



Brigham Young University Prelaw Review

Volume 22

Article 7

4-1-2008

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Collings, Clark (2008) "Viacom v. Youtube: The Crossroads of Copyright Law," *Brigham Young University Prelaw Review*. Vol. 22 , Article 7.

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VIACOM v. YOUTUBE:
THE CROSSROADS OF COPYRIGHT LAW

by Clark Collings¹

I. INTRODUCTION

When the borders of technology expand, copyright law must quickly expand with it to fill the void. If it cannot, anarchy is free to reign because the protection of the law is not provided. The issue is whether existing law can fill the gap, or if new law must be formed to keep new technology in check. In January 1984, the consumer release of the VCR rekindled this question. The debate reached the United States Supreme Court in the landmark copyright case of *Sony v. Universal City Studios*. Writing for the United States Supreme Court, Justice John Paul Stevens addressed this issue and suggested that one must find an equilibrium when applying copyright law to new technology: “. . . [interpreting copyright law] involves a difficult balance between the interests of the authors and the inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information and commerce on the other hand. . . .”² Once again, the expanding scope of copyright law has reached a new horizon, and the debate mentioned above, coupled with the balancing act described by Justice Stevens, takes center stage in the recent lawsuit of *Viacom v. YouTube*.

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2 *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, at 429 (1984).

YouTube has innovated and currently operates a video sharing and viewing website in which the user has free access to post and view a variety of copyrighted content (e.g. the Daily Show and SpongeBob SquarePants) and non-copyrighted content (e.g. a family vacation video). By providing Internet users with an online forum where they can post any type of video media they wish, copyrighted or not, YouTube has been accused of violating several copyright and intellectual property laws. Most recently, these claims have been presented by the colossal cable media company Viacom (owner of The Daily Show and Sponge Bob Square Pants). Viacom's copyrighted media has frequently been exposed on the YouTube website and Viacom is seeking damages for the infringement of their works. Michael Fricklas, general counsel for Viacom, further explained the amount of the copyrighted media on YouTube when he said, "In fact, Plaintiffs [Viacom] have identified more than 150,000 unauthorized clips of their copyrighted programming on YouTube that had been viewed an astounding 1.5 billion times."³ In addition to these unauthorized clips that have been identified, Viacom alleges that YouTube posts many more copyrighted videos that have not been identified due to the difficulty of searching every posted video on the site. For these reasons, Viacom is currently suing YouTube and its parent company Google for \$1 billion in damages for the alleged copyright infringement that has taken place on YouTube's website.

Justice Stevens' careful balancing act, described years before in *Sony v. Universal City Studios*, runs parallel with the current case of *Viacom v. YouTube*. It is clear that there is sufficient law available to fill the gap left by the growth of technology. However, it is not clear whether a decision for Viacom will stifle the "free flow of ideas"⁴ provided by YouTube's site, or if a decision for YouTube would fail to protect the interests of the artists, and hence stifle creativity and innovation. Nevertheless, the opinion of the court in *Fox Film Corp. v. Doyal*, explains the basic goal of copyright law: "The immediate effect of our copyright law is to secure a fair return for an author's

3 Michael Fricklas, Our Case Against YouTube, Washington Post, Mar 24, 2007, at A17.

4 Sony, *supra* note 2.

creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general good of the public.”⁵ Given this purpose of copyright law—and by following a roadmap of analyzing key definitions, legislative law, and related cases—one will conclude that YouTube’s business model prohibits artist innovation and that YouTube should be held liable for copyright infringement.

II. BACKGROUND

There are several phrases of legal language that must be defined before an explanation of existing copyright legislative and common law can be treated. This section will briefly define the following copyright law terminology: fair use, substantial non-infringing use, vicarious infringement, and contributory infringement. After these have been defined, this article will then explore the legislative law and common law cases from which the following definitions have been derived.

