 2:10-CV-01756-KJD-LRL (D. Nev. Oct. 12, 2010) [hereinafter Temporary Restraining Order], available at <http://docs.justia.com/cases/federal/district-courts/nevada/nvdce/2:2010cv01756/76713/7>. Presumably, and quite interestingly, most of the benefit of this restraining order likely came, at least initially, from outside of the United States. Most UFC events are in pay-per-view, but UFC 120 aired for free on Spike in the United States though aired on pay-per-view in Australia. Compare *UFC 120—How to Watch*, UFC, [http://www.ufc.com/event/UFC120\\_london\\_event/watch](http://www.ufc.com/event/UFC120_london_event/watch) (last visited Oct. 22, 2010), with *UFC 120—How to Watch*, UFC, [http://au.ufc.com/event/UFC120\\_london\\_event/watch](http://au.ufc.com/event/UFC120_london_event/watch) (last visited Oct. 22, 2010). Note that the latter site is the Australian version of the UFC website.

<sup>181</sup> See Temporary Restraining Order, *supra* note 180.

are doing, according to a profile, livevss conceded that it shows online TV, sports, news and entertainment.<sup>182</sup>

Zuffa has successfully obtained a stipulated restraining order against another website, *hq-streams.net*.<sup>183</sup> While effective, this could simply be a case of Zuffa flexing its legal muscle in an aggressive move to inform pirates of its monitoring.<sup>184</sup> Zuffa, in acquiring said restraining orders, sent fear to websites who likely operate on a smaller budget than Zuffa, and could not practically afford to meet Zuffa in court. However, absent the temporary restraining orders, if one of these sites chose to see the litigation to its conclusion, it is not out of the realm of possibility that any one (or all) of them would qualify for protection under the wide-reaching scope of the DMCA. As discussed above, Gandu might be rendered safe under the DMCA safe harbor, and the aforementioned sites do not fall in an altogether different or unique category. It is unclear, then, whether Zuffa's suits against Gandu, Justin.TV, UStream.TV, livevss or any similar website would be successful under the DMCA if fully litigated. If Zuffa cannot rely on the courts to provide a remedy, it might instead have to rely on takedown notices to effectuate its copyrights.<sup>185</sup>

Zuffa has recently sent takedown notices to Google, asking it to remove from its search results certain websites that it knows frequently host and allow the viewing of illegal videos that are uploaded by "pirates."<sup>186</sup> These notices, calling for the removal of certain search results, were sent pursuant to a section of the DMCA relating to website archives and search engines that is separate

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<sup>182</sup> See *Sites Like Livevss.tv*, COMJUICE, <http://similarsites.comjuice.com/browse/related/sites-like/sm-livevss.tv-472856.html> (last visited Oct. 22, 2010). Justin.TV and UStream.TV purport to allow you to broadcast what you are doing.

<sup>183</sup> See Justin Klein, *Tike (hq-streams.com) Stipulate to Permanent Injunction in Zuffa Streaming Action*, FIGHT LAWYER (Sept. 9, 2010, 1:35 PM), <http://www.fightlawyerblog.com/2010/09/tike-and-hq-streamscom-stipulate-to.html> (The two parties settled the matter with an agreement that Tike would enter into a "Stipulated Permanent Injunction.").

<sup>184</sup> See Jason Cruz, *Zuffa Sues British PPV Pirate*, MMA PAYOUT (Oct. 11, 2010), <http://mmapayout.com/2010/10/zuffa-sues-british-ppv-pirate>.

<sup>185</sup> See 17 U.S.C. § 512(c)(3) (2006).

<sup>186</sup> See Justin Klein, *Zuffa Takes the Piracy Fight to Google*, MMA PAYOUT (Nov. 19, 2010), <http://mmapayout.com/2010/11/zuffa-takes-the-piracy-fight-to-google> [hereinafter Klein, *Piracy Fight*].

from the notice-and-takedown requirements litigated in *Viacom*.<sup>187</sup> Under a separate provision of the DMCA, a website that provides “information location,” such as Google, is not liable for linking to websites containing infringing material as long as the site “expeditiously” takes down the link when informed of infringement.<sup>188</sup>

Though not directly related to the issue of streaming video, the notices bear mentioning because the move backfired against Zuffa.<sup>189</sup> While many of the links to pirate sites were taken off of Google’s search results, the websites themselves were not taken down.<sup>190</sup> Worse, in making its demand, Zuffa inadvertently published a list of websites that host pirated videos, websites that were still active even if they were not posted on Google’s search results.<sup>191</sup> Zuffa’s strategy of trying to choke off traffic to infringing websites has thus worked only to help the pirate websites achieve newfound recognition and draw more viewers.<sup>192</sup>

### III. RECOMMENDATIONS

#### A. *Changes in Takedown Procedures and in the Knowledge Standard are Necessary for Streaming Video*

##### 1. Takedown Notices are Insufficient

The current takedown notice regime has been criticized recently<sup>193</sup> with critics arguing that notice and takedown procedures have been widely abused. As of 2009, Google reported that more than half of the takedown notices it had received since the enactment of the DMCA had been from copyright owners

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<sup>187</sup> See generally 17 U.S.C. § 512.

<sup>188</sup> See *id.* § 512(d).

<sup>189</sup> See Klein, *Piracy Fight*, *supra* note 186.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 122 (2009); Andre Menko Bleech, Comment, *What’s the Use? Good Faith Evaluations of ‘Fair Use’ and Digital Millennium Copyright Act ‘Takedown’ Notices*, 18 COMM.LAW CONSP. 241 (2009); Michael P. Murtagh, Note, *The FCC, the DMCA, and Why Takedown Notices Are Not Enough*, 61 HASTINGS L.J. 233 (2009).

targeting competitors; of those, nearly 40% of the claims were invalid.<sup>194</sup> It has been suggested that the abuse of takedown notices is related to the fact that only substantial compliance with takedown notices is required.<sup>195</sup> The DMCA contains a provision that establishes a penalty for any copyright owner who knowingly misrepresents any information concerning allegedly infringing material on its takedown notice.<sup>196</sup> However, in the first ten years of the DMCA's enactment that provision has been successfully enforced only once.<sup>197</sup>

Some have criticized the DMCA's takedown procedures for hurting legitimate end-users who are remixing materials, thus chilling a fair use.<sup>198</sup> In a letter to the Library of Congress, the Electronic Frontier Foundation noted that large copyright owners send hundreds of thousands of takedown notices to service providers *each month*.<sup>199</sup> Third party users who have their content removed are able to counter-notify to have their material put back up.<sup>200</sup> However, this is rarely done.<sup>201</sup>

At the same time, copyright owners must spend a considerable amount of time determining whether or not the material in question constitutes fair use.<sup>202</sup> Unsurprisingly, most copyright owners believe any use is infringing, and not fair use. Because most

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<sup>194</sup> See Ted Gibbons, *Google Submission Hammers Section 92A*, PC WORLD NEW ZEALAND (Mar. 16, 2009), <http://pcworld.co.nz/pcworld/pcw.nsf/feature/93FEDCEF6636CF90CC25757A0072B4B7>.

<sup>195</sup> See Bleech, *supra* note 193, at 254–56.

<sup>196</sup> 17 U.S.C. § 512(f) (2006).

<sup>197</sup> Charles W. Hazelwood, Jr., *Fair Use and the Takedown/Put Back Provisions of the Digital Millennium Copyright Act*, 50 IDEA 307, 325 (2010).

<sup>198</sup> See Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 919 (2010) (arguing that the true negative impact of the current regime is the inability of fair users to respond to takedown notices or infringement claims even when they have strong claims on the merits of fair use).

<sup>199</sup> Letter from Fred von Lohmann & Jennifer S. Granick, Elec. Frontier Found., to U.S. Copyright Office, Library of Cong. 22 (Dec. 2, 2008), available at <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>.

<sup>200</sup> 17 U.S.C. § 512(g)(2).

<sup>201</sup> See Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1014 (2008).

<sup>202</sup> See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154–55 (N.D. Cal. 2008).



copyright owners believe any unauthorized use is infringing, a copyright owner is more likely to fire off massive amounts of takedown notices, and as a result takedown notices are subject to abuse. As the Internet continues to grow and the amount of content and information on the Internet becomes more and more incalculable, there is an increased likelihood that work will be infringed upon on the Internet.<sup>203</sup> Because copyright owners are given the onus to police the entire Internet for infringing work,<sup>204</sup> this task is becoming increasingly onerous.

Though copyright owners are faced with an incredibly arduous task to protect their works, they still are criticized for casting too wide a net. Viacom was criticized for sending hundreds of thousands of notices to YouTube, many of which were improper, as many of the videos targeted did not, in fact, infringe Viacom's copyrights.<sup>205</sup> However, those who criticize the numerosity of takedown notices largely fail to consider the enormity of the task at hand. Even one court has admitted that saddling the copyright owners with the exclusive responsibility of forever policing websites in search of infringing content violates the spirit of the DMCA.<sup>206</sup>

However, at least in *Viacom*, the court squarely places the burden to police the Internet on the content owner, reasoning that a website's infringing works may represent only a small fraction of the total works on the website.<sup>207</sup> The *Viacom* court pointed out that over twenty-four hours of video was posted on YouTube every minute.<sup>208</sup> The court does not seem to consider (and neither do some like-minded critics) that the burden is too onerous on copyright holders, especially those copyright holders for whom time is of the essence in protecting their rights. Why is the burden too onerous for a service provider to police its own website, when

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<sup>203</sup> See Bleech, *supra* note 193, at 260–61.

<sup>204</sup> See Jansen, *supra* note 58, at 172–73.

<sup>205</sup> Fred von Lohman, *Unfairly Caught in Viacom's Dragnet? Let Us Know!*, ELEC. FRONTIER FOUND. (Feb. 8, 2007), <http://www.eff.org/deeplinks/2007/02/unfairly-caught-viacoms-dragnet-let-us-know>.

<sup>206</sup> *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 917 (C.D. Cal. 2003).

<sup>207</sup> *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523–24.

<sup>208</sup> *Id.* at 518.

only a fraction of the work posted may be infringing, but the burden is not too onerous for a content owner to hunt for that same potentially tiny fraction? The very reason that websites are inundated with incredible amounts of takedown notices is almost undoubtedly *because* copyright owners are forced to police the entire Internet and are thus crunched for time to protect their copyrights. It is wholly unclear that placing the burden on copyright owners to scour the vast reaches of the Internet for infringement is sound policy.

The purpose of copyright law is to promote the advancement of science and art by providing protection for original works of authorship.<sup>209</sup> However, current readings of the DMCA do not foster this goal or policy. An author with creative works is faced with significant barriers to create works of art. Rather than fostering the advancement of science and art, the DMCA's regulatory scheme might actually be hindering it. A content owner, on top of working to create an original work of authorship, is, under the DMCA, faced with the burden of policing the Internet to see that its work is not infringed. This forced expenditure of time, money and effort to protect content on the Internet poses a significant disincentive to create new and interesting works.

The *Viacom* court appeared to appreciate the enormity of the task for website owners to police their own websites for infringing material, but did not appreciate the content owners' burden in policing that same amount of material for their own works. It remains unclear how the current regime reflects a "balance" at all between copyright owners and website service providers. The argument that the onus to police the Internet would be too heavy on website service providers, but not too heavy on content owners is ultimately shortsighted.

## 2. The Unique Position of Pay-Per-View

The onus to police the Internet is amplified in the context of live streaming of pay-per-view content. While receipt of a takedown notice forces the service provider to take down or block

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<sup>209</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (citing U.S. CONST. art. I, § 8, cl. 8).

access to the infringing video “expeditiously,”<sup>210</sup> no court has yet held a service provider liable for failure to take down content expeditiously.<sup>211</sup> In fact, the *Viacom* court seemed satisfied that *almost all* of the takedown notices were acted upon by the next business day.<sup>212</sup>

Zuffa, and other companies reliant on the pay-per-view industry, do not have that kind of time. Every second that a stream is live and being watched is of absolutely critical importance. UFC President Dana White is correct in stating, “All this [pay-per-view piracy] stuff is brand new . . . . When our event gets stolen, it’s dead. It’s over. You know the results. A live event is different than anything else.”<sup>213</sup> Zuffa thus has a maximum of three hours—the average length of one of its pay-per-views<sup>214</sup>—to issue takedown notices. After the notice is issued, Zuffa is forced to wait and hope the service provider takes down or blocks access almost immediately. If Zuffa wants to recapture any piece of the market that would normally pay the full price for the event, it must be almost instantaneous on the draw; every minute that passes makes it less likely that someone will pay full price for a smaller and smaller fraction of an event. Thus, the DMCA, as it currently stands and as it is currently interpreted, cannot successfully defend pay-per-view and other live events against Internet piracy.

Zuffa’s chances at being paid for its live content are immeasurably injured by the DMCA’s notice-and-takedown requirements. If Zuffa, or any content owner producing a pay-per-view, is unable to discover a stream in progress within three hours, then its search is ultimately meaningless—the event is over and the issuance of any takedown notice is pointless. However, Zuffa must do considerably more than that. Even if Zuffa discovers the stream, to successfully recover even some of its profits, it must

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<sup>210</sup> 17 U.S.C. § 512(c)(1)(C) (2006).

<sup>211</sup> Debra Weinstein, Note, *Defining Expeditious: Uncharted Territory of the DMCA Safe Harbor Provision—A Survey of What We Know and Do Not Know About The Expeditiousness of Service Provider Responses to Takedown Notifications*, 26 CARDOZO ARTS & ENT. L.J. 589, 603–04 (2008).

<sup>212</sup> *Viacom*, 718 F. Supp. 2d at 524.

<sup>213</sup> See Morgan, *supra* note 43.

<sup>214</sup> See *UFC, IN DEMAND*, <http://www.indemand.com/events/ufc> (last visited Oct. 22, 2010).

draft and send a compliant takedown notice, and the recipient of the notice must actually take down the content, all within the three-hour window. Moreover, the ambiguous term “expeditiously” does not indicate whether takedown of the infringing stream, even a day later, would comply with the statute (although *Viacom* suggests that it almost certainly would). Worse, the current trend of deference to website owners for any delay in providing appropriate remedies has been pervasive among courts across the country.

For example, in *UMG Recordings, Inc., v. Veoh Networks, Inc.*,<sup>215</sup> defendant Veoh, a video hosting site like YouTube, delayed nine months in applying a fingerprinting technology in order to better track infringing works on its site.<sup>216</sup> This meant, of course, that potentially infringing videos sat on the Internet for over nine months, where they could be viewed for free. The court held that Veoh was under no affirmative duty to implement any sort of technological measure, so its failure to implement any such measure within any particular amount of time did not show a lack of good faith.<sup>217</sup>

Extrapolating these holdings to Zuffa’s situation would likely mean that a website like Justin.TV, UStream or any number of similar websites that at least on occasion host illegal streams of pay-per-view events could wait nearly a year, and perhaps through nearly a dozen pay-per-view events, to implement technology to detect infringement without waiving statutory immunity for infringement liability. While the courts have seemed satisfied with the “expeditious” removal in *Viacom* and other cases, the day or two it took YouTube to take down videos would prove disastrous for Zuffa. Because of the nature of live pay-per-view, waiting even an hour to remove or block a video would be devastating to Zuffa; a day would be catastrophic.

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<sup>215</sup> 665 F. Supp. 2d 1099.

<sup>216</sup> *Id.* at 1111.

<sup>217</sup> *Id.* at 1111–12.

### 3. The Knowledge Standard as Articulated by Courts is Too Onerous

The DMCA provides that if a service provider is aware of information that makes infringement apparent, that service provider will not be protected under the safe harbor, unless upon gathering such information he or she acts expeditiously to remove infringing material.<sup>218</sup> In practice, however, courts have stated that this “red flag” test means that if any investigation into the content is required on the part of the service provider to discover whether or not the content infringes, then the service provider does not forfeit the safe harbor.<sup>219</sup>

In so holding, courts collapsed the “actual knowledge” standard into the “red flag” test, in essence creating one stringent standard for knowledge, as opposed to the two separate standards. It could not have been Congress’s intent to create two separate clauses that in effect operate the same way.<sup>220</sup> Congress, when discussing the passage of the DMCA, discussed the “actual knowledge” and the “red flags” standards in wholly separate sections of the DMCA.<sup>221</sup> In fact, Congress stated that the subjective knowledge of the service provider should be taken into account in conducting the red flag test.<sup>222</sup> Later, Congress stated in both the House and Senate Committee’s advisory notes that “once a service provider obtains actual knowledge *or* awareness of facts or circumstances from which infringing material or activity on the service provider’s system or network is apparent,” the service provider must take down the material.<sup>223</sup> However, as construed by the courts, it is unclear how the red flag test, in practice,

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<sup>218</sup> See 17 U.S.C. § 512(c)(1)(A)(ii)–(iii) (2006).

<sup>219</sup> See *UMG Recordings*, 665 F. Supp. 2d at 1108.

<sup>220</sup> The Supreme Court has previously cautioned against reading text in a way that makes part of it redundant. See, e.g., *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 669 (2007) (“[W]e have cautioned against reading a text in a way that makes part of it redundant.”); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“We are reluctant to treat statutory terms as surplusage in any setting.” (internal quotation marks omitted)).

<sup>221</sup> See *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 520–21 (S.D.N.Y. 2010) (quoting H.R. Rep. No. 105-551, at 44–45 (1998); S. Rep. No. 105-190, at 53–54 (1998)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* (emphasis added).

operates in any substantively different way than the actual knowledge standard.

Furthermore, it is illogical to argue that when a website like Justin.TV or UStream.TV receives multiple takedown notices for the same content, the sites have not been placed “on notice” simply because some level investigation is required to determine if the claims are true. Yet, the *Viacom* court seemed to hold that unless the service provider has specific knowledge of a particular case of infringement, generalized knowledge of infringement will not cost it the safe harbor protection.<sup>224</sup> This interpretation has been criticized previously, and many commentators have argued that once a service provider becomes aware of a specific instance of infringement, it should no longer be protected for failure to take down the infringing content.<sup>225</sup> In fact, two French courts have already held that an initial takedown notice effectively put Google on notice for future infringements of the same video.<sup>226</sup>

Considering that the DMCA was passed over a decade ago, and the evolving technology in this day and age, the time has come for Congress to reassess the functionality of the DMCA and assess how copyright owners and website owners should interact with one another to better enforce copyright protection.<sup>227</sup> Since just before the passage of the DMCA, the percentage of people worldwide using the Internet has increased twelve-fold.<sup>228</sup> Congress, when writing and passing the law, could not have comprehended a world like today’s where website owners have made a profitable business

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<sup>224</sup> *Id.* at 525.

<sup>225</sup> See Jansen, *supra* note 58, at 179–80.

<sup>226</sup> See Ginsburg, *supra* note 169, at 606–08 (citing *Zadig Productions et autres / Google Inc, Afa*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., 2e sec., Oct. 19, 2007 (Fr.) available at [http://www.legalis.net/jurisprudence-decision.php?id\\_article=2072](http://www.legalis.net/jurisprudence-decision.php?id_article=2072)).

<sup>227</sup> Alan L. Friel & Nathan D. Meyer, *Friel and Meyer on User-Generated Content: Potential DMCA Safe Harbor*, LEXISNEXIS (Apr. 16, 2008 6:18 PM), [http://www.lexisnexis.com/community/copyright-trademarklaw/blogs/copyrightandtrademarkcommentary/archive/2008/04/16/friel-and-meyer-on-user\\_2d00\\_generated-content-in-the-web-2.0-era\\_3a00\\_-the-potential-dmca-safe-harbor.aspx](http://www.lexisnexis.com/community/copyright-trademarklaw/blogs/copyrightandtrademarkcommentary/archive/2008/04/16/friel-and-meyer-on-user_2d00_generated-content-in-the-web-2.0-era_3a00_-the-potential-dmca-safe-harbor.aspx).

<sup>228</sup> See Bleech, *supra* note 193, at 260.

through skating by and around the DMCA.<sup>229</sup> It has even been suggested that some websites now deliberately upload and offer infringing content to boost their traffic, but finding proof of such conduct is prohibitively difficult.<sup>230</sup> A reassessment of copyright protection in light of the relatively recent ability to stream live television over the Internet is a necessary step to effectuate fair protection of content owners.

#### 4. New Legislation—How the Current Proposed Legislation is Inadequate

It appears that some members of Congress have at least tacitly acknowledged the DMCA's failure to target sites that are set up almost exclusively to infringe copyright. On September 20, 2010, an amendment to the Combating Online Infringement and Counterfeits Act ("COICA") was introduced in Congress.<sup>231</sup> This amendment attempted to close the gap left by the DMCA some twelve years ago.<sup>232</sup>

COICA would require the Attorney General to receive information from the public—including content owners—about sites that are dedicated to committing infringement and to provide content owners information about informing the Department of Justice of these sites.<sup>233</sup> Under the proposed Act, the Attorney General would be able to ask for a temporary restraining order or injunction to prevent any further infringement.<sup>234</sup> The Attorney General would also be empowered to bring an in rem action against such websites.<sup>235</sup>

Interestingly, COICA covers both domestic and international websites<sup>236</sup> and would permit the Attorney General to commence

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<sup>229</sup> Mathew D., *Gaming the DMCA Safe Harbor Law for Profit*, GLOBAL OUTPOST (June 24, 2010, 4:04 PM), <http://www.theglobaloutpost.com/archives/43>.

<sup>230</sup> *Id.*

<sup>231</sup> See Combating Online Infringement and Counterfeits Act, S. 3804, 111th Congress (2010) [hereinafter COICA].

<sup>232</sup> See generally *id.*

<sup>233</sup> *Id.* Sec. 3(1).

<sup>234</sup> *Id.* Sec. 2 § 2324(b).

<sup>235</sup> *Id.* Sec. 2 § 2324(c)(1).

<sup>236</sup> See *id.* Sec. 2 § 2324(d)(2). It should also be noted that several world powers have come together to create the Anti-Counterfeiting Trade Agreement ("ACTA"), which

in rem proceedings against a foreign website, so long as the website is accessible in the United States, conducts business with residents of the United States and infringes the copyrights of residents of the United States.<sup>237</sup> COICA even provides criteria to determine whether a site is conducting business directed at residents of the United States.<sup>238</sup>

However, issues arise when COICA attempts to define which websites are actually covered under this proposed legislation. A website is dedicated to infringing activities if it is “primarily designed, has no demonstrable, commercially significant purpose or use other than, or is marketed by its operator, or by a person acting in concert with the operator” to infringe.<sup>239</sup> Additionally, even if a site is not primarily designed with the purposes of infringement, if infringement is “central to the activity” of the website, the site will also be covered.<sup>240</sup>

This proposed legislation has met with some criticism from Internet engineers; more than ninety Internet engineers have banded together to urge the Senate to reject this bill.<sup>241</sup> They allege that COICA would create tremendous fear in the Internet community,<sup>242</sup> dampening technological innovation.<sup>243</sup> Interestingly, this sentiment echoes the very concerns articulated

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would encourage Internet service providers to cooperate with content owners to remove infringing material. While the agreement has not been made public, it has been the subject of much debate. International comity would be helpful in providing COICA with jurisdiction over international websites, and would also help to create a system by which website owners would communicate with content owners worldwide to help impede infringement. However, because the precise text of the act is still secret, it would be imprudent to refer to and criticize it at this time. For more information on ACTA as it operates globally, see *What is ACTA?*, ACTA, <http://acta.net.nz>. (last visited Mar. 25, 2011).

<sup>237</sup> See *id.* Sec. 2 § 2324(d)(2)(B).

<sup>238</sup> See *id.*

<sup>239</sup> *Id.* Sec. 2 § 2324(a)(2)(A).

<sup>240</sup> *Id.* § 2324(a)(2)(B). This result appears to be a codification of the holding in *MGM Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>241</sup> See Peter Eckersley, *An Open Letter from Internet Engineers to the Senate Judiciary Committee*, ELEC. FRONTIER FOUND. (Sept. 28, 2010), <http://www.eff.org/deeplinks/2010/09/open-letter>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



by Congress when passing the DMCA in 1998.<sup>244</sup> Similarly, several law professors have also opposed COICA<sup>245</sup> arguing that there are “egregious Constitutional infirmities in the act.”<sup>246</sup> These professors contend that COICA will abridge free speech on the Internet and would also frequently and improperly target Internet providers<sup>247</sup> instead of the operators of the infringing websites themselves.<sup>248</sup>

Worse, it is not readily apparent that COICA will do anything to truly help content owners who stream their content over the Internet. Zuffa, for one, has already been able to obtain preliminary injunctions and temporary restraining orders against websites streaming their work under the existing copyright regime.<sup>249</sup> Moreover, Justin.TV, UStream.TV and some of the more popular “pirate” websites *still* might be safe under COICA. Justin.TV and UStream.TV both hold themselves out as Internet communities of webcam users who are broadcasting what they are doing live.<sup>250</sup> It may be difficult, then, to argue that infringement is Justin.TV or UStream.TV’s primary reason for operating.<sup>251</sup> Additionally, it may be difficult to prove that either website has no discernible “commercially significant purpose” since the sites’ stated purpose ostensibly has nothing to do with any pre-existing content, let alone infringement. Rather both sites’ “commercially significant purpose” is just to provide a website on which people can broadcast their lives.

It is also unclear how the “central to the activity” standard would apply to Justin.TV or UStream.TV, if at all. If the

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<sup>244</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) (quoting S. Rep. No. 105-190 (1998)).

<sup>245</sup> See Letter from Temple Law School Law Professors in Opposition to S. 3804 (Combating Online Infringements and Counterfeits Act) (Nov. 16, 2010), *available at* <http://www.temple.edu/lawschool/dpost/COICAFull.doc>.

<sup>246</sup> *Id.*

<sup>247</sup> The distinction is subtle. An Internet service provider, in this context, is a company that *provides access to* the Internet, as opposed to a service provider in the context of the DMCA, which is a website that provides a service *on* the Internet. See *ISP*, WEBOPEDIA, <http://www.webopedia.com/term/i/ISP.html> (last visited Apr. 3, 2011).

<sup>248</sup> *Id.*

<sup>249</sup> See *supra* Part II.C.2.

<sup>250</sup> See *supra* notes 115–16.

<sup>251</sup> See COICA, *supra* note 231, § 2324(a)(1).

application and interpretation of the DMCA's "red flag" test is any indication<sup>252</sup> it is likely that the "central" test will be applied quite stringently. This would likely mean that if a website can prove or even argue that infringement is not the site's primary purpose, and that most of the site's uploads are not infringing, Justin.TV and UStream.TV might be able to get away unscathed by COICA, at least as currently drafted.

