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A Safer Harbor

LINDSEE GENDRON*

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I. INTRODUCTION

Copyright law is not prepared for today's world. It cannot protect rights holders from having their works exploited at the simple click of a button. And no wonder: the relevant legislation is almost ten years old. In 1997, when the Digital Millennium Copyright Act ("DMCA")[1] was introduced, there were only about fifty-eight million internet users in the United States.[2] Ten years later, over fifty-six million users log on to YouTube alone each month.[3] Video sharing sites like YouTube have many infringing works posted to their site and they receive upwards of 65,000[4] new video uploads per day, making video sharing sites a copyright holder's worst nightmare. The copyright holders cannot police it all themselves and, when they turn to the law, they do not find the helping hand they deserve.

Through the DMCA, Congress has created the safe harbor provision ("Safe Harbor") for online service providers ("OSPs"). This Safe Harbor shields an OSP from liability for infringing materials found on its site as long as the OSP can meet these tests: (1) it "does not have actual knowledge that the material is infringing;" (2) it receives no financial benefit from the infringing activity; and (3) it removes the infringing material quickly upon notification by the copyright holder.[5] An OSP must do very little to be eligible for Safe Harbor. In fact, it does not have to do anything at all until it receives a takedown notice from a copyright holder. The standard is easy to meet because Congress recognized the value of both sites like search engines and the development of new internet technologies and wanted to ensure their protection.[6]

Sharing sites have been operating under the Safe Harbor. They do little to prevent the uploading of copyright infringing materials and, instead, simply remove these materials as they receive takedown notices. This policy is not ideal, as it leads to results that do not balance the interests of both sides. It results in the copyright holder policing all of these sharing websites and sending notices for every infringing upload, while the site has no responsibilities. Not only does this overly burden the copyright holder, but it also creates no incentive for the websites to invest in the development and application of new technologies that protect copyrights. Also, unlike search engines, sharing sites can bear the burden of some responsibility without stifling new technologies or destroying the site. The amount of material to police is much less, as the sites are not searching the

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[*] Author Bio Needed.

[1] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in Title seventeen of the United States Code) (listing effective date of Oct. 28, 1998); Digital Millennium Copyright Act, 98 CIS PL 105304 (LexisNexis Oct. 28, 1998) (citing Presidential Statement on Oct. 28, 1998); *Bill Tracking Report HR 2281*, 105 Bill Tracking H.R. 2281 (LexisNexis Oct. 20, 1998) (The DMCA was introduced on July 29, 2007 and was enacted and become effective on October 28, 1998).

[2] OracleDBAExpert, *Internet Usage Analysis*, http://oracledba.ezpowell.com/info/internetUsage.html (last visited Feb. 1, 2010).

[3] Nielsen//NetRatings, *Nielsen//NetRatings Reports Topline U.S. Data for August 2007*, http://www.nielsen-netratings.com/pr/pr_070910.pdf.

[4] Pete Cashmore, *YouTube Hits 100 Million Videos Per Day*, MASHABLE: THE SOCIAL MEDIA GUIDE, July 17, 2006, http://mashable.com/2 006/07/17/youtube-hits-1-million-videos-per-day.

[5] 17 U.S.C.S. § 512(d) (LexisNexis 2009).

[6] 144 CONG. REC. H7074, 7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank); *see generally* 144 CONG. REC. S4884 (daily ed. May 14, 1998).

entire internet, but only their own sites. For this reason, sharing sites should not be granted the same level of unrestricted protection as other OSPs like search engines.

However, sharing sites should not be granted so little protection that they take on too much risk and cannot be profitable, because they do have value. They allow people to express themselves and share those expressions with others, giving new authors a chance to display their works to the world.[7] Therefore, the promotion of these sites is good public policy, and they should be afforded some level of protection.

In order to strike a balance between these competing rights, a Safe Harbor that is specific to sharing sites[8] must be created. A revised proposed standard would have more requirements than the Safe Harbor currently in place for internet service providers. The proposed requirements are that the site proprietor: (1) does not have actual knowledge that the material is infringing; (2) receives little financial benefit[9] from the copyrighted materials; (3) removes infringing material promptly upon the receipt of takedown notices; and (4) actively polices the site for infringement using filtering technology having a success rate at least equal to current industry standards. This provision would keep much of the current Safe Harbor while conceding that some financial benefit is inevitable from traffic gained from copyrighted materials. It also continues to encourage the copyright owners to search for their materials and work with the websites, leaving some of the burden of copyright protection on the copyright owners. It, however, adds the element of active policing, which shall include the utilization of filtering technologies, such as watermarking and filtering, for detecting infringement. This active policing places a shared burden on the sites to protect the copyright owners, while still shielding them from much of the potential liability. The result of the new Safe Harbor is that the rights of copyright holders receive more protection while the responsibility of protection is more balanced by the shifting of some of the burden to the websites, while still protecting the websites so that they will remain available for their legal uses.