A. Key Definitions

1. *Fair Use/Substantial Non-Infringing Use*—Fair use and substantial non-infringing use are similar concepts and on a general level can be used interchangeably. For our purposes we will use the definition of fair use. It is defined by Black’s Law Dictionary as, “A reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody.” Copyright infringers often use fair use as a defense against liability in court. The concept of fair use is key when considering if a work has been used illegally or not. In regard to this concept, the opinion of the court in *Dellar v. Samuel Goldwyn* states that “[Fair use is] the most troublesome [problem] in the whole law of copyright.”⁶ Fair use is subjective in nature, causes confusion, and is central in *Viacom v. YouTube*.

5 Fox Film Corp. v. Doyal, 286 U.S. 123; at 52 (1932).

6 BLACK’S LAW DICTIONARY 634 (8th ed. 2004).

2. *Vicarious Infringement*—The idea of vicarious infringement is pivotal to the *Viacom v. YouTube* case, and is defined by Black’s Dictionary as, “A person’s liability for an infringing act of someone else, even though the person has not directly committed an act of infringement.”⁷ This act is also associated with the direct financial gain from a third party infringer.

3. *Contributory Infringement*—The doctrine of contributory infringement is closely related to vicarious infringement, and is divided into three parts: patents, copyright, and trademarks. The section regarding contributory infringement in the copyright arena is the section that is most applicable to the *Viacom v. YouTube* case. Black’s definition is as follows: “The act of either (1) actively inducing, causing, or materially contributing to the infringing conduct of another person, or (2) providing the goods or means necessary to help another person infringe.”⁸

B. Legislative Law

1. *United States Copyright Law*—Article I, Section 8 of the United States Constitution is the first point of interest when discussing the rights of authors and inventors, and it provides a means through which artists can protect their works. It states that “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁹ Furthermore, Chapter 11 of the Copyright Law of the United States of America helps to clarify this constitutional statement and align its intended meaning with that of the current issue of copyright infringement of video media on the Internet. Chapter 11 specifically deals with “Unauthorized fixation and trafficking in sound recordings and music videos.”¹⁰ A more detailed analysis of Chapter 11 will be introduced later in the article. This particular basic law has

7 *Id.* at 797.

8 *Id.* at 796.

9 U.S. Const. art. I, § 8.

10 17 U.S.C. § 1101 (2003).

the need to be clarified for the purpose of certain newer technologies, and for this reason the DMCA was created to provide this much needed clarification.

2. *DMCA*—Another piece of legislative law that is heavily considered in this discussion and even thought by some to be the heart of the *Viacom v. YouTube* case is the recent Digital Millennium Copyright Act (DMCA).¹¹ The DMCA contains five titles; the title most relative to the *Viacom v. YouTube* case is Title II. The basic purpose of Title II sometimes referred to as the “Online Copyright Infringement Liability Limitation Act,”¹² is to protect certain Internet Service Providers (ISPs), like AOL, from being liable for copyright infringement. In other words, it “creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.”¹³ To qualify to be protected, an ISP must fulfill specific criteria. If the criteria are met, the ISP is then considered protected under the DMCA as a safe harbor ISP.¹⁴ The DMCA is usually the first piece of law used when a more recent copyright case comes about, and an overall knowledge of its purpose is necessary when considering the *Viacom v. YouTube* case.

C. Common Law Cases

In addition to the above legislative law, there is also a large amount of common law that applies to the particular case of *Viacom v. YouTube*. In this section, a short summary of each case with brief comments will provide a general knowledge of past and present issues in copyright law. Concerning the importance of common law, Justice Souter stated in *MGM v. Grokster* that “these doctrines of secondary liability emerged from common law principles and are

11 The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

12 *Id.*

13 *Id.*

14 Brian P. Wikner, Comment, Copyrights to Come, Santa Clara Computer & High Tech. L.J. 949 (2006).

well established in the law.”¹⁵ An understanding of the following case law and the associated precedent is vital to understand the arguments of Viacom and YouTube.

1. *Buck v. Jewell-La Salle Realty Co.*—In 1931, a hotel owner was found liable for contributory infringement as the hotel broadcasted a popular radio show into each hotel room even after being notified that the radio program was infringing on copyrights. Although there was no agreement between the radio show and the hotel, the hotel benefited from the infringement of another. The court found that the La Salle Hotel was liable for infringing performances when it (1) could control the premises, and (2) obtained direct financial benefit from the audience, who paid to enjoy the infringing performance.¹⁶

2. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*—Another fundamental case in which contributory and vicarious infringement were key issues was *Gershwin Publishing Corp. v. Columbia Artists Management Inc.* In this case, Columbia Artists Management, Inc. a concert artist management company was found liable for vicarious infringement when one of its performers publicly performed a song “for profit at a concert . . . without the permission of the plaintiff Gershwin Publishing Company, the copyright proprietor. . . .”¹⁷ In his opinion, Judge Anderson explained that “one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁸ Judge Anderson continued when he stated, “Similarly, one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer. . . .”¹⁹ The following

15 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, at 930 (2005).

16 *Buck v. Jewell-La Salle Realty Co.* U.S., 23 U.S. 191, 51 S. Ct. 410 (1931).

17 *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F2d 1159, at 1160 (1971).

18 *Id.* at 1162.

19 *Id.*

statement was then known as the “Gershwin Supra” and was applied to several cases thereafter. Again, one must consider and apply the same violations committed in this case to the case at hand, *Viacom v. YouTube*. In the analysis, the “Gershwin Supra” will be applied to our current case.

3. *Sony v. Universal City Studios, Inc.*—As mentioned in the introduction, one of the landmark cases regarding copyright infringement and fair use is the *Sony v. Universal City Studios* case. This case has been cited in a variety of copyright cases and has transformed the way copyright law has been tailored to new technological advances.

In the late 1970s and the early 1980s, Sony was manufacturing and selling a home recording device called the Betamax Video Tape Recorder (VTR). This new device allowed home users to record and retain live television public broadcasts. Universal City Studios saw this act of recording their live broadcasts as infringing and sought relief from the legal system. The Supreme Court rejected Universal City Studios appeal, and Sony was found not liable for copyright infringement. The manner in which the Supreme Court came to this decision is extremely relevant to the argument between Viacom and YouTube, and a further explanation of the court’s opinion will be treated.

The most relevant principle in the Sony case is that of substantial non-infringing use of copyrighted material. This means that the product is capable and used for many legal purposes in addition to some illegal purposes. The Court found that the chief use of the VTR was to watch programs for which a person could not be physically present to watch. This practice, known as time-shifting, enlarges the television viewing market. The court concluded that the VTR fell under the doctrine of substantial non-infringing uses, and that “Sony’s sale of such equipment to the general public does not constitute contributory infringement of respondent’s copyrights.”²⁰ The following opinion of the Court has come to be known as the “Sony Standard,” and will be applied to several cases in the future.

20 *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct.774, at 456 (1984).

4. *Fonovisa Inc. v. Cherry Auction Inc.*—In the seemingly unrelated case of *Fonovisa Inc. v. Cherry Auction Inc.*, another ruling in regard to vicarious and contributory infringement was handed down. Cherry Auction owned and operated a local flea market management group. It was held liable for vicarious copyright infringement because, even though they were unaware, a certain booth in their market was selling copyrighted music. The criteria for vicarious infringement was fulfilled when the court proved that Cherry Auction benefited financially from the sale of the copyright music because of the revenues it received from admission fees, parking fees, and concession stand sales at the flea market. Cherry Auction was also held liable for contributory infringement because it was directly involved with providing the infringers with services and amenities such as retail space, parking, advertising, and most important, customers.²¹ The logic and application of law used in this case is pivotal in proving that YouTube has very little protection when it comes to providing a digital flea market for blatant infringement.

5. *A&M Records, Inc. v. Napster*—Another Internet media provider like YouTube who was recently held liable for copyright infringement was Napster, Inc. Two of the underlying principles in this case are the definition and application of the term fair use, and Napster's attempt to find safe harbor under the DMCA.

Napster provided software that allowed users to exchange MP3 file through a process called peer-to-peer file sharing.²² Another pivotal part of Napster's file sharing empire was not only dependant on the peer-to-peer sharing, but also on the fact that Napster uploaded this music to their own servers and then transferred the music to the users. Many of these shared files were copyrighted music files owned by A&M Records. With this direct infringement in mind, A&M Records filed a lawsuit against Napster in 2000. Napster argued two of the following issues: (1) that they were protected under the DMCA, and (2) that they were not liable because its users were "engaged in [the] fair use of the material."²³ In regard to fair use, Napster sought

21 *Fonovisa Inc. v. Cherry Auction Inc.*, C.A. 9 (Cal.), at 263–264 (1996).