Moreover, the *Viacom* decision likely would have come out the same way even if COICA were in place at the time it was decided. In *Viacom*, the court read the word "expeditiously" heavily in favor of YouTube,<sup>253</sup> holding that YouTube's removal of almost all of the videos at issue from its site within one business day qualified as "expeditious" under the statute.<sup>254</sup> This holding looks to achieve Congress's stated goal of fostering the growth of the Internet, with which courts readily have fallen in line, while ignoring Congress's other stated goal of continuing to protect copyright. This interpretation of the word "expeditious" is too broad, at least in the context of pay-per-view, and there is no reason to assume courts would read COICA any differently. The *Viacom* court likely would still seek to protect service providers, and, in turn, the growth and expansion of the Internet. Were the court to have read COICA, it is likely that the word "central" would have been read similarly. Several courts, from the *Veoh* decisions up through *Viacom* have sided with service providers over content owners.

This judicial favor can also be identified in the equally broad reading of the "red flag" test.<sup>255</sup> In interpreting the DMCA, courts have created a heavy burden for copyright owners, and in the process, have even run counter to the intent of Congress.<sup>256</sup> Were the courts to show similar deference to service providers in construing COICA, terms such as "central" and "primary" would likely be read in favor of service providers. Courts have essentially collapsed the "red flag" standard into the actual

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<sup>252</sup> See *supra* Part II.A.

<sup>253</sup> See *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010).

<sup>254</sup> *Id.*

<sup>255</sup> See *supra* Part I.B.1.

<sup>256</sup> See *supra* Part I.B.1.

knowledge standard,<sup>257</sup> creating an enormous barrier for copyright owners to achieve protection. Were the vague terms of COICA to be interpreted by the same courts in similar cases, COICA might well be interpreted similarly to place its remedies beyond the reach of most copyright owners.

Third, COICA does not address the most pressing need for the owners of copyright in live streaming video: the absolutely critical nature of time.<sup>258</sup> As noted above, Zuffa has very little time to scour the Internet, find infringing content, consider fair use and issue a takedown notice. Nevertheless, its revenue model depends upon content whose value, while high, is fleeting and completely reliant on its being live and in the moment. Legislation like the DMCA and COICA simply does not address copyright protection in the context of live, streaming content. Indeed, even if a court were to read the word “expeditiously” in the DMCA as requiring any particular website to take down a video within seconds, Zuffa would still have to scour the Internet and prepare compliant takedown notices, using up time it does not have.

This Note additionally proposes an approach for protecting copyright in live streaming content without chilling protected speech on the Internet.

##### 5. Recommendation of Increased Interaction Between Websites and Content Owners Through the Copyright Office

Even courts that have liberally construed the DMCA safe harbor have recognized the tremendous burden on content owners to police the Internet.<sup>259</sup> While content owners do possess unique knowledge of what their content actually *is*, and are in a better position to assess infringement and, to a lesser extent, fair use,<sup>260</sup> websites too possess critical knowledge: what is being uploaded, by whom, and when.

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<sup>257</sup> See *supra* Part III.A.3.

<sup>258</sup> See generally COICA, *supra* note 231.

<sup>259</sup> *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1155 (N.D. Cal. 2008).

<sup>260</sup> See Jansen, *supra* note 58, at 172–73.

Professor Jane Ginsburg,<sup>261</sup> in assessing difficulties courts have had in interpreting the DMCA, believes that eventually courts will parse out “good” infringers from “bad.”<sup>262</sup> In fact, COICA seems to echo Ginsburg’s sentiments that a site must be economically viable without infringement in order to qualify for statutory protection.<sup>263</sup> Ginsburg also believes that the “red flag” standard articulated in the DMCA should be changed from requiring “apparent” infringement to “reasonably anticipatable” infringement, which could occur after as little as one notice of infringement.<sup>264</sup>

Some technological measures, such as video fingerprinting, may be of some assistance.<sup>265</sup> However, as noted earlier, an assessment of fair use necessarily requires a human, non-automated review process.<sup>266</sup> Critics of the DMCA and COICA rightly point out that automatic rejection using automated systems of assessment could chill many fair uses of copyrighted content.<sup>267</sup> Were fair use videos automatically rejected and taken off the Internet, it stands to reason that fewer videos that make fair use of copyrighted content would be made at all, because there is diminished incentive to create when nobody can see or enjoy the work.

Thus, the balance here is actually more complicated than Congress initially anticipated. First, the courts and the legislature must balance the interests of copyright owners with website service providers, as provided in the DMCA. However, we must also attempt to balance both of those parties’ interests against fair uses by third parties. A rebalancing of the interests of all three of these parties is called for, particularly in the highly time-sensitive context of copyright in streaming video.

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<sup>261</sup> Jane C. Ginsburg, COLUMBIA L. SCH., [http://www.law.columbia.edu/fac/Jane\\_Ginsburg](http://www.law.columbia.edu/fac/Jane_Ginsburg) (last visited Mar. 19, 2011).

<sup>262</sup> See generally Ginsburg, *supra* note 169.

<sup>263</sup> See *id.* at 602.

<sup>264</sup> *Id.* at 608. Ginsburg is not alone in this belief. See, e.g., Jansen, *supra* note 58, at 179–80.

<sup>265</sup> See generally Sawyer, *supra* note 57.

<sup>266</sup> *Id.* at 388–90.

<sup>267</sup> Jansen, *supra* note 58, at 176.

In reimagining how the DMCA should operate in order to avoid abuse by copyright owners, Congress should change the DMCA to provide that takedown notices pass through the Copyright Office as opposed to going directly to website service providers, as they do now.<sup>268</sup> Admittedly, this would take more time, and require an additional expenditure of resources.<sup>269</sup> However, due to the nature of the Internet, and how pervasive it is in society, the costs of policing the Internet to protect copyright must be taken into account by the government as a cost of effectively protecting copyright in the Internet age.<sup>270</sup>

The United States Copyright Office could oversee takedown notices by requiring them to be filed in a national registry. “Good infringers” (or “Sony Sheep” as Ginsburg refers to them<sup>271</sup>), could come forward to the Copyright Office as owners of websites that truly wish to eliminate infringement from the sites. These websites would acknowledge, upon registration, that they believe that streaming, live (or slightly delayed), infringing content is available, or will likely be made available on their websites because of the nature of the legitimate service they provide. Registration would provide a rebuttable presumption of non-infringement freeing them from the bounds of the DMCA, which provides disincentives for policing their own sites.<sup>272</sup> By contrast, a website that does not register would remain subject to regular takedown notice procedure. If repeatedly found to be hosting infringing live videos, the site will be denied safe harbor protection, subjecting it to vicarious and contributory infringement liability.<sup>273</sup>

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<sup>268</sup> Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. L. SCI. & TECH. 387, 404 (2009).

<sup>269</sup> *Id.* at 405.

<sup>270</sup> *Id.*

<sup>271</sup> See Ginsburg, *supra* note 169, at 587.

<sup>272</sup> See Erick Schoenfeld, *Justin.TV Turns to Law Professor Eric Goldman as it Battles Live Video Piracy*, TECHCRUNCH (Mar. 15, 2010), <http://techcrunch.com/2010/03/15/justin-tv-eric-goldman-copyright>.

<sup>273</sup> Vicarious liability occurs when a defendant has the right and ability to control infringing conduct and has a direct financial interest in the infringement. Interestingly, there is no knowledge requirement. The defendant does not have to know that another actor is infringing. Contributory infringement takes two forms: (1) personal conduct

On the other side, content owners who believe that their material will be infringed may likewise register. These owners may be able to manifest a belief that their content has, in the past, been infringed on live streaming websites. Before their content went up live on television or pay-per-view, content owners would submit a modified form of a current takedown notice including the title of the content, a description of the content, and the times during which such content will air in each respective market. This information would be forwarded to the websites, and the law would impose a duty to monitor the website for the specified content upon website owners.

As argued above, the DMCA's "red flag" standard is too high. At the very least, in the context of streaming video, the "red flag" standard should be lowered to "reasonable anticipation," as Professor Ginsburg suggests.<sup>274</sup> Providing video hosting sites with information about what pay-per-view or other live events might be pirated and when the live event will be aired would create "reasonable anticipation" for websites. When a suspicious stream is uploaded, the website, having been placed on notice of a simultaneous copyrighted broadcast with the same or similar name, would have to send a link to the video in question to the Copyright Office. The website would also temporarily disable access to the video, to prevent economic harm to the copyright holder and inform the uploader that his video has been flagged. Meanwhile, the content owner would provide the actual content to the Copyright Office. The Copyright Office could then compare the two, live and as they occur, to see if the video in question is a fair use or an infringement. If found to be the latter, the Copyright Office would order an immediate takedown. While this may not catch all infringing videos—for example, because titles could be misleading or intentionally misspelled—it will get rid of the most popular and obvious ones. Of course, if a content owner sees repeated alternate spellings of its content over time, it could add these popular misspellings to its initial notice to the websites.

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furthering infringement or (2) contribution of means to infringe. For a more detailed discussion on these two types of infringement, see 3-12 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.04 (Matthew Bender rev. ed. 2010).

<sup>274</sup> See Ginsburg, *supra* note 169.

The above proposal prevents abuse on all sides. ISPs are protected, copyright owners are protected, and websites, once registered, are protected from liability for videos over which they exercise no control. The Copyright Office plays a crucial role as a neutral arbiter under this system. Its participation is needed to prevent overreach by copyright owners who might otherwise be eager to quash anything critical of or in competition with their own products. Indeed, critics of the DMCA's notice-and-takedown regime argue that takedown notices are so misused now, resulting in massive abuse of the system.<sup>275</sup>

Additionally, the proposed system saves vital seconds, minutes and hours in the fight against piracy of live events. The proposed framework permits websites to quickly—indeed, preemptively—target infringing works and flag them for the Copyright Office. The Copyright Office can then swiftly assess whether the content at issue infringes and order it taken down immediately, if necessary. No longer would the content owner have to scour the vast reaches of the Internet to discover infringement. No longer would it have to prepare takedown notices, assess fair use and pray that the notice is received and acted upon in time.

Of course, this system does require a significant investment of resources to pay for employees, equipment and the like. The proposed system would likely not be cost prohibitive, however, if both sides were required to pay to be involved in the system. Upon registration, website owners would pay a fee per video uploaded to stream on their websites, just as producers of CD burners pay a nominal fee per burner produced,<sup>276</sup> and as has been suggested for production of digital video recorders.<sup>277</sup> Additionally, content owners would also pay into the system per copyright they seek to protect. Of course, this would create barriers to entry into the registry, but would also provide both the content owner and the website service provider with incredibly beneficial results. Copyright owners would receive increased protection for their content with greatly reduced enforcement costs. Service providers

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<sup>275</sup> See Tushnet, *supra* note 201, at 1003.

<sup>276</sup> See 17 U.S.C. § 1004 (2006).

<sup>277</sup> See Justin M. Jacobson, Note, *Cablevision Remote DV-R and a Solution for a Digital Recording Age*, *TOURO L. REV.* (Forthcoming 2011).

would enjoy reduced exposure to vicarious infringement liability, and a strong presumption of non-infringement in the event of litigation. Of course, there must be some high-level cost-benefit analysis in order to establish the proper outcome. However, the ad revenue from the websites themselves should cover almost all of the cost. At a minimum, Congress should recognize that Internet copyright issues are only going to increase in number and complexity in the future, increasing the urgency of developing a robust copyright protection regime for streaming video sooner than later.

Paying in also provides an additional benefit. If a website is set up exclusively to infringe via live streaming, it will face additional pressures whether or not it registers. Registered pirates (assuming there are any) will presumably post very few videos under this new regime, as each posting would be immediately removed. This would decrease website traffic, as the site would be essentially empty. As ad revenues dried up with the sites' traffic, websites that exist solely to infringe would be driven out of business. If a streaming site whose primary purpose is infringement elects not to register, if it is found to be a repeat offender, it will forfeit DMCA safe harbor protection and become liable for vicarious and contributory infringement. The proposed system thus makes it unprofitable to be a website that is set up exclusively to infringe. This would help to curb at least streaming video piracy.

### *B. Editing COICA*

With regard to piracy generally, if COICA is to be passed, several changes in wording should be made. Potentially ambiguous terms should be clearly defined so as to prevent courts from construing them too heavily in favor of websites (as this Note argues they have done with respect to the DMCA). Congress should provide unmistakably firm definitions of the terms "central" and "primary" in the statute. Perhaps a percentage-based formulation is necessary; sites whose total number of works includes a high percentage of infringing works are those for which infringement is "central" to the activity of the website. One could also measure how many traffickers watch infringing works through



the website as compared to works that are legitimate. One way or another, a more exact definition of “central” and “primary” should be required before passage so as to cover the most pervasive infringers. Were Congress to leave nebulous wording in place, it is not unlikely, based largely upon the considerations at work in the *Viacom* ruling, that courts would interpret COICA to be more protective of websites than originally intended.

Congress could also impose a “repeat infringer” test in COICA. Essentially, Congress could provide for contributory and vicarious infringement liability for websites that have shown a tendency to react more slowly to takedown notices or which have consistently been the targets of legitimate takedown notices but which fail to police infringement on their sites. A website that shows a tendency to repeatedly host infringing videos will be forced to police its own site or to face vicarious or contributory copyright liability. This test would be similar to the percentage test described above, as some level of defined frequency of infringement would be necessary. Allowing the courts to essentially dictate and define the statute’s terms would result in unanticipated and dangerous windfalls for service providers as it has with the DMCA.

*C. An Alternative Take—Giving the Power of the Websites to Copyright Owners*

Justin.TV and UStream.TV claim to be DMCA-compliant websites.<sup>278</sup> In order for a website to comply with the DMCA, a website must retain the ability to block access to or remove infringing content.<sup>279</sup> It must be true, then, that Justin.TV and UStream.TV are able to block access to or remove certain videos from their respective websites. Congress could create a system where sites that host live streaming video content could grant limited access to these blocking mechanisms to the copyright holders themselves.

Every copyright holder could sign up as the valid owner of live content, with a unique identification number (perhaps even one

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<sup>278</sup> See Part II.B.

<sup>279</sup> See 17 U.S.C. § 512(c) (2006).

that changes daily). Content owners could then go to the websites and immediately, but temporarily, sign in to block allegedly infringing content themselves. The block could last for an hour, three hours, or however long is determined to be adequate by the parties. Those who have their streams blocked by content providers would have the ability to appeal the block, and recover for any damages if the block was later found to quash a fair use. To prevent abuse of the system by content providers, frequent abuses of the system (such as blocking competitors' content or content in which the "provider" does not, in fact, hold a copyright) would be temporarily or permanently banned from using the system, on top of being liable for damages (and possibly heightened statutory damages for intentional abuse of the system).

Such a system would allow for the immediacy that live content requires in order to be successfully protected. The mechanisms for blocking and taking down infringing content are already in place, as the DMCA requires. Giving content owners the ability to use these blocking and takedown systems quickly will help to curb rampant pay-per-view and live television piracy. In creating this "shared blocking ability" system and providing incentives to use the system properly, Congress would create a workable copyright protection regime for live television streaming on the Internet.

#### CONCLUSION

Zuffa LLC and the UFC, as pay-per-view-driven companies, face enormous threats to the sanctity of their copyrights in the Internet era. While UFC President Dana White has embraced the Internet, he has also encountered in it a formidable foe. The DMCA and the courts interpreting it have done little to provide relief to content owners. This twelve-year-old legislation has proven archaic and needs an overhaul. The time has come for Congress to reassess how copyright owners and Internet service providers interact in light of new technologies. In the context of unauthorized live video streaming, time is of the utmost importance in stopping infringement. Creating a dialogue between content owners and ISPs through a third-party intermediary will help to provide needed relief to content owners more swiftly and

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less onerously than the current regime permits. This will help separate those websites meant to infringe from those that unwittingly infringe as a function of the service they provide. It will give content owners who rely on pay-per-view revenues and viewership of their live product a much more thorough degree of protection and will enable content creators like Zuffa to keep the hits coming.