Part I of this article describes the DMCA Safe Harbor in its current form and discusses the reasons behind its enactment. Part II will explain what sharing sites are and how they run their sites in respect to copyrights. Part III argues that the current DMCA Safe Harbor should not apply to such sharing sites. Part IV presents a new version of the Safe Harbor that should be applied to the sites. Part V applies this new test to a variety of real and hypothetical cases to demonstrate its results.

II. THE DCMA SAFE HARBOR

A. *The Legislation: 17 U.S.C § 512(c)*

[7] *Video-sharing Sites let Scientists show off*, HOLLYWOOD REPORTER, Dec. 3, 2007, http://www.hollywoodreporter.com/hr/content_display/business/news/e3ic663debf321a4f2a3dc72788eb89 80d0; *see also* JoVE: Journal of Visualized Experiments, http://www.jove.com (last visited Feb. 1, 2010) (providing an excellent example of the worth of sharing sites is JoVE, which is a user generated video outlet for scientific research).

[8] Sharing sites, for the purposes of this article, are defined as sites that store user generated materials on their server at the direction of users.

[9] *See infra* Part III (defining "little financial benefit").

As part of the DMCA, the Safe Harbor was codified in 17 U.S.C § 512 and labeled "Limitations on Liability Relating to Material Online."[10] It is entitled The Online Copyright Infringement Liability Limitation Act ("OCILLA"), and is commonly referred to as the Safe Harbor Provision ("Safe Harbor").[11] It protects service providers, which can include many different entities,[12] from secondary liability for copyright infringement under certain circumstances.[13] Secondary liability is liability not for actually infringing, but for contributing to the infringement.[14]

A service provider can take many shapes. An internet service provider ("ISP") typically provides internet connectivity, such as Time Warner's Roadrunner cable broadband service or Verizon's DSL service. An online service provider ("OSP"), however, is not limited to such a narrow set of characteristics. An OSP is simply what it says: an entity that provides services online.[15] An OSP can include search engines, newsgroups, bulletin board hosts, and even email providers. One other type of OSP that may be shielded from secondary liability, and the most important for the purposes of this paper, is an entity that, at the direction of a user, allows information to reside on its system or network and allows others to access this information.[16] The uploading of this information is commonly known as "posting."

As long as a service can be labeled an ISP or OSP, it can be shielded from liability by this Safe Harbor. The last type of OSP named above receives its protection under 17 U.S.C § 512(c).[17] Thus, as long as the OSP does not know about the infringing

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[10] 17 U.S.C.S. § 512(c).

[11] *See id.*

[12] *Id.* § 512(k)(1)(A), (B) (defining service provider as "a provider of online services or network access, or the operator of facilities therefore, and includes an entity" which "offer[s] the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received").

[13] *See id.* § 512 (providing protection for service providers when they offer transitory network communications, system caching, information location tools, they have information residing on systems or networks at direction of users, or it is a non-profit educational institution).

[14] MGM Studios v. Grokster, 545 U.S. 913, 930 (2005) (defining secondary liability as "[o]ne [who] infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it[]").

[15] "Services" seems very broad, because that is exactly what it is meant to be. Almost any provider of a service available on the internet may be considered an OSP. "Services" cannot be overestimated.

[16] For purposes of this paper, OSPs shielded from secondary liability will be the only type of OSP to be referenced unless otherwise noted.

[17] Pursuant to 17 USC § 512, regarding information residing on systems or networks at the direction of user:

> (1) In general. A service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—
>
> (A)
>
> (i) does not have *actual knowledge* that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

material, doesn't directly generate revenue from it, and takes it down once it is asked, the OSP cannot be held secondarily liable for the infringement.[18]

These three elements – knowledge, financial benefit, and takedown – are all that need to be considered for protection from liability under this current Safe Harbor.[19] There is little that an OSP has to do to meet these requirements. In fact, the only affirmative step that the OSP must take is to simply remove infringing materials once they are informed of the presence of these materials by the copyright holder.[20] Congress stated that the sharing sites would have no requirements to actively search for the materials and police their sites.[21] Nor do they have any requirements to take affirmative steps to seek out facts that may indicate infringing activity or the presence of infringing materials.[22] If they do discover infringing materials, they must remove them.[23] Also, such site review that would lead to a discovery of infringement puts the site at risk of having had knowledge, which opens the sharing sites up to infringement. Therefore, the current rule not only lacks active encouragement of responsible monitoring, but it also results in a "race to the bottom" where all sites try to show no knowledge of what happens on their site.

B. The Reasons Behind The Legislation

Congress passed this legislation with some important goals in mind. The copyright holders wanted their works to continue to be adequately protected. At the same time, there must be enough incentive for the continuing research and development of new technologies in order to continue making strides toward the future. In creating the legislation, Congress recognized that their new law would have to strike a balance between these two equally important but competing interests.[24]

There is much to be lost if copyrighted works are not effectively protected. Copyright holders will lose a great deal of the value and profit from their works as infringers view and share these works at no cost. But they are not the only ones who stand to lose from this infringement: all of society stands to lose. The goal of copyright is to promote the creation of works, so that we may continue to make great strides in the

---

> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
>
> (B) 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; and
>
> (C)upon *notification* of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C.S. § 512(c)(1) (emphasis added).

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See generally* 144 CONG. REC. H7074-104 (daily ed. Aug. 4, 1998); 144 CONG. REC. S4884-900 (daily ed. May 14, 1998).

[22] *See generally* 144 CONG. REC. H7074-104; 144 CONG. REC. S4884-900.

[23] *See* 17 U.S.C.S. § 512(c)(1).

[24] 144 CONG. REC. H7074, 7093 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley); 144 CONG. REC. S4884, 4887, 4894 (daily ed. May 14, 1998) (statements of Sens. Leahy and Biden).

arts and sciences. If works are no longer receiving enough protection, then the artists who create them will no longer be incentivized to continue to create them.[25] Congress recognized the importance of America's contribution to the art of the world and created a law that they believed would protect it.[26] They provided for takedown notices so that copyright owners may protect their material. They also allowed OSPs to remove materials subject to the takedown notices immediately, in order to ensure that the posting would do minimal damage. Congress believed that this law would adequately protect the copyright holders and "ensur[e] that America will remain the world leader in the development of intellectual property."[27]

There is also much to be lost if new technologies are under-protected. If there is too much risk of liability, then researchers and designers of new technologies will not accept that risk. There will no longer be significant developments in the field and the United States will no longer set the pace in the technological world. Congress decided that both shielding the OSPs from liability and providing them with clear-cut guidelines, which are easily understood and followed, would be the best way to ensure the United States' continued successes in the technological world.[28] According to Senator Hatch: "In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand."[29]

III. SHARING SITES

A. *Sharing Sites Defined*

A sharing site is an entity that, at the direction of a user, allows information to reside on its system or network and allows others to access this information. At the time that the DMCA was enacted, this definition primarily included blogs or multi-purpose sites.[30] While used by many to share ideas and beliefs, they had not yet matured into the major source of copyright infringement that they would soon become.[31]

Today, sharing sites are not so limited. They no longer account for only a tiny fraction of internet use. Nor are they limited to minor use on major websites. Instead, sharing sites are the fastest growing type of service available on the web. They now account for as much internet use as search engines, and they are surpassed only by email[32]. They are also no longer limited to blogs and bulletin boards, and there are now well over fifty of them,[33] with uses vastly different from their decade-old counterparts.

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[25] *See* 144 CONG. REC. H7074, 7095 (statement of Rep. Goodlatte).

[26] *See id.*

[27] 144 CONG. REC. H7074, 7095 (statement of Rep. Goodlatte).

[28] 144 CONG. REC. S4884 (statement of Sen. Hatch) ("Without clarification of their liability, service providers may hesitate to make the necessary investment to fulfill that potential.").

[29] *Id.* at S4884-85 (statement of Sen. Hatch).

[30] Examples of multi-purpose sites includes AOL or Yahoo, both of which offer a variety of features that include groups where users may post information on blogs and bulletin boards. *See* AOL.com, http://www.aol.com (last visited Feb. 1, 2010); Yahoo!, http://www.yahoo.com (last visited Feb. 1, 2010).

[31] Information shared on such sites now includes videos, music, and photographs, as well as textual works. These works are considered "materials" in this paper.

[32] The Nielson Company, *Ad Relevance at a Glance: Top Site Genres*, http://www.nielsen-netratings.com/resources.jsp?section=pr_netv&nav=1 (last visited Feb. 27, 2010) (discussing that

Sharing sites have been created and are used in countries all over the world.[34] There are many sites with different levels of popularity and various uses. Some sites, such as VideoEgg, are used primarily for editing videos.[35] Others, like Photobucket focus on sharing photographs rather than videos.[36] Still others, such as YouTube,[37] Veoh,[38] and Dailymotion,[39] provide for the uploading and sharing of videos. Even the sites that are primarily serving the same purpose are not all the same. Some sites allow more editing than others; some do not allow it at all. Some of the video sharing sites do not require any limits on the length of the videos. Of the video sharing sites that do have length limits, the time restrictions vary by site. Some have distribution options; others require an account. Most have privacy options, although these also vary by site. Some sites are family friendly and easy to use, while others are more complicated and meant for the more advanced user. Despite the long list of differences, there is one feature that these sites have in common: all allow users to share potentially copyrighted materials.

B. How Sharing Sites Act

It does not take a significant amount of effort to locate copyrighted materials on the internet. In truth, it takes almost no effort at all. A simple search of YouTube immediately showed numerous copyrighted works. For instance, in March 2009 a search for "South Park" returned over 44,000 results.[40] But, there is no need to search through page after page to find the illegally posted, infringing works. The second video listed on the first page of results was "Part 3" of an episode.[41] It was posted by "copyrightviolator1" for just one week, but it had already been viewed 42,155 times. This simple search that took less than a minute highlights the current state of sharing sites. Little protection is afforded to copyright holders. Most sites have not policed themselves or reviewed uploaded materials before posting them. Repeat infringers are not stopped from creating new accounts. Only materials at the exact URL of a takedown notice are removed, leaving identical or nearly identical works posted all over the sites.[42]

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entertainment sites account for 9% of internet usage, which include more than just sharing sites, but not sports and recreation, news, weather, community and local, auctions, or shopping sites).

[33] These sharing sites include Blip.tv, VideoEgg, Dailymotion, YouTube, Veoh, Grouper, Jumpcut, Eyespot, Fliqz, Revver, MySpace, Vimeo, vMix, Bolt, vSocial, Yahoo Video, Ourmedia, and many more. Robin Good and Michael Pick, *Video Publishing Online: Where To Share Your Video Clips On The Web*, ROBIN GOOD'S MASTERNEWMEDIA, Nov. 25, 2006, http://www.masternewmedia.org/news/2006/ 11/25/video_publishing_online_where_to.htm.

[34] Although, for the purposes of this paper, I will focus only on those that come within the scope of US law.

[35] Light Reading, *Top Ten Video Sharing Websites*, Aug. 14, 2006, http://www.lightreading.com/ document.asp?doc_id=100934&table_number=1&page_number=&site=.

[36] *Id.*

[37] *See generally* YouTube, http://youtube.com.

[38] *See generally* Veoh, http://www.veoh.com/.

[39] *See generally* Daily Motion, http://www.dailymotion.com/us.

[40] Search conducted by author in March of 2009.

[41] The length limitations of the site do not allow full length episodes to be posted, so users divide the episodes into three parts, which are posted separately and labeled "Part 1," "Part 2," and "Part 3."

[42] Viacom v. YouTube, No. 07-CV-2103, 2007 U.S. Dist. Ct. Pleadings 2103, at *15-16 (S.D.N.Y. 2007).

Thus, the sharing sites have done little to respect the copyrights that are enduring rampant infringement.

As time has passed and the lawsuits have piled up,[43] however, the sharing sites have begun to do more to protect copyrighted material. Many are now taking affirmative steps in the right direction. For instance, YouTube has recently added video fingerprinting technology to identify infringing works.[44] MySpace added similar technology in 2007.[45] YouTube has also added a time limit for uploaded videos: they can no longer be over ten minutes for anyone but Premium Content Program users.[46] In other words, unless the users have shown themselves to be serious about their videos, they are not able to post videos that are long enough to be infringing on another's copyright.[47] These changes are a step in the right direction, but they have not yet made a serious dent in the massive infringement taking place each day.

IV. DCMA SAFE HARBOR SHOULD NOT APPLY

The existing Safe Harbor should not be applied to these online sharing sites for a variety of reasons. First, the sites are encouraged to do no more than the bare minimum to keep copyrighted materials off of their sites. Second, the job of policing these sites for the enormous amount of copyrighted materials is too large for even the most dedicated copyright holder. Third, there is a need for a system that not only protects the development of new technologies, but also protects the rights of the copyright holder. Finally, the current state of affairs, which includes massive amounts of uninhibited infringement occurring daily, clearly shows that the current Safe Harbor is not the correct answer.

A. Encouraging the Bare Minimum

Currently, there are huge numbers of copyrighted materials illegally posted across the internet. This vast collection of infringing materials is not limited to short clips and pieces, but includes full length shows, songs, music videos, and movies.[48] Some of these videos are even clearly named, with no attempt to hide the infringement.[49] These obviously infringing materials should be so easy to see, and it would take so little effort to remove them that one would expect the websites to remove at least some of the most glaring acts of infringement. However, the websites make no attempt to remove any of these items on their own. In response to the safe harbor protections they enjoy, most

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[43] YouTube is currently being sued by Viacom and others, which is bringing the threat of litigation to them all. *See generally id.*

[44] Bill Rosenblatt, *Google Launches Video Fingerprinting for YouTube*, DRM WATCH, Oct. 18, 2007, http://www.drmwatch.com/ocr/article.php/3706016.

[45] Bill Rosenblatt, *MySpace Pilots Audible Magic's Video Fingerprinting Technology*, DRM WATCH, Feb. 15, 2007, http://www.drmwatch.com/ocr/article.php/3660281.

[46] Broadcasting Ourselves ;) The Official YouTube Blog, *Your 15 Minutes of Fame..ummm...Make that 10 Minutes or Less*, Mar. 26, 2006, http://www.youtube.com/blog?entry=oorjVv_HDVs.

[47] *See id.*

[48] *See* YouTube, www.youtube.com (for a website that showcases a variety of potentially infringed materials).

[49] *See* MySpace, www.myspace.com (for a website upon which a search for potentially infringed materials may be performed).

OSPs have taken the stance that they need only remove materials after receiving takedown notices. Thus, the protection from liability has created a policing race to the bottom.

B. Strength in Numbers

The copyright holders cannot do it alone. There are millions of postings every day on more websites than a copyright holder can imagine. They cannot police their materials every second of every day on every website in every corner of the World Wide Web. Even if they could keep up, this policing would not be enough. Every copyright infringing posting at every individual web address needs to be listed on a takedown notice.[50] A takedown notice for a specific work is not a blanket takedown notice for any postings of that work, so every individual posting needs to be recorded.[51] Thus, even if they had kept up with the policing, the copyright holders would need extra hours in every day just to draft and send out all of the takedown notices. The DMCA does not require the websites to take an active role in the policing.[52] Thus, all of it is left to the copyright holders, who could never even imagine that they could protect their works on their own. Using the websites as the first line of defense against the infringement makes more sense, as they have the ability to keep the materials from ever being posted in the first place. Then, the copyright holders could spend their time policing a less daunting amount of material; for instance, they could focus more on slightly altered copies of their work that the sites may miss. If the copyright holders and the websites began working together, they could do a much better job. Neither the copyright holders nor the websites would have to spend as much time on the issue, and they would all fair better in the battle against infringement.

C. A Need for Balance

The DMCA recognizes the need for balance between the encouragement of the development of new technologies and the protection of copyright. Unfortunately, when it comes to user-generated materials, the DMCA misses the mark on balancing these two competing interests. It successfully encourages the development of new technologies, but it fails to protect the rights of the copyright holders. It encourages technology by making clear cut rules that guarantee protection. It, however, fails to protect copyright by not including affirmative actions of the site in those clear cut rules. The DMCA does not require the sites to do anything, which encourages the bare minimum and leaves too much work for the copyright holders. [54] Instead, there needs to be a rule which encourages not only the copyright holders, but also the websites, to protect the copyrighted materials, while still offering enough protection to the sites to encourage technological progress.

V. A SAFER HARBOR

[50] *See* 17 U.S.C.S. § 512(c)(3).
[51] *See id.*
[52] *See id.* § 512.
[54] *See supra* Part III and accompanying text.

Since Congress's intent in enacting the original Safe Harbor was to protect the rights of the copyright owner, while protecting current technologies and encouraging the development of new ones, it is important that these objectives are accomplished by the law that governs sharing sites.[57] The Safe Harbor accomplished technological encouragement by giving companies a clear rule that shielded them from liability, rather than a mushy standard that was difficult to apply. That ease in application of the rule allows companies to develop new technologies without fear of substantial liability. The site knows exactly what it must do to protect itself. Thus, although the current Safe Harbor should not apply to these sites because of its failure in protecting copyright, some form of a safe harbor should apply so that new technologies may continue to be developed.

A. *The Proposed Safe Harbor*

I propose the creation of a new Safe Harbor to be added to the current DMCA. This provision will be applicable only to sharing sites,[58] and it requires that the site:

> 1)
>
> > a) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; or
> >
> > b) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
> >
> > c) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
>
> 2) receives little financial benefit from the infringing activities;
>
> 3) actively polices the site with filtering technology having a success rate at least equal to current industry standards;
>
> 4) upon notification of claimed infringement, responds expeditiously to remove, or disable access to, the material

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[57] *See generally* 144 CONG. REC. H7074 (daily ed. Aug. 4, 1998) (statement of Rep. Coble), 144 CONG. REC. S4884 (daily ed. May 14, 1998) (statement of Rep. Hatch).

[58] A multipurpose site will still fall under this rule for the sections that are sharing-based. For example, although Yahoo is primarily a search engine, Yahoo Video is a sharing service, so any videos posted on Yahoo video must be filtered. *See* Yahoo!, http://www.yahoo.com. Pursuant to this proposed rule, Yahoo need not apply the filtering technology to the rest of its site, it must follow these rules for the Yahoo video webpage.

> that is claimed to be infringing or to be the subject of infringing activity.

This new rule will not only continue to protect the sites and the development of new technologies, but it will also better serve the interests of the copyright holders in protecting their works.

B. New Rules, New Application: New Results

Two of the elements of my proposed standard, actual knowledge and notice and takedown, have not been changed from their current form in the DMCA because they apply equally as well to video sharing sites as they do to the other sites which find protection under the Safe Harbor.[59] One element, the site's little financial benefit from the infringing activities, has been altered from its current state in the DMCA. The final element, the site's policing for infringement, is entirely original and will bring the greatest change to both the Safe Harbor and the state of copyright protection on sharing sites.

1. Actual Knowledge

Actual knowledge is worded exactly the same as it was in the original Safe Harbor.[60] Its application also remains unchanged. This element requires a site to take down any works that it knows to be infringing. Under this element, a website cannot know that a specific user-generated file is in fact infringing another's copyright and leave it posted until it receives a takedown notice. Once it learns that the material is infringing, it must remove the file. Thus, an OSP may not be eligible for Safe Harbor if it knows of the infringing materials and fails to remove them.

2. Notice and Takedown

Although "notice and takedown" will be playing a very different role, the element still works in the same way that it does under the current Safe Harbor.[61] Websites must continue to supply their contact information and notice requirements for takedowns. The copyright holders shall continue to police websites, in search of pirated copies of their copyrighted works. They should continue to send takedown notices to the OSPs, and OSPs should continue to remove the infringing materials. The actions involved with notice and takedown have not changed at all.

Although it will still be an integral part of the system, it will no longer be the first line of defense for copyright holders. Active policing is a new element. While it has been tested in laboratory conditions, it has not yet been put to the rigorous testing that real world use provides. Technology is never perfect; there are always ways to circumvent it and there are always failures. No technology will protect the copyright

[59] Although the wording and actions have not changed, notice and takedown will be playing a very different role.

[60] *See* 17 U.S.C. § 512(c)(1)(A)(i).

[61] *See id.* § 512(c)(1)(A)(iii), (c)(1)(C).

holders completely; thus, the copyright holders must still protect themselves. They may continue to use notice and takedown to fill the gap where the technology fails.

The retention of this element of the current Safe Harbor yields the result that some of the burden of policing remains with the copyright owners. They will still be responsible for searching for their works and sending notices to alert the OSPs of the need for removal. This balancing of the burden between both the copyright owner and the OSP is good for copyright because both sides working towards the same goal will yield the best results. The OSP will not face the pressure of either finding every copyrighted work or risking expensive litigation. Likewise, the copyright owner will find not only that their work is being protected as much as possible by the OSPs, but also that their expenses for policing are significantly diminished because they are now merely catching any instances of infringement that may slip through the cracks. Therefore, the shifting of this burden to create more balanced responsibilities leads to lower costs for both sides with more thorough protections of the copyrighted works, which creates a considerably more efficient system than that of the current Safe Harbor.

3. Little Financial Benefit

While there is a rule for financial benefit in the existing Safe Harbor, its wording, and its effect, have been changed significantly in this new version in order to ensure the protection of these websites.[62] In the current Safe Harbor, no financial benefit attributable to the infringement is permitted.[63] This standard, however, is a standard that is virtually impossible for these types of websites to meet. These sites make their money through advertising. Advertising revenues are based on traffic to the site and its pages. It is not difficult to argue that any infringing works may generate traffic for the site. It is even easier to show how an infringing work helps to bring in specific money from an advertiser: each page has advertisements on it, and the advertising proceeds are often based off of the number of people who viewed the advertisement. Because most sites keep record of the number of "hits" each work gets, one can see how many people viewed the infringing works and calculate the advertising revenues generated by those views. Therefore, because it is not difficult to find a financial benefit gained by the sites, thus causing them to fail the current "financial benefit" rule, the proposed Safe Harbor has a much different standard under which the sites can still qualify for limited liability even with some financial benefits.

The difference in the proposed Safe Harbor is the word "little." Sites will now be allowed to receive some financial benefit from the works that are posted on their site without eliminating them from any possibility of protection. However, while some financial benefit is inevitable and must be accepted as a consequence of an advertising-based business model, a significant benefit is not. Accordingly, only a small financial benefit is allowed under the proposed Safe Harbor. "Little" and "small" are relative words, so, in response to the varied sizes and profit levels of the websites who seek shelter under the Safe Harbor, the financial benefit standard is also relative.

The amount of financial benefit acceptable for any website must be a small percentage of the site's overall financial gain. There are multiple possible approaches to

[62] *See* 17 U.S.C. § 512(c)(1)(B).
[63] *See id.*

determine an acceptable level of financial benefit. Although they all have great benefits, none are without flaws. When taken together, however, they lend valuable insight into the inner workings of the website.

One approach to determining the level of financial benefit is viewer-based. This approach focuses on the number of times that an infringing posting has been viewed since it was uploaded. The idea is to compare the number of views of the infringing materials to the number of views of the non-infringing materials. This comparison allows a court to consider the proportionate benefit conferred to the site. If the infringing views are close in number to the non-infringing views, then the site is likely getting a great financial benefit from the infringing material. On the other hand, if the infringing views account for only a tiny fraction of the site's overall views, then the site is making a miniscule amount of its total income directly from the infringing work and, thus, receiving little financial benefit.[64] As most sites already keep track of these statistics, it will not be difficult to obtain this information. However, this approach does not cover every issue involved with financial benefit and, although it is extremely important and must be considered, it should not be the only approach used in the analysis.

The next two factors that should be considered are quite similar in their application and meaning. These factors are a user-based approach and a material-based approach. The user-based approach looks at the number of users posting infringing materials and compares it to the number of overall users. The material-based approach compares the number of infringing materials to the total number of materials available on the site. These two approaches are quite similar in that they both attempt to account for not just the number of fleeting visitors to the site, but also the typical users of the site. If many users are posting infringing materials, then it is more likely that their ability to post such materials caused them to join the site in the first place, and in turn they posted some non-infringing materials amongst their infringing ones. Thus, more of the posted materials are likely the result of infringement than just the number of actual infringing videos. Likewise, if there are many infringing materials, even when compared to the number of non-infringing materials, then it is likely that the infringing materials attracted many viewers to the site and these viewers also likely viewed non-infringing materials. Thus, both of these factors are important because they show not only how many infringing materials there are, but also how much of the website thrives on infringement.

4. Active Policing

The current Safe Harbor has no policing requirements for sites, so this active policing condition is completely novel. The proposed Safe Harbor states that a site must: "actively police the site with filtering technology having a success rate at least equal to current industry standards." This condition requires sites to employ filtering technology of some sort on their sites in order to protect copyright holders. No specific technology is required, so the sites may choose a technology that best fits their needs. The only requirement is that the technology be as good as current industry standards. While at first glance "current industry standards" seems difficult to apply (since there are not actually any industry standards yet), this is simply not the case. Although sites are not yet

[64] The test suite section includes a variety of examples that highlight the differences in benefit.

required to use the technology, there is already a market for it, and a variety of competitors already exist.

In the world of internet content filtering, there are many choices available. While some are better than others, testing has shown that the best technologies score better than ninety percent accuracy and have yielded no false positives.[65] Some of the leaders in the market are Audible Magic,[66] Vobile,[67] Civolution,[68] and Thomson.[69] Vobile is currently leading the pack with its video fingerprinting technology, VideoDNA.[70] Audible Magic, which has also done well in testing, is not far behind and has already landed contracts with major websites like MySpace.[71] Two other successful technologies, Philips and Thomson, use watermarking technology and audio fingerprinting technology in order to detect copyrighted works.[72] While these technologies are currently the main competitors, this fact will soon be changing. Nielsen and Digimarc have announced a watermark-based service, Nielsen Media Manager, which will be available mid-2008.[73] This new technology will focus on watermarking, but will supplement it with audio fingerprinting to catch anything that watermarking may miss.[74] There are also technologies available that search text in order to filter novels, titles, and other written works. In sum, there are already a variety of successful filtering technologies on the market, and more are soon to come.

The competition that already exists in this market makes the introduction of the filtering requirement economically feasible. There are already a number of companies in the field who will have to compete to license their technologies to websites. Some websites may even choose to develop their own technologies instead of choosing between the currently available options.[75] Also, the new requirement will heighten the demand for such technologies enough that many new companies will develop software and enter the market. For all of these reasons, it should be economically feasible for sites to conform to this new requirement.

The technology will have many benefits for the sites and the copyright holders. The sites will no longer have to worry about potential liability for having too much copyright infringing material on their websites. Nor will they have to waste time and money reviewing postings manually. Copyright holders will also benefit from the technology: they will no longer have to suffer through seemingly endless infringement of

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[65] " Bill Rosenblatt, *MovieLabs Shows Results of Fingerprint Testing*, DRM WATCH, Sept. 27, 2007, http://www.drmwatch.com/watermarking/article.php/3702101; Jon Healey, *The content-recognition bakeoff*, L.A. TIMES: BIT PLAYER BLOG, Sept. 21, 2007, http://opinion.latimes.com/bitplayer/2007/09/the-content-rec.html.

[66] *See* Audible Magic, http://www.audiblemagic.com/index.asp.

[67] *See* Vobile, http://vobileinc.com.

[68] *See* Civolution, http://www.civolution.com.

[69] *See* Thomson, http://www.thomson.net/GlobalEnglish/Pages/default.aspx.

[70] Brad Stone, *One Anti-Piracy System to Rule Them All*, N.Y.TIMES: BITS BLOG, Sept. 21, 2007, http://bits.blogs.nytimes.com/tag/vobile.

[71] Brad Stone & Miguel Helft, *New Weapon in Web War Over Piracy*, N.Y. TIMES, Feb. 19, 2007, http://www.nytimes.com/2007/02/19/technology/19video.html.

[72] Bill Rosenblatt, *Nielsen and Digimarc Announce Watermark-Based TV Content Identification Service*, DRM WATCH, Dec. 6, 2007, http://www.drmwatch.com/watermarking/article.php/3715141.

[73] *Id.*

[74] *Id.*

[75] *See* Broadcasting Ourselves ;) The Official YouTube Blog, *supra* note 46.

their works. The technology will remove infringing works faster and more efficiently. It will cause both the sites and the copyright holders to enjoy more protection with less work.

VI. APPLICATION OF THE NEW SAFE HARBOR

The following paragraphs apply the proposed Safe Harbor to various situations which have occurred or likely could occur. This application provides insight as to how the potential law would actually work. It highlights the greatest benefits of the potential law as well as its weaknesses or flaws. The proposed Safe Harbor successfully resolves the majority of situations clearly, and it gives significant guidance toward the appropriate answers to the rest.

One real world example is YouTube in its current form. YouTube does not currently police its site.[76] It fails to terminate accounts of repeat infringers. Although YouTube responds to takedown notices, there is a huge amount of infringing material on the site, which draws millions of views.[77] Under the proposed rule, YouTube would be liable for the infringement both because of the amount of financial benefit it receives from the traffic and because it fails to police its site. However, the site would not have to be shut down forever; it has the ability to conform to the new standard in order to avoid any future liability.

Other types of OSPs, such as internet search engines and peer-to-peer networks, do not fall into the category of websites which contain user-generated materials stored on the sites. Therefore, they will not be included in the scope of the new Safe Harbor. Instead, the current DMCA Safe Harbor will continue to apply to them.

One hypothetical that highlights the rule is this: a brand new site which uses its server to store and replay user-generated materials is created. The site has only existed for a few months and has yet to take off; so far it has only a few users and not very many videos. In order to use the site, users must accept the site's terms of use, which inform them of the site's infringement policies, including mandatory review of any ten minute or longer video. The site also removes infringing material immediately upon receiving a takedown notice. One infringing video is posted for almost a month, attracting many users to the site. This material has resulted in so many views that it has almost doubled the sites total views. While it seems that the site did everything correctly, there is still a question of whether it should be protected under the Safe Harbor because the infringement amounted to such a large percentage of the site's traffic that it received too much financial gain from the infringement. The proposed rule leaves room for some judicial discretion in cases involving financial benefit. The Court can take into consideration the fact that only one infringing video existed on the site. This number is low when compared to the number of non-infringing videos. Also, this number means that only one user posted an infringing video, which shows that it is not a common practice on the site. However, the fact that an infringing video of such popularity stayed

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[76] This was the case at the commencement of the Viacom litigation. *Viacom*, 2007 U.S. Dist. Ct. Pleadings 2103, at *2-3. YouTube has since announced that they will begin using filtering technology on their site. *See* You Tube: Content Management, http://www.youtube.com/t/content_management (last visited Feb. 28, 2010).

[77] *Viacom*, 2007 U.S. Dist. Ct. Pleadings 2103, at *2-3.

up for weeks and attracted extremely high numbers of viewers for the site clearly overshadows the low proportions in the user-based and video-based analyses. Thus, the site should be liable for the infringement.

While it seems that this rule would hurt start-up companies, and therefore come to a bad result, it does not. The smaller the site, the less effort it takes to police the site well. Even if this video made it through the filters, the fact that the site's number of viewers more than doubled because of this one video should have raised a red flag. A site that small should still be easy to watch, and a video that doubles traffic should be reviewed. Thus, the rule would not hurt small companies that are doing all that they can to police and fight infringement. Instead, the rule will only hurt those who already are not doing enough to protect the rights of the copyright holders.

Another example may contain a more established company that responds quickly to takedown notices. It polices its site with filtering technology, and by finding and removing infringing material and the users who post it. However, about one-third of the material on the site infringes copyrights. Such a case should result in liability because one-third of the site's material is most certainly a significant amount. At this level, too much of the site's popularity and traffic are the result of the infringing activities.

But what if one-third of the site is not infringing; what if it is only fifteen or ten percent? Obviously the financial benefit factor is somewhat of a judgment call. If these copyright infringing videos account for twenty or fifteen percent of the site's total views, then that should persuade a court toward imposing liability: the infringing works are actually accounting for even more than that percentage of the traffic because people attracted by that video will likely watch others as well. On the other hand, if the views of these videos are much less than that percentage, then it is clear that these videos are not the reason for much of the traffic. If all else is done well, a court could find no liability. It is not required to, however, and it could still decide that the infringement is too significant or the other actions of the site were not sufficient to preclude liability. There must still be that grey area that will be left to the discretion of the courts, so that a fair, case-by-case decision will be reached in those cases that are too close to call without more thorough investigation.

VII. Conclusion

Copyright infringement on user-generated sharing sites is widespread and remains essentially unchecked. The DMCA has not been effective in controlling it; thus, there needs to be a new Safe Harbor incorporated into the law that adequately protects copyrighted materials, while still encouraging the development of new technologies. The Safe Harbor proposed in this article will do both. The new financial benefit standard allows the sites, which primarily profit from advertisements (and, thus, traffic), to qualify for protection while continuing to do business. This change gives technology developers the incentives needed to continue to make strides toward the future. The new active policing standard protects the rights of the copyright holders without forcing them to spend all of their time searching the internet. The proposed Safe Harbor more successfully and efficiently attains the goals for which the DMCA aimed. Thus, it should be incorporated into the law.