22 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, at 1011 (2001).

23 *Id.* at 1014.

protection under the Sony doctrine, the idea upon which substantial non-infringing uses protect the alleged violator from liability. In this case, Napster likened its space-shifting of music to Sony's time-shifting of television shows. However, the court concluded that Napster's users were not fair users under the argument that when a user space-shifts a certain MP3 file in Napster's peer-to-peer environment, the copyrighted file is then distributed to the general public. This is unlike the Sony VTR, where the copy stays in the users' home. The Ninth Circuit Court also ruled that Napster was not considered an applicable candidate for safe harbor under DMCA. The outcome of this case was pivotal for developing software companies and further refined the use of the "Sony Standard."

6. *Metro-Golden-Mayer Studios Inc v. Grokster, LTD.*—This case was argued before the United States Supreme on March 29, 2005, and contains all the basic elements in *A&M Records v. Napster*. MGM sued Grokster for copyright infringement due to Grokster's peer-to-peer sharing network that provided users the opportunity to download copyrighted music and video owned by MGM artists. Grokster even used a similar defense to that used by Napster. In addition, Grokster contended that they were not liable because they did not house the copyrighted MP3's on their own servers. In light of this evidence the court still found Grokster liable for contributory infringement and Grokster was forced to shut down their operations.²⁴

7. *Robert Tur d/b/a Los Angeles News Service v. YouTube*—*Robert Tur v. YouTube* is one of the first and most recent copyright lawsuits to be brought against YouTube. Several months before Viacom filed its suit against YouTube, Robert Tur filed a suit in complaint that YouTube was infringing copyrighted media he filmed during the 1992 Los Angeles riots. Although the court has not come to a decision yet, shortly after the suit was filed, YouTube motioned for partial summary judgment under the DMCA. YouTube's motion was denied by the court under the argument that YouTube had insufficient evidence regarding the process that takes place from the act

24 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, (2005).

of the user's video upload to YouTube's server to the final posting of that video on YouTube's website. Due to the vague nature of YouTube's business model, the court was unable to consider YouTube for immediate protection under the DMCA.

III. ANALYSIS

Now that the basic principles, existing legislature, and current rulings regarding copyright law have been explained, we can apply this understanding to the key issues to *Viacom v. YouTube*. First, a discussion and application of YouTube's probable defense to Viacom's claims will be treated. Afterwards, Viacom's argument will be presented so that one will conclude that YouTube's business model prohibits artist innovation and that YouTube should be held liable for copyright infringement.

A. *YouTube's Defense*

Three of YouTube's main arguments against Viacom's claims of copyright infringement are as follows: (1) their site's substantial non-infringing uses and the Sony Standard, (2) their alleged protection under the DMCA, and (3) the fact that they do not encourage infringement among its users and cannot control their actions.

1. *Substantial Non-Infringing Uses and the Sony Standard*—YouTube claims that there exists a sufficient amount of non-infringing uses on its website to conclude that its service qualifies to be protected under the Sony Standard. Much like the idea of time-shifting of television shows, according to YouTube, a viewer may use the site to watch a television show they missed. Many authorized commercial uses are available on the YouTube site in addition to copyrighted works that have been approved for use by its owners. Another particular non-infringing benefit of YouTube is that “[s]ociety may benefit because YouTube provides an alternate forum compared to traditional methods of educating and influencing the public. . . . Unlike expensive television commercials, YouTube provides a free venue for the government and politicians to air their messages

to audiences traditionally difficult to reach.”²⁵ In addition to political candidates posting campaign information on YouTube, recently CNN and YouTube have teamed up to take full advantage of the 2008 presidential election. Several public debates between primary presidential candidates have been posted, and YouTube users have been given the opportunity to ask the candidates questions through a video posting. YouTube may consider the above uses sufficient to qualify for protection under the Sony Standard, but it also regards the DMCA as another protection against liability.

2. *Protection under the DMCA*—YouTube asserts that it qualifies for the safe harbor provision under the DMCA because of the nature of the services it provides. YouTube considered itself a service that provides the “storage of information on systems or networks at direction of users.”²⁶ As mentioned above, under this type of service, YouTube must pass the following requirements:

- (1) The provider must not have the requisite level of knowledge of the infringing activity. . . .
- (2) If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.
- (3) Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.²⁷

To qualify for requirement one, YouTube claims they cannot control what happens on their site, hence exonerating themselves of any infringement liabilities. Requirement two is fulfilled in YouTube’s eyes because they also claim to receive no financial benefit from the video on their site. In the *Tur* case they claimed that “[YouTube] does not receive a financial benefit directly attributable to the allegedly in-

25 Michael Driscoll, Article, *Will YouTube Sail into the DMCA’s Safe Harbor or Sink for Internet Piracy?* J. Marshall L. Rev., 556 (2007).

26 The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

27 *Id.*

fringing activity.”²⁸ In regard to the last requirement, YouTube states that as soon as they are alerted to infringing activities on their site, they immediately remove the material. If the above claims are true, then YouTube should be protected under the DMCA. In addition to their safe harbor defense, YouTube also stands by the fact that they lack control of their site and discourage infringement.

3. *Discouragement of Infringement and Control of Activity*—YouTube has expressed their stance in regard to their involvement in the infringing activity that is taking place on their site; they state,

“We don’t control the content on our site. Our users post the content on YouTube—including videos, comments, and ratings. Our community guidelines and clear messaging on the site make it clear that users must own or have permission from copyright holders to post any videos. We take copyright issues very seriously. We prohibit users from uploading infringing material and we cooperate with copyright holders to identify and promptly remove infringing content.”²⁹

YouTube also stated in the Tur case that “it does not have the right or ability to control the infringing activity.”³⁰ Though this defense did not hold up in the Napster and Grokster courts, YouTube is unique in the fact that it discourages infringement on its site as opposed to the preceding two companies.

B. Viacom’s Argument

Viacom may claim that YouTube is liable for copyright infringement because, (1) YouTube is not in accordance with Chapter 11 of the Copyright Law of the United States of America, (2) YouTube receives direct financial gain for the infringing acts, hence qualifying

28 Robert Tur d/b/a Los Angeles News Service v. YouTube, 2007 U.S. Dist., 3 (2007).

29 YouTube Fact Sheet, http://youtube.com/t/fact_sheet (last visited Mar. 15, 2007).

30 Robert Tur d/b/a Los Angeles News Service v. YouTube, 2007 U.S. Dist., Lexis 50254, at 3 (2007).

it for vicarious infringement, (3) YouTube is liable for contributory infringement because of the medium it provides for the copyright infringement, (4) YouTube does not provide ample fair use and non-infringing activities to be protected under the Sony Standard, and (5) YouTube does not qualify for safe harbor under the DMCA, therefore not protected from liability.

1. *United States Copyright Law*—If one were to examine the *Viacom v. YouTube* case from a distant perspective, they would quickly consider the most basic copyright law set in place in Chapter 11 of the Copyright Law of the United States, which is to protect the interest's of inventors and artists. As explained above, Chapter 11 clarifies the following as “unauthorized acts”.³¹

Anyone who, without the consent of the performer or performers involved—(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation, (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord. . . .³²

The service's provided on YouTube's site fits into each of the above categories. YouTube reproduces, transmits, communicates, offers, and traffics—without the permission of artists—copies of the artist's performances. This piece of law should be enough to demonstrate the illegality of YouTube's business practice. However, there is an enormous amount of case law that protects artists from what YouTube provides internet users.

2. *Direct Financial Gain and Vicarious Infringement*—In the official complaint to the District Court for the Southern District of New York, Viacom has claimed that “YouTube deliberately built up a library of infringing works to draw traffic to the YouTube site,

31 U.S. Const. art. I, § 8.

32 *Id.*

enabling it to gain a commanding market share, earn significant revenues, and increase its enterprise value.”³³ YouTube makes its revenues from selling advertising space on its website and drawing users to the site with its video content to see the placed advertising. Michael Fricklas, general counsel of Viacom, explains how YouTube earns its revenues as opposed to other web services. He says, “YouTube reaps financial benefits from that attraction through selling the traffic to advertisers . . . it lures consumers and competes by having great content—a resoundingly substantial part of which it did not create or pay for.”³⁴

As the common law cases cited above explain, when a third party infringer receives direct financial gain from a certain infringing activity, they are liable for vicarious infringement. In *Buck v. Jewell-La Salle Realty Co.*, the La-Salle Hotel was held liable for infringing performances when it was proven that it obtained direct financial benefit from playing copyrighted music through a master radio receiving set to its hotel guests who paid to enjoy the infringing performance. In the same fashion, YouTube has a master radio receiving set wired into homes, offices, schools, and internet cafes, broadcasting copyrighted material.

Another example of vicarious infringement mentioned above is *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, The opinion of the court stated the cause for liability in a vicarious infringement and financial gain case. It states, “even in the absence of an employer-employer relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”³⁵ Though YouTube has no direct relationship with its users, it definitely receives financial gain from its users much like the Columbia concerts.

These two cited cases clearly demonstrate that one who directly benefits from infringing activities is liable for vicarious infringe-

33 Compl. ¶ 5.

34 Michael Fricklas, *Our Case Against YouTube*, Washington Post, Mar 24, 2007, at A17.

35 *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F2d 1159, at 1160 (1971).

ment. There is little difference between the La Salle Hotel, the Columbia concerts, and YouTube. Each of the three profited vicariously from copyrighted works. If these companies were held liable, there is no reason why YouTube should not be held liable.

3. *YouTube and Contributory Infringement*—YouTube provides its users with the means to post and watch the infringing material on YouTube’s website. In fact, YouTube goes as far as storing the copyright works on their own servers and allowing the users to access the video from YouTube. Viacom also identified that YouTube has a feature that allows any website to have an embedded YouTube video interface. “When a user clicks the play icon [on the host site], the embedded video plays within the context of the host website, but it is actually YouTube, not the host site, that publicly performs the video by transmitting the streaming video content from YouTube’s own servers to the viewer’s computer.”³⁶ The implication of this act is astounding. Not only is the copyrighted media exposed on YouTube’s website, but it is potentially available on any website on the entire Internet. Meanwhile, YouTube provides the software and the storage space for these infringers to perform such actions.

The services performed by YouTube that are described above are defined as contributory infringements, and resemble the acts performed by the liable parties described in the common law section. First, *Fonovisa Inc. v. Cherry Auction Inc.* demonstrates the fact that a simple flea market owner was held liable for contributory infringement when a booth at his market was selling copyrighted music. Judge Schroeder stated in this case that “[p]roviding the site and facilities for known infringing activity is sufficient to establish contributory liability.”³⁷

There is little difference between Cherry Auction’s open-air flea market and YouTube’s digital flea market. YouTube is providing the facilities for known infringement and should be held liable as was Cherry Auction. Second, *Grokster* was found liable for providing a peer-to-peer network for infringement to take place. In this case, *Grokster* did not even store the media on its own servers, but provid-

36 Viacom, *supra* note 33, at ¶ 32.

37 *Fonovisa Inc. v. Cherry Auction Inc.*, C.A. 9 (Cal.), at 263–264 (1996).

ed the means whereby its users could download material from others' computers. To repeat the opinion of the court, Justice Souter's states, "We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."³⁸ If Grokster was liable under the preceding ruling, then YouTube should be held liable for housing copyrighted media on its servers. It is obvious by the manner in which YouTube provides its services, and the law created by *Cherry Auction* and *Grokster*, that YouTube is also liable for contributory infringement.

4. *Sony Standard Does Not Apply*—Another barrier YouTube has erected to guard itself from taking responsibility for the infringing activity on its site is the protection provided by the Sony Standard. As already mentioned above, YouTube considers its services as a means to provide fair use and substantial non-infringing uses. Both *Napster* and *Grokster* tried to seek protection under the same standard and failed to prove that their products supplied enough non-infringing uses to qualify.

Napster argued that time-shifting of music qualified for fair use. YouTube could make the same argument by stating that its users utilize the YouTube software to watch their favorite shows at a different time than when it was originally broadcasted. However, the same ruling handed down in the *Napster* court is applicable to YouTube's argument. The *Napster* court concluded that "it is obvious that once a user lists a copy of music he already owns on the *Napster* system in order to access the music from another location, the song becomes 'available to millions of other individuals,' not just the original user."³⁹ Furthermore, the *Sony* court stated that *Sony* was not held liable for infringement because the respondents [*Universal City Studios*] failed to demonstrate that time-shifting would cause any likelihood for non-minimal harm to the potential market for,

38 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, at 919 (2005).

39 *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, at 1019 (2001).

or the value of, their copyrighted works.⁴⁰ In YouTube's case, the so-called time-shifting of videos does cause harm to the value and potential market of Viacom's copyrighted works.⁴¹

In the *Grokster* case, *Grokster* claimed that they received protection under the Sony Standard not because of time-shifting, but because they alleged their product to contain substantial non-infringing uses. In response, the court denied *Grokster* the protection of the Sony Standard as a defense and made the distinction between *Grokster* and Sony. This comparison and the above statements confirms that if the Sony Standard did not apply to *Grokster* and *Napster*, it should not be applied to YouTube.

5. *DMCA Does Not Apply*—The final loose link in YouTube's armor is its perceived protection under the DMCA. YouTube does not receive safe harbor under the DMCA because (1) it does not qualify for the safe harbor requirements, and (2) because previous cases with similar circumstances have denied YouTube, and similar companies, protection under the act.

As stated above, the requirements set by the DMCA for a company to receive safe harbor is that the company is a specific type of internet service provider (ISP) and fulfill the qualifications associated with that particular ISP standard. The only requirement that YouTube does fulfill in the DMCA is that it is used as a storage of information, that is the storage of copyrighted material for infringers.⁴² Other than that, YouTube does know and can control infringers on its site, and as has already been stated, YouTube receives direct financial benefit from the infringement. Therefore, under the current requirements stated by the DMCA, YouTube does not qualify for safe harbor.

In addition to YouTube not qualifying for the DMCA requirements, two separate courts have determined that the DMCA should not be applied to YouTube and similar companies. The *Napster* court

40 Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S.Ct.774, at 456 (1984).

41 Viacom, *supra* note 37.

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

states “we need to accept a blanket conclusion that Section 512 of the DMCA will never protect secondary infringers.”⁴³ In addition to this strong language, the court in the current case of *Tur v. YouTube* rejected YouTube’s motion for summary judgment under the protection of the DMCA. The *Tur* case stated:

There is insufficient evidence regarding YouTube’s knowledge and ability to exercise control over the infringing activity on its site. . . . YouTube also asserts that while it is able to remove clips once they have been uploaded and flagged as infringing; its system does not have the technical capabilities needed to detect and prescreen allegedly infringing videotapes. . . . Thus, there is insufficient evidence from which the court can determine YouTube’s right and ability to control the infringing act.”⁴⁴

YouTube’s motion for summary judgement was denied because their business model is too vague to be considered for safe harbor under the DMCA. These two court cases and the additional evidence presented are sufficient to establish that YouTube has no protection against the impending copyright infringement liabilities and should be exposed to the full measure of the law.

IV. CONCLUSION

As a result of the preceding arguments, it is apparent that YouTube stands liable for a multitude of copyright infringements. Because of the manner in which YouTube executes its business model, it has denied a fair return for artists’ creative work.⁴⁵ Whether YouTube is providing the means that enables its users to infringe or profiting from the traffic these copyrighted works attract, they cannot escape the consequences of breaking the law. For now, holding YouTube liable in its current case with Viacom will bring justice and

43 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, at 1011 (2001).

44 Robert Tur d/b/a Los Angeles News Service v. YouTube, 2007 U.S. Dist. Lexis 50254 at 2–4 (2007).

45 *Id.*

compensation to the artists whose works have been infringed. More permanently, it will help companies like YouTube refine the way in which they provide services to their users and fill the void left by expanding technology with a precedent that will protect artists far into the future.