

Summer 6-1-2011

Lord of the Files: International Secondary Liability for Internet Service Providers

Emerald Smith

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Emerald Smith, *Lord of the Files: International Secondary Liability for Internet Service Providers*, 68 Wash. & Lee L. Rev. 1555 (2011), <https://scholarlycommons.law.wlu.edu/wlulr/vol68/iss3/24>

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Lord of the Files: International Secondary Liability for Internet Service Providers

Emerald Smith*

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I. Introduction

How responsible are those who *provide* Internet services for the actions of those who *use* those services? With Internet companies expanding beyond national borders¹ and user-generated content now a

* Candidate for J.D., Washington and Lee University School of Law, May 2012. The author would like to thank Professor Sarah K. Wiant and Rob Vrana, Class of 2011, for their invaluable advice and assistance in shaping this Note.

1. See Reshma Kapadia & Russell Pearlman, *Where to Invest in 2011*, WALL ST. J., Dec. 28, 2010, <http://online.wsj.com/article/SB10001424052748704457604576011363287700304.html> (last visited Mar. 2, 2011) (listing continuing global expansion as a reason to

substantial portion of Internet content,² the international legal community is facing new issues of the legality of Internet behavior. One of those issues is assigning legal liability when copyright-infringing content appears on the Internet.

An example may best explain this problem. A YouTube subscriber named Ayn R. is a fan of *The Colbert Report* on Comedy Central. In fact, she is such a fan that her user name is "colbertroxmysox," and she uploads digital recordings of the show onto her YouTube account. As she does not have permission from Comedy Central or its parent company to do so, this is a violation of copyright. These illegal copies sit on YouTube along with others and get many hits from other Colbert fans. One or two users "flag" them as inappropriate, but they remain on the site. Eventually, an employee of Comedy Central finds the videos while searching for Comedy Central content on YouTube. The company sends YouTube's designated agent a list of copyright-violating videos, including identifying information such as the URLs of the offending content, among which are Ayn's uploads of *The Colbert Report*. YouTube removes the videos and sends Ayn an email informing her that she has violated her user agreement with YouTube and if she gains two more "strikes" her account will be terminated.³ Ayn creates a new account under the name "ColbertrulesCCdools" and resumes uploading *The Colbert Report*.

The problem is deciding at what point, if ever, in this list of events liability should attach to YouTube for Ayn's action. This Note explores the international legal landscape created by the variety of answers that courts in different countries have provided when copyright holders have asked that question. This Note also will argue that an international standard for secondary liability would be both possible and beneficial.

The appearance of illegal copies of copyrighted material online is an acknowledged problem, with industry trade organizations estimating that a substantial amount of internet traffic involves pirated material, including as

invest in internet companies) (on file with the Washington and Lee Law Review).

2. See Paul Verna, *A Spotlight on UGC Participants*, EMARKETER.COM (Feb. 19, 2009), <http://www.emarketer.com/Article.aspx?R=1006914> (last visited Mar. 2, 2011) (estimating the number of Americans who generate online content as 82.5 million) (on file with the Washington and Lee Law Review).

3. See *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 527–28 (S.D.N.Y. 2010) (quoting YouTube's policy as termination of a user's account once that user receives three "strikes" for uploading infringing content). Strikes are prompted by content holders sending a takedown notice regarding the content to YouTube. *Id.*; see also *infra* note 66 and accompanying text (pointing to the statutory provision that requires and details the components of the takedown notice).

much as 95% of all downloaded music.⁴ Some commentators have questioned whether media industries and the trade federations they control inflate the numbers,⁵ but not the basic premise that illegal content is common online.⁶ At the same time, user-generated content is becoming a greater part of the Internet landscape.⁷ User-generated content is the addition of creative and editorial content to online sites and resources by people who have traditionally been considered "users."⁸ In other words, it is the breakdown of the barrier between professional and amateur content. The musings of Tumblr.com users, the crowd-sourced editing of the online encyclopedia Wikipedia.com, and the videos uploaded to YouTube.com are all examples of user-generated content.⁹

The growth of content processed outside the barriers of gatekeeper media has not been without problems.¹⁰ Among those problems have been

4. See ENVISIONAL, TECHNICAL REPORT: AN ESTIMATION OF INFRINGING USE OF THE INTERNET 2 (2011), available at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (estimating that infringing activities compose 23.76% of all Internet traffic); see also Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/business/global/22music.html> (last visited Mar. 2, 2011) (quoting figures regarding the amount of pirated music from the International Federation of the Phonographic Industry) (on file with the Washington and Lee Law Review).

5. See, e.g., Carlo Longino, *IFPI Says 95% of Music Downloads Are Illegal*, TECHDIRT.COM (Jan. 19, 2009 6:58 AM), <http://www.techdirt.com/articles/20090116/0955383440.shtml> (last visited Mar. 2, 2011) (questioning the accuracy of the IFPI's methods used to determine lost sales, especially given the motivation for higher statistics in order to justify calls for government intervention) (on file with the Washington and Lee Law Review).

6. See *id.* (cautioning readers to take the industry numbers "with a large grain of salt" but not questioning the underlying idea that illegal downloading occurs).

7. See Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 845–46 (2009) ("Hundreds of millions of Internet users are downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer.").

8. See Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 923–24 (2009) (explaining the history and effect of user-generated content).

9. See *id.* ("User-generated content can be found on wikis, blogs, Twitter feeds, YouTube, Facebook, and pirate websites, as well as in virtual worlds, reactions to news stories, reactions to others' reproductions of news stories, and ratings for products or ratings for seller reputations—not to mention many more places yet to be described or envisioned.").

10. See, e.g., Lane Hartwell, *Wikipedia*, ECONOMIST (Jan. 13, 2011), http://www.economist.com/node/17911276?story_id=17911276 (last visited Mar. 2, 2011) (discussing the accuracy issues that have plagued Wikipedia due to the crowd-sourced nature of its editing) (on file with the Washington and Lee Law Review).

the increasing ease with which users can add copyrighted material and the prevalence with which such additions have occurred.¹¹ The disseminated nature of the problem makes legal action more difficult as it is rarely of economic practicality to go after individual users for the infringement.¹²

The economic difficulty of pursuing individuals for posting infringing content has led to copyright holders seeking legal remedies from the companies that provide the platform for posting content: Internet Service Providers (ISPs).¹³ These efforts have primarily hinged on the concept of secondary liability, a doctrine spawned from the tort concept of master-servant relationships that would essentially hold the ISP liable for not stopping the infringing use of its services by users.¹⁴ Secondary liability divides into two types: (1) vicarious infringement and (2) contributory infringement.¹⁵ Vicarious liability generally attaches to defendants when they: (1) possess the right and ability to supervise the infringing conduct of the direct infringer and (2) have a direct financial interest in the exploitation of the copyrighted materials.¹⁶ The related contributory infringement attaches when defendants: (1) have knowledge of the infringing activity or (2) induce, cause, or materially contribute to the infringing conduct of another.¹⁷

11. See Alan Braverman & Terri Southwick, *The User-Generated Content Principles: The Motivation, Process, Results and Lessons Learned*, 32 COLUM. J.L. & ARTS 471, 471 (2009) ("The threat [to copyright owners] is that a good percentage of the most heavily-viewed user-posted content is infringing.").

12. See Dawn Osbourne, *User Generated Content (UGC): Trademark and Copyright Infringement Issues*, 3 J. INTELL. PROP. L. & PRAC. 555, 555 (2008) (noting that most users are not worth pursuing for infringement and such pursuit can create bad publicity for copyright owners).

13. See MELLVILLE B. NIMMER, *Liability of Online Service Providers*, 3-12B NIMMER ON COPYRIGHT § 12B.01 (2010) (pointing out that content owners like the ability to pursue liability against ISPs because they tend to have "deep[er] pocket[s]" than individual users and "the primary actor may often be unknown or not meaningfully amenable to suit").

14. *Id.* § 12.04 (describing how a series of cases have imposed secondary liability under the Copyright Act despite the act itself not making the doctrine explicit); see also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 428 (1984) (discussing damages in the context of the "nonstatutory tort of contributory infringement").

15. See NIMMER, *supra* note 13, at § 12B.01 (describing the concept of the two types of secondary liability).

16. See *MGM v. Grokster*, 545 U.S. 913, 930 n.9 (2005) ("In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement.").

17. See *id.* at 927 ("[D]istribution of a commercial product capable of substantial noninfringing uses [can] not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on

How and when to assign secondary liability is problematic given the extent to which websites that rely heavily on user-generated content have expanded beyond U.S. borders.¹⁸ Involvement in the international market has resulted in uncertainty regarding the international application of the secondary liability principle for companies serving multiple countries. Although an American court ruled in 2010 that YouTube does not have liability for copyright infringing videos that users upload to the site,¹⁹ the issue has split European courts,²⁰ including a German court that ruled YouTube would face secondary liability in a substantially similar case.²¹

This Note evaluates the current state of international law on secondary liability, using lawsuits against the American-based company YouTube as a lens. YouTube is a helpful lens because of both the number of recent cases filed against it and its business model. YouTube operates as a conduit for user-generated content, making it particularly helpful for exploring issues of secondary liability. Part II briefly explains the current state of international law in this area. Part III explains the United States' choice to interpret and expand beyond the current international copyright requirements when passing the Digital Millennium Copyright Act and how that resulted in the American court's treatment of YouTube. Part IV explores how the European Union and various Member States have

that knowledge."); *id.* at 935–36 (rejecting the plaintiffs' contention that they could escape contributory liability because their product had "substantial non-infringing uses" because they were also inducing and encouraging subscribers to use it in ways that violated copyright).

18. See, e.g., Facebook, *Statistics: Global Reach*, FACEBOOK.COM, <http://www.facebook.com/press/info.php?statistics> (last visited Mar. 2, 2011) ("About 70% of Facebook users are outside the United States . . .") (on file with the Washington and Lee Law Review); Wikipedia, *Wikipedia: About*, WIKIPEDIA.COM, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 2, 2011) ("Every day, hundreds of thousands of visitors from around the world collectively make tens of thousands of edits and create thousands of new articles to augment the knowledge held by the Wikipedia encyclopedia.") (on file with the Washington and Lee Law Review); YouTube, *YouTube Statistics*, YOUTUBE.COM, http://www.youtube.com/t/press_statistics (last visited Mar. 2, 2011) ("YouTube is localized in 25 countries across 43 languages.") (on file with the Washington and Lee Law Review).

19. See *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010) (ruling that YouTube was not liable for content posted by users in violation of copyright as long as YouTube complied with the required DMCA takedown provisions), *appeal docketed*, No. 10-3270 (2d Cir. Aug. 11, 2010). See *infra* Part III.B for an extended discussion of the case.

20. See *infra* Part IV.B for an extended discussion of the European cases and judgments.

21. See LG Hamburg 8. Zivilkammer, 308 O 27/09 (2010) (ruling the YouTube was liable for the infringing content users posted on its site); see also *infra* Part III.B.3 for an extended discussion of the case.

addressed secondary liability within the confines of international law and the resulting variety of rulings across those Member States. Finally, Part V presents a plan for how the international community can foster greater certainty for international businesses by clarifying the requirements for secondary liability of ISPs.

II. International Copyright Law and the WIPO

International intellectual property standards are governed by multilateral treaties,²² the most wide-reaching of which are the Berne Convention and the Paris Convention.²³ The World Intellectual Property Organization (WIPO) grew out of a need to have an administrator of these essential international intellectual property treaties.²⁴ The WIPO's antecedents trace back to the *Bureaux Internationaux réunis pour la protection de la propriété intellectuelle* (BIRPI), established under the supervision of the Swiss shortly after the two conventions took effect.²⁵ The Stockholm Conference of 1967 established the WIPO as a formally independent international organization, and it became a specialized agency of the United Nations in 1970.²⁶ The WIPO has 184 member states, including the world's major economic players.²⁷

The WIPO's stated purpose is "developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest."²⁸ The organization primarily functions as

22. See GRAEME DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 35 (2d ed. 2008) [hereinafter DINWOODIE] (describing the development of the use of multi-lateral treaties in the copyright context).

23. See *id.* at 35–36 (explaining how the Berne and Paris Conventions are the two treaties with the most signatory countries in the world).

24. See SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY 411–13 (2008) (explaining the history of the WIPO and its antecedents as treaty administrators).

25. See CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: RESURGENCE AND THE DEVELOPMENT AGENDA 19–21 (2007) (providing a timeline for the creation of the treaties and accompanying administrative agencies).

26. See *id.* at 24 (explaining that two of the primary motives for the move to specialized agency status was the universalization of law and the encouragement of participation by developing countries).

27. See WIPO, *Member States*, <http://www.wipo.int/members/en/> (last visited Mar. 2, 2011) (listing more established countries such as the United States, France, and Germany as well as countries like China that are gaining economic power) (on file with the Washington and Lee Law Review).

28. WIPO, *What is WIPO?*, http://www.wipo.int/about-wipo/en/what_is_wipo.html

"the chosen forum for negotiating further extensions to the global governance regime for intellectual property."²⁹ In recent years the World Trade Organization has taken over most direct enforcement of international, multilateral treaties regarding copyright under the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement.³⁰ The WIPO and WTO agreed to work in collaboration with the WIPO providing technical assistance to the WTO.³¹ In addition to that work, the WIPO plays an active role in providing models for national law.³² The WIPO provides assistance to developing countries in creating intellectual property systems and helps countries modernize existing legal infrastructure.³³

In the 1980s it became clear that the growth in new technology would require corresponding change in international copyright agreements.³⁴ Discussion of possible updates to the Berne Convention began when the WIPO Governing Bodies convened a committee to investigate the possibility in 1989.³⁵ The negotiation and drafting of the treaty took seven years and included the participation of representatives and experts from the member states.³⁶ The differing interests of the member states, in particular the difference in positions between developing and industrialized countries, created difficulties in finishing the treaties at the Diplomatic Conference to finalize them in 1996.³⁷

(last visited Mar. 2, 2011) (on file with the Washington and Lee Law Review).

29. MAY, *supra* note 25, at 36.

30. *See id.* ("[A]fter the establishment of the WTO with the TRIPs agreement as one of its key elements the WIPO's direct governance activities were circumscribed.")

31. *See* Agreement Between World Intellectual Property Organization and World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754, 756–57 (setting out the division of labor between the WTO and the WIPO).

32. *See id.* (describing the resources the WIPO provides to developing countries).

33. *See* WIPO, *Cooperation with Countries in Transition*, http://www.wipo.int/activities/en/cooperation_asia.html (last visited Mar. 2, 2011) (describing the resources available to countries seeking WIPO assistance) (on file with the Washington and Lee Law Review).

34. *See* LEWINSKI, *supra* note 24, at 431–32 (explaining the development of the "internet treaties" and their relationship to the growth of the "digital agenda" and related technology).

35. *Id.* at 429.

36. *See id.* at 429–40 (detailing the various steps in the process of creating the treaties).

37. *See id.* at 440 ("This diversification of interests and coalitions regarding different issues rendered the negotiations particularly complex.")

In 1996, the WIPO ultimately adopted the two treaties intended to address problems arising with the growth of the Internet:³⁸ the WIPO Copyright Treaty (WCT)³⁹ and the WIPO Performers and Phonographs Treaty (WPPT).⁴⁰ Both treaties contain specific provisions protecting copyright owners' right to control "communication to the public."⁴¹ Scholars generally interpret these provisions as protecting control over distribution via the Internet.⁴² Both treaties are also clear that member states should honor copyright holders' use of digital protection technology, particularly mentioning digital forms of broadcasting. Article 12 of the WIPO Copyright Treaty requires that the parties "provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention . . ."⁴³ A substantially similar provision appears in the WPPT.⁴⁴ Domestic law still controls the effect these treaties have on the

38. See Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 498 (2000) ("Those treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—were an attempt to develop copyright law prospectively for the digital age . . .").

39. World Intellectual Property Organization Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT].

40. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WPPT].

41. See WCT, *supra* note 39, art. 8 ("[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means . . ."); see also WPPT, *supra* note 40, art. 14 ("Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means . . .").

42. See, e.g., DINWOODIE ET AL., *supra* note 22, at 559 (discussing the meaning of the WCT and WPPT provisions).

43. WCT, *supra* note 39, art. 12. The acts in question were "to remove or alter any electronic rights management information without authority" or "to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." *Id.* The article further clarified:

As used in this Article, 'rights management information' means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Id.

44. See WPPT, *supra* note 40, art. 19 (containing the same wording other than

practical enforcement of copyrights.⁴⁵ This is important to remember when considering how the treaties impact law. Member states must implement WIPO treaties for them to take effect.⁴⁶

Likely because of the difficulty and necessity of gaining consensus among parties when negotiating treaties, both the WCT and WPPT contain a high level of flexibility and thus can create uncertainty in terms of how member states choose to protect the rights they encompass.⁴⁷ Some issues raised by the emergence of the digital environment could not gain the consensus needed in the negotiation of the WCT and the WPPT to make it into the finalized treaties or had not yet risen to the level of international recognition necessary for the drafters to consider them.⁴⁸ Among the issues not covered was secondary liability for ISPs, leading to varying international legal approaches.⁴⁹ This level of uncertainty in the determination of liability has created problems for Web 2.0⁵⁰ companies whose Internet presence crosses international borders.⁵¹

replacing references to work/author/owner of rights with references to performance/performer/producer as needed).

45. See DINWOODIE ET AL., *supra* note 22, at 559 (noting that individual countries make the final decision about how they implement the treaties).

46. See *id.* at 562–63 (discussing the implementation issues of the WIPO treaties).

47. See *id.* at 559 (pointing out the inherent flexibility provided to individual countries to create laws "appropriate to their particular circumstances").

48. See LEWINSKI, *supra* note 24, at 482–86 (detailing the discussed provisions that did not make it into the finalized treaties). These provisions included two requiring changes to the licensing structures of mechanical recordings and for broadcasting. *Id.* at 483. A proposal for defining "rental" with respect to neighboring rights was also rejected. *Id.* at 484. The delegation chose not to add online publication to the Berne Convention's protections. *Id.* Finally *sui generis* protection of databases never made it into the treaty because of time constraints on the negotiations. *Id.* at 486.

49. See DINWOODIE ET AL., *supra* note 22, at 562–63 (comparing the approaches of the United States and Australia).

50. Scholar Tim O'Reilly first described Web 2.0 as a conceptual model for seeing certain Internet applications as integration-based and interaction-based rather than platform-based and experience-based. See Tim O'Reilly, *What is Web 2.0?*, O'REILLY.COM, (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html> (last visited Mar. 2, 2011) (using graphs and examples to explain the concept of Web 2.0) (on file with the Washington and Lee Law Review). Web 2.0 companies, therefore, often allow significant opportunities for user-generated content. *Id.*

51. See *id.* ("Differing approaches to ISP liability can generate uncertainties [as to the applicable secondary liability principles].").

III. Specificity in Secondary Liability Legislation and Results

In the United States, Congress chose to enact comprehensive legislation to update American copyright law for the new digital age.⁵² This legislation went beyond the provisions required to fulfill its obligations under the WIPO treaties to include law regarding the extent of secondary liability for ISPs.⁵³ In applying these statutes, U.S. courts have concluded that ISPs will not face secondary liability under U.S. law providing the ISPs comply with the statutory procedures for removing infringing content from their services.⁵⁴

A. Implementation in the United States: The DMCA and Its Application

The U.S. Congress implemented the WIPO treaties in the United States as part of the Digital Millennium Copyright Act (DMCA).⁵⁵ Though the treaties provided the impetus for the statute, the DMCA also contained provisions beyond those needed for implementation⁵⁶ and updated the Copyright Act of 1976 to handle the new challenges of computer technology.⁵⁷ Many consider the DMCA one of the stricter implementation structures of the treaty requirements.⁵⁸ This is perhaps not surprising given that U.S. representatives pushed for treaties that would grant more protection to copyright owners.⁵⁹ However, when passing the DMCA,

52. See *infra* notes 55–60 and accompanying text (describing the DMCA's provisions and origins).

53. *Infra* note 58 and accompanying text.

54. See *infra* notes 76–82 and accompanying text (explaining the district court's decision in *Io Group v. Veoh*); *infra* notes 83–118 and accompanying text (explaining the district court's decision in *Viacom v. YouTube*).

55. Digital Millennium Copyright Act of 2008, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 § U.S.C. 101 et seq.).

56. See CRAIG NARN ET AL., *THE LAW OF INTELLECTUAL PROPERTY* 516–17 (2006) (describing the general purposes of the DMCA).

57. See *id.* (explaining the steps Congress took in the 1980s and 1990s in response to changes in technology).

58. See, e.g., CHRISTOPHER MAY, *DIGITAL RIGHTS MANAGEMENT: THE PROBLEM OF EXPANDING OWNERSHIP RIGHTS* 50 (2007) (noting that "the protections enshrined in US legislation go beyond even those measures actually required by their multilateral treaty commitments").

59. See Bill Herman & Oscar Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 *CARDOZO ARTS & ENT. L.J.* 121, 130–31 (2005) (describing the efforts of Patent Commissioner Bruce Lehman to convince the international community to create a version of the WCT and WPPT treaties that more

Congress indicated that it did not want the effort to protect copyright owners to go so far that it might chill Internet expansion and improvement of services.⁶⁰

In keeping with the desire to protect innovation, the DMCA offers a "safe harbor" provision that protects websites and web providers from secondary liability for copyright violations performed by subscribers on their network.⁶¹ In order to qualify for this protection, a company must meet the statutory definition of a service provider, defined as "an entity offering 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."⁶² Though the question of interpreting this part of the statute has yet to reach the Supreme Court, a variety of lower courts have been consistent in interpreting it broadly beyond the conventional, colloquial definition of service provider—a company that provides access to the Internet.⁶³ The safe harbor also requires that: (1) the qualified service provider not have "actual knowledge" of the infringing material,⁶⁴ (2) the service provider not get a direct financial benefit from having the infringing material on its website,⁶⁵ and (3) the service provider comply with any takedown notices provided by the content owners and do so in expeditious manner.⁶⁶ If the service provider fails to meet any one of these requirements, it forfeits the protections of the safe harbor.⁶⁷

strongly favored copyright holders).

60. See The Senate Committee on the Judiciary Report, S. REP. NO. 105-190, at 8 (1998) [hereinafter Senate Report] (expressing concern that "without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet").

61. 17 U.S.C. § 512 (2008).

62. *Id.* § 512 (k)(1)(A).

63. See *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 626 (4th Cir. 2001) (indicating that a newsgroup website would fall under the definition); see also *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) (finding that Amazon.com fits within the definition); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1175 (C.D. Cal. 2002) ("For the moment, however, the Court will assume that Cybernet is a 'provider of online services' as defined in section 512(k)."); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1087 (C.D. Cal. 2001) ("[E]Bay clearly meets the DMCA's broad definition of online 'service provider.'").

64. 17 U.S.C. § 512 (c)(1)(A) (2008).

65. *Id.* § 512 (c)(1)(B).

66. *Id.* § 512 (c)(1)(C).

67. *Id.* § 512.

Congress did not intend for this protection to cover providers who intentionally allowed infringing content and indicated that a "red flag test" would be applied—infringing activity that would be apparent to a "reasonable person" could cause a service provider to lose the protections of the statute.⁶⁸ This test is harder to meet than might initially be apparent, as Congress clarified that communication of copyright violations to the service provider by the copyright holder would not terminate the safe harbor unless the format of the notification complied with the statute.⁶⁹ In addition, Congress specified that courts should not apply the red flag test in a way that would "create a disincentive to the development of directories which involve human intervention."⁷⁰

The attitude exemplified by the DMCA provisions was in keeping with larger philosophies of infringement liability, such as the Supreme Court holding in *Metro-Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*,⁷¹ 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."⁷² The companies in *Grokster* had attempted to avoid liability by arguing that the software programs in question had substantial non-infringing uses.⁷³ The Court found the argument unconvincing and concluded that passing one test regarding secondary liability did not preclude liability under other evidence, in this case intent to cause infringing use.⁷⁴ The case is instructive in that it establishes that the

68. See Senate Report, *supra* note 60, at 44 ("[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."); see also The House Committee on Commerce Report, H.R. REP. NO. 105-551, at 53 (1998) [hereinafter House Report] (listing an identical quotation).

69. See *id.* at 54 ("[N]either actual knowledge nor awareness of a red flag may be imputed to a service provider based on information from a copyright owner or its agent that does not comply with the notification provisions of subsection [512](c)(3), [and] . . . the limitation of liability set forth in subsection (c) may still apply.").

70. *Id.* at 58.

71. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (holding that the defendants were liable for Grokster users illegally sharing files using the Grokster software because the defendants had created the software with that purpose in mind and actively encouraged that type of activity on the part of the users).

72. *Id.*

73. See *id.* at 933 (noting the company's argument that the Court should decide the case based on the doctrine that it had established in *Sony Corp. of America v. Universal City Studios, Inc.*); see also *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 425 (1984) (concluding that because the device was capable of "substantial non-infringing use" Sony would not be liable for customers using it to infringe copyright).

74. See *MGM*, 545 U.S. at 934 ("This view of *Sony*, however, was error, converting

Supreme Court is willing to apply liability where companies intend for infringement to occur and encourage such infringement. As Part III.B demonstrates, Viacom attempted to use this theory of liability to work around the protections afforded YouTube by the DMCA safe harbor provision but was ultimately unsuccessful.⁷⁵

One of the first tests of the safe harbor provision came in the case *Io Group, Inc. v. Veoh Networks, Inc.*⁷⁶ Though this district court case is not cited in *Viacom v. YouTube*, there are parallels in the reasoning behind applying the safe harbor provision of the DMCA in both cases. Io Group sued Veoh when it discovered user-uploaded clips from its adult films on Veoh's website.⁷⁷ The uploading of the clips violated Veoh's Terms of Use,⁷⁸ and Io Group did not notify Veoh of the infringing videos.⁷⁹ The court concluded that Veoh qualified for protection from damages liability under the DMCA safe harbor provision and that the injunctive relief the plaintiffs could still seek was moot because Veoh had already taken down the clips as part of its decision not to allow pornography on its site.⁸⁰ In rejecting the plaintiff's argument for vicarious liability, the court noted that "the plain language of *section 512(c)* indicates that the pertinent inquiry is not whether Veoh has the right and ability to control its *system*, but rather, whether it has the right and ability to control the *infringing activity*."⁸¹ Like the *Viacom* court, the *Veoh* court roundly rejected an interpretation of the DMCA that would require the service provider to change its business

the case from one about liability resting on imputed intent to one about liability on any theory. . . . *Sony* did not displace other theories of secondary liability.").

75. See *infra* note 116 and accompanying text (determining that there was insufficient evidence that YouTube encouraged infringing activity to hold the company liable).

76. See *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1154 (N.D. Cal. 2008) (concluding that the plaintiff had not "raised a genuine issue of material fact that Veoh had the right and ability to control the alleged infringing activity on Veoh.com").

77. See *id.* at 1136–37 (describing the origins of the lawsuit).

78. See *id.* at 1137 ("[Y]ou may not publish or make available any User Material that constitutes an infringement of third party intellectual property rights, including rights granted by U.S. copyright law, or that otherwise violates the Acceptable Use Policy.") (citations omitted).

79. See *id.* at 1137 ("When it discovered the presence of the allegedly infringing files, Io did not tell Veoh that it believed its copyrights were being violated.").

80. See *id.* at 1141 ("[T]his court concludes that Veoh is eligible for safe harbor protection from damages and, further, that the limited injunctive relief provided under the DMCA is moot.").

81. *Id.* at 1151.

structure in order to hunt down independently any and all infringing videos that might appear on its website.⁸²

B. Liability in Viacom International Inc. v. YouTube, Inc.

In 2010, the Southern District of New York filed a decision in *Viacom International Inc. v. YouTube, Inc.*, granting summary judgment to YouTube.⁸³ The dispute arose from the presence of content owned by Viacom and its subsidiaries on YouTube.⁸⁴ As the court noted in the opinion, YouTube has a designated agent in charge of receiving and responding to copyright violation notices, and YouTube takes down clips for which the site receives DMCA takedown notices.⁸⁵ Likely because of YouTube's practice of complying with takedown notices as instructed in the DMCA,⁸⁶ Viacom chose to challenge YouTube's compliance with other requirements of the DMCA's safe harbor provision, arguing that YouTube promoted and encouraged infringing use of its services⁸⁷ and that YouTube had actual knowledge of the infringing use and did not respond in an expeditious manner.⁸⁸

The court was unconvinced and in ruling on the defendants' motion for summary judgment stated the issue:

82. *See id.* (rejecting the plaintiff's "not-so-subtle suggestion that, if Veoh cannot prevent infringement from ever occurring, then it should not be allowed to exist").

83. *See Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Aug. 11, 2010) (ruling that YouTube was not liable for content posted by users in violation of copyright as long as YouTube complied with the required DMCA takedown provisions).

84. *See* Complaint at 5, *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. Mar. 13, 2007) (No. 07 Civ. 2103) [hereinafter *Complaint*] (listing Viacom's claims against YouTube and their basis).

85. *See Viacom*, 718 F. Supp. 2d at 519 ("However, defendants designated an agent, and when they received specific notices that a particular item infringed a copyright, they swiftly removed it. It is uncontroverted that all the clips in suit are off the YouTube website, most having been removed in response to DMCA takedown notices.").

86. *See supra* note 66 and accompanying text (describing service providers' responsibility to comply with takedown notices sent by content owners).

87. *See* *Complaint*, *supra* note 84, at 3 ("Defendants actively engage in, promote and induce this infringement.").

88. *See id.* at 3-4 (arguing that YouTube knew that there was widespread infringement on its site and both chose not to take "reasonable precautions" and purposely made it difficult for content owners to locate infringing material); *see also supra* note 64 and accompanying text (noting that actual knowledge of infringing material can remove a service provider from the protection of the safe harbor provision).

Thus the critical question is whether the statutory phrases "actual knowledge that the material or an activity using the material on the system or network is infringing," and "facts or circumstances from which infringing activity is apparent" in § 512(c)(1)(A)(i) and (ii) mean *a general awareness that there are infringements* (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items.⁸⁹

In the opinion, the court placed great emphasis on the legislative intent behind the language of § 512.⁹⁰ It began with a discussion of legislative history, quoting the intent of the legislators that "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."⁹¹ The court pointed out—with accompanying quotations—the "almost identical language" used by both reports to "describe the DMCA's purpose and structure"⁹² The opinion also pointed to descriptions of the safe harbors as not intended to designate the activity as non-infringing but rather to limit the liability for that activity where appropriate.⁹³

In the reports, the legislators specified that actual knowledge is not necessarily confined to notification from content owners.⁹⁴ They also suggested that knowledge that infringing material exists on the system or network does not constitute actual knowledge.⁹⁵ The court interpreted the

89. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) (emphasis added).

90. *See id.* at 519–24 (quoting extensively from the discussion of the proposed law in the Senate Committee on the Judiciary Report and the House Committee on Commerce Report).

91. *Id.* at 519 (quoting the Senate Report, *supra* note 60, at 8).

92. *Id.* at 520.

93. *See id.* ("As provided in subsection (k), section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify." (quoting Senate Report, *supra* note 60, and House Report, *supra* note 68)). "Rather the limitations of liability apply if the provider is found to be liable under existing principles of law." *Id.* (quoting Senate Report, *supra* note 60, and House Report, *supra* note 68).

94. *See id.* ("A service provider wishing to benefit from the limitation on liability . . . must 'take down' or disable access to infringing material . . . of which it has actual knowledge or that meets the 'red flag' test, even if the copyright owner or its agent does not notify it of a claimed infringement." (quoting Senate Report, *supra* note 60, at 45)).

95. *See id.* at 521 ("[The law] requires that the copyright owner or its authorized agent provide the service provider with information reasonably sufficient to permit the service provider to identify and locate the allegedly infringing material.").

available judicial history as indicating that the use of the phrase "actual knowledge" in § 512 "describe[s] knowledge of specific and identifiable infringement of particular individual items. Mere knowledge . . . is not enough."⁹⁶ In the court's view, to impose responsibility on providers "to discover which of their users' postings infringe a copyright would *contravene the structure and operation of the DMCA*."⁹⁷ This idea holds true even when the provider may know that such infringement is prevalent.⁹⁸ The court interpreted the DMCA placing the burden of policing content on copyright owners as logical given that the service platforms in question contain both infringing and non-infringing works and submission methods can make it difficult to determine which is which.⁹⁹ Simply put, the DMCA does not require affirmative action by the service provider.¹⁰⁰

This interpretation is consistent with prior judicial authority. In a case before the Ninth Circuit involving a service provider hosting websites whose names indicated their infringing content, that court announced, "We impose no . . . investigative duties on service providers."¹⁰¹ In deciding a similar case, a California District Court interpreted the Ninth Circuit's decision as an indication that "facts and circumstances" are not red flags if they would require investigation in order to determine whether infringement is present.¹⁰² The court noted that this decision captured "the reason why awareness of pervasive copyright-infringing, however flagrant and blatant, does not impose liability on the service provider" to wit because it "furnishes at most a statistical estimate of the chance any particular posting is infringing" ¹⁰³

96. *Id.* at 523.

97. *Id.* (emphasis added).

98. *Id.*

99. *See id.* at 524 ("[T]he infringing works . . . may be a small fraction of millions of works posted by others on the service's platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a 'fair use' of the material . . .").

100. *See id.* (describing the DMCA's choice not to require affirmative action as "explicit").

101. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

102. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) ("*CCBill* teaches that if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'").

103. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010).

In another case that pre-dates the Ninth Circuit's decision, a Washington District Court reached a somewhat similar interpretation in *Corbis Corp. v. Amazon.com, Inc.*¹⁰⁴ When confronted with the question of Amazon's liability for vendors selling trademark infringing merchandise on their site, the court identified the issue as one of Amazon's specific knowledge of the activity of the vendors rather than a "general awareness that a particular type of item may be easily infringed."¹⁰⁵ In *Viacom*, the court pointed particularly to the fact that evidence that red flags may have existed in general did not create liability for Amazon because the plaintiffs did not prove that Amazon chose to ignore the red flags of infringement regarding specific vendors.¹⁰⁶

As the court pointed out, this attitude has deep roots in copyright and trademark law.¹⁰⁷ The Second Circuit followed similar reasoning in the trademark infringement case *Tiffany, Inc. v. eBay, Inc.*¹⁰⁸ Though a lower court found merit in Tiffany's allegation that eBay had generalized notice of the possibility that some of the "Tiffany goods" sold by eBay vendors were counterfeit,¹⁰⁹ the Second Circuit decided that such generalized notice was insufficient for attachment of contributory trademark infringement,¹¹⁰ especially given the significant proportion of the goods for sale that were authentic Tiffany merchandise.¹¹¹ Though the trademark claims of that case would not be covered by the DMCA, the *Viacom* court asserted that they

104. See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) (finding that Amazon did not have liability for vendors using their marketplace service to sell infringing items).

105. *Id.*

106. See *Viacom*, 718 F. Supp. 2d at 524 ("Other evidence of 'red flags' was unavailing, for it 'provides no evidence from which to infer that Amazon was aware of, but chose to ignore, red flags of blatant copyright infringement on specific zShops sites.'" (quoting *Corbis Corp. v. Amazon.com, Inc.*, 352 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004))).

107. See *id.* at 523–25 (discussing cases outside the purveyance of the DMCA that have reached similar conclusions regarding when a provider has actual knowledge of infringement).

108. See *Tiffany, Inc. v. eBay, Inc.*, 600 F.3d 93, 107, 109 (2d Cir. 2010), *cert. denied* 131 S. Ct. 647 (2010) (holding that generalized knowledge such as the appearance of search results for the term "Tiffany" was not sufficient to establish contributory liability for trademark infringement on the part of eBay).

109. See *id.* at 106 (responding to Tiffany alleging that eBay knew or had reason to know that counterfeits were sold ubiquitously on the site).

110. *Id.* at 107. Contributory liability is generally narrower under trademark infringement law than it is under copyright infringement law.

111. See *id.* at 97–98 (estimating that up to 75% of the merchandise listed under "Tiffany" might be counterfeit but a "substantial number" were authentic).

shared a common underlying principle with the YouTube claims: "General knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements."¹¹²

In his final discussion of applicable case law, the *Viacom* court differentiated the YouTube case from the *Grokster* line of cases.¹¹³ In those cases, the DMCA offered no protection to the defendants because they had actively encouraged copyright infringement on their networks and/or provided services for that purpose.¹¹⁴ Though Viacom argued that this line of reasoning should be applied to YouTube,¹¹⁵ the court was unconvinced and concluded that the absence of evidence that YouTube actively encouraged infringement combined with their prompt removal of material when notified protected the company from liability.¹¹⁶

Viacom has appealed the ruling to the Second Circuit Court of Appeals.¹¹⁷ If that court follows the district court's reasoning, it seems clear that the standard for "actual knowledge" in applying the DMCA safe harbor provision will be a high one, requiring specific knowledge of individual infringing activity. Given the Second Circuit's decision in the *Tiffany* case as well as the prevailing position in American law that the holder of the right has the responsibility of policing for infringement, it is likely that the court will uphold the district court's decision.¹¹⁸

112. *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010).

113. *See id.* at 526 (discussing the line of cases beginning with *MGM Studios, Inc. v. Grokster, Ltd.*); *see also* *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (assigning liability to the creators of a peer-to-peer file sharing network where they had clearly encouraged users to violate copyright).

114. *See Viacom*, 718 F. Supp. 2d at 525 (explaining why the DMCA either did not come up in the case or did not offer the defendant any protection).

115. *See* Motion for Partial Summary Judgment at 2, *Viacom Int'l Inc. v. YouTube Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. Mar. 18, 2010) (No. 07 Civ. 2103) (arguing that the *Grokster* case led to judgment for the plaintiffs).

116. *See Viacom*, 718 F. Supp. 2d at 526 (pointing out that even Viacom in its strongest arguments was unable to assert that YouTube existed only to provide an avenue for infringing activity and thus the *Grokster* analogy was unsuitable).

117. Notice of Appeal, *Viacom Int'l Inc. v. YouTube Inc.*, 718 F. Supp. 2d 514, No. 07 Civ. 2103 (S.D.N.Y. Aug. 10, 2010).

118. *See supra* notes 108–13 and accompanying text (upholding the ruling in a similar case involving secondary liability for trademark infringement).

IV. Open-Ended Secondary Liability Legislation and Results

The European Union took a different approach to secondary liability and addressed it in a directive to Member States in 2001.¹¹⁹ The directive lacked the procedural structures of the DMCA¹²⁰ and required implementation by Member States to take effect.¹²¹ The applications of the resulting Member State legislation have led to conflicting results in the EU courts.¹²²

A. The European Union's Approach to ISP Liability

Under its power of internal market regulation, the European Union undertook a series of directives in order to bring copyright law in its Member States into compliance with the WIPO Treaties as well as provide needed harmonization of such laws.¹²³ Directive 2000/31/EC, frequently called the E-Commerce Directive, directly addresses ISP liability.¹²⁴

The E-Commerce Directive grants liability exemptions to passive service providers¹²⁵ providing they do not "collaborate" with a user or users

119. See *infra* notes 123–33 and accompanying text (explaining the directive and its effects on Member State law).

120. See *infra* note 130 and accompanying text (comparing the provisions of the DMCA and the E-Commerce Directive).

121. See *infra* note 131 and accompanying text (explaining that EU directives are not directly effective and require implementation by Member States).

122. See *infra* Part IV.B (detailing the Member State legislation and resulting court judgments).

123. See J.A.L. STERLING, *WORLD COPYRIGHT LAW* 761–62 (2d ed. 2003) (describing the source of the EU's power of regulation and its stated purpose of harmonizing the law on particular aspects of copyright and related rights (as well as other areas of intellectual property) throughout the Community); see also Directive 2001/29/EC, art. 2, 2001 O.J. (L 176) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> ("The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe.").

124. See Directive 2000/31/EC, arts. 40–58, 2000 O.J. (L 178) 1 (EC) [hereinafter E-Commerce Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0016:EN:PDF> (establishing and describing the harmonization goals regarding ISP liability and the responsibilities of the Member States thereof).

125. See *id.* art. 42 ("The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited . . . [to the cases in which it] has neither knowledge of nor control over the information which is transmitted or stored.").

to undertake illegal acts.¹²⁶ ISPs must also act "expeditiously to remove or to disable access" to any illegal information on "obtaining actual knowledge or awareness of illegal activities."¹²⁷ While the directive does prevent Member States from requiring ISPs to monitor their services for illegal activity,¹²⁸ it specifically allows Member States to impose "duties of care, which can reasonably be expected from [ISPs] and which are specified by national law, in order to detect and prevent certain types of illegal activities."¹²⁹ In many ways, the E-Commerce Directive parallels the DMCA, though its provisions are generally less detailed and explicit.¹³⁰

The difference in specificity becomes exaggerated when one considers how the European Union Member States implement directives. In the European Union, "directives are *binding* as to the *effect* to be achieved but [leave] the choice as to form and method to the Member States."¹³¹ On a practical level, this means Member States may adopt the directive wholesale, adopt laws that achieve the effect desired, or not adopt it at all, arguing that national laws already achieve the desired effect.¹³² As a result, YouTube commonly argues that EU law offers the same type of "safe harbor" liability exemptions for ISPs as the DMCA when litigating copyright infringement claims in European courts, with varying results.¹³³

126. *See id.* art. 44 ("A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.").

127. *Id.* art. 46.

128. *See id.* art. 47 ("Member States are prevented from imposing a monitoring obligation on service providers . . . with respect to obligations of a general nature . . .").

129. *Id.* art. 48.

130. *Compare id.* art. 46 (requiring that ISPs remove discovered illegal content "expeditiously"), with the Digital Millennium Copyright Act, 17 U.S.C. § 512 (c)(1)(C) (2008) (requiring ISPs to remove illegal content when provided with a takedown notice by the content owner that complies with the conditions laid out in the DMCA).

131. MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 114 (6th ed. 2010); *see also* Treaty on the Functioning of the European Union, art. 288, 2008 O.J. (C 115) 47 ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

132. *See* HORSPOOL & HUMPHREYS, *supra* note 131, at 114 (explaining the various approaches that Member States may permissibly take regarding an EU directive).

133. *See* Eric Pfanner, *YouTube Can't Be Liable on Copyright, Spain Says*, N.Y. TIMES (Sept. 23, 2010), <http://www.nytimes.com/2010/09/24/technology/24google.html?ref=youtube> (last visited Mar. 2, 2011) ("While lawyers say the European protections for hosts are generally similar to America's 'safe harbor' provisions in the Digital Millennium Copyright Act, which reduces a host's liability, European courts have offered a range of interpretations.") (on file with the Washington and Lee Law Review).

B. Secondary Liability Law: National Interpretations and Applications in Four EU Member States

Four cases considering YouTube's liability for user copyright infringement that parallel *Viacom International Inc. v. YouTube, Inc.* have been litigated in France, Spain, Germany, and Italy. All four countries are members of the European Union and thus subject to the E-Commerce Directive.¹³⁴ Yet the cases have resulted in widely different decisions. YouTube won in Spain, but the company is still litigating in France.¹³⁵ YouTube lost in Germany and Italy, though possibly for very different reasons.¹³⁶

1. France

France implemented the E-Commerce Directive with the passage of the *Law on Copyright and Related Rights in the Information Society* on August 1, 2006.¹³⁷ The legislation closely parallels the E-Commerce Directive in many ways.¹³⁸ It specifies that ISPs do not have an obligation to monitor for illegal content, except in cases where judges mandate measures designed to combat incitement to violations of human dignity such as child pornography.¹³⁹ French law also includes notice-and-takedown procedures.¹⁴⁰

134. EUROPA, *The Member Countries of the European Union*, http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Mar. 2, 2011) (on file with the Washington and Lee Law Review).

135. See *infra* notes 137–51 and accompanying text (explaining the results in the French and Spanish cases).

136. See *infra* notes 152–68 and accompanying text (explaining the results in the German and Italian cases and discussing possible explanations for the results).

137. Loi 2006-961 du 1 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Aug. 3, 2006, No. 178. See generally Thibault Verbiest, *Study on the Liability of Internet Intermediaries*, EUROPEAN UNION COUNTRY REPORT—FRANCE (2007), available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/france_12Nov2007_long_fr.pdf (explaining how France chose to implement the E-Commerce Directive).

138. See Verbiest, *supra* note 137, at 2–3 (explaining the extent to which the French Legislation tracked the E-Commerce Directive).

139. See *id.* ("Article 6-I-7 of the LCEN does not require of *access providers or service providers* a general obligation to monitor the information transmitted on their networks nor a general obligation to search out instances of illegal activity.").

140. See *id.* at 9 (quoting the legal requirement that a takedown notice include the date of notification, identity and contact information of the complaining party, a description of

In 2008, a music publishing company, SPPF, filed a copyright infringement lawsuit against YouTube that did not go to final judgment because YouTube pulled all SPPF material from its site.¹⁴¹ In 2009, SPPF filed a second lawsuit, alleging that its material was once again appearing on YouTube without authorization.¹⁴² It has yet to be decided.¹⁴³ Though YouTube is still facing litigation in France, other companies have chosen to contract with YouTube to license their content to the company.¹⁴⁴ There is some indication that France is taking an approach to secondary liability for ISPs that offers ISPs more protection: The Court of Appeals of Paris recently overturned a judgment holding that Google had some responsibility for the caching of search results that contained illegal content.¹⁴⁵

2. Spain

Spain implemented the E-Commerce Directive in 2002 as part of the *Law on Information Society Services and Electronic Commerce*.¹⁴⁶ The Spanish implementation of the law does provide a "safe harbor" for ISPs, but only to the extent that an ISP does not have "actual knowledge" of

the offending content, and the basis of the complaining party's rights to the material).

141. See John Hopewell, *French Labels Sue YouTube*, VARIETY.COM (June 17, 2009), <http://www.variety.com/article/VR1118005062?refcatid=16&printerfriendly=true> (last visited Mar. 2, 2011) ("SPPF alleges that YouTube is again hosting more than 100 [music videos] made by its members, which YouTube removed from its site after SPPF took legal action against it in 2008.") (on file with the Washington and Lee Law Review).

142. See *id.* ("Gaul's Societe Civile des Producteurs de Phonogrammes en France (SPPF) lodged the suit with Paris superior court Tribunal de Grand Instance, which handles civil offenses . . .").

143. *Id.*

144. See Kevin J. O'Brien, *Germany Is the Last Holdout in YouTube's European Music Quest*, N.Y. TIMES (Oct. 17, 2010), <http://www.nytimes.com/2010/10/18/technology/18euroyoutube.html?ref=youtube> (last visited Mar. 2, 2011) ("Sacem, the powerful French music copyright group, signed an agreement with Google that allowed YouTube to air French music videos on its site in France through 2012.") (on file with the Washington and Lee Law Review).

145. *SAIF v. Google*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 26, 2011 (Fr.), available at <http://www.juriscom.net/jpt/visu.php?ID=1285>.

146. Ley 34/2002, de 11 de Julio, de servicios de la sociedad de la información y de comercio electrónico (B.O.E. 166, 12 July 2002, p. 25388). See generally Aurélie Van der Perre, *Study on the Liability of Internet Intermediaries*, EUROPEAN UNION COUNTRY REPORT—SPAIN (2006), available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/spain_12nov2007_en.pdf (explaining how Spain chose to implement the E-Commerce Directive).

infringing activity where the complainant seeks damages or "awareness" where the complainant seeks an alternate civil remedy.¹⁴⁷

In 2008, Telecinco, a music publishing company, took YouTube to court for clips of its content appearing on the site.¹⁴⁸ The judge in Spain decided in favor of YouTube on Telecinco's copyright claims, refusing to require that the company monitor users' uploads and weed out any potentially infringing content.¹⁴⁹ The judge did say, however, that YouTube could face liability if it did not remove content when informed that it violated copyright.¹⁵⁰ Interestingly, although the cases resulted in very different rulings, the same media conglomerate that owns Telecinco also owns the company that brought an action against YouTube in Italy.¹⁵¹

3. Germany

The E-Commerce Directive was implemented in Germany as part of the 2007 Telemedia Act.¹⁵² According to the act, Internet service providers do not have an affirmative responsibility to monitor for illegal activity.¹⁵³ In secondary liability cases, German courts apply general tort law

147. See Miquel Peguera, *Internet Service Providers' Liability in Spain: Recent Case Law and Future Perspectives*, 1 JIPITEC 151, 152 (2010) ("Thus, a two-tiered standard is set forth: lack of actual knowledge for claims other than for damages, and lack of constructive knowledge in case of claims for damages.").

148. S. Juz. Mer. No. 7, 289/2010, Sept. 20, 2010.

149. See Pfanner, *supra* note 133 ("A Spanish court on Thursday sided with Google in a dispute with the broadcaster Telecinco, saying Google's online video-sharing service, YouTube, did not have to screen television clips for potential copyright violations before posting them on the site.").

150. See *id.* ("Like the American court, the judge in Madrid said YouTube was not liable as long as it removed copyrighted material when notified by the rights holder.").

151. See *id.* (noting that Telecinco is owned by the Berlusconi family conglomerate); see also *infra* note 168 and accompanying text (noting that the same conglomerate owns Mediaset in Italy).

152. See *Telemediengesetz*, Feb. 26, 2007, BGB1. I at 179 (Ger.) ("This Law is designed to implement Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services . . ."). See generally Gerald Spindler, *Study on the Liability of Internet Intermediaries*, EUROPEAN UNION COUNTRY REPORT—GERMANY (2007), available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/germany_12nov2007_en.pdf (explaining how Germany chose to implement the E-Commerce Directive).

153. See *Telemediengesetz*, *supra* note 152, art. 7 (stating that an ISP, as defined by the Act, is not responsible for monitoring but is still responsible for any requirement to block or remove illegal content arising under other areas of German law).

principles,¹⁵⁴ and courts have been considering defendants joint tortfeasors if they violated their "duty of care" in cases of "enabled infringement."¹⁵⁵

In Germany, classical singer Sarah Brightman's representative, joined by Germany's music royalty group, sued YouTube over the appearance of protected music videos on the website.¹⁵⁶ The 2010 decision of the Hamburg district court refused to grant YouTube the same protections as the courts in the United States or Spain.¹⁵⁷ The court said that asking users if they had the right to post content at the uploading screen was insufficient to insulate YouTube from liability.¹⁵⁸ Nonetheless, the court only imposed liability where the plaintiffs had given YouTube some notice of the presence of copyright violations on the site.¹⁵⁹ Although it remains to be seen whether this approach will survive a possible appeal to a higher court, the decision to require YouTube to take down videos based on any notice of alleged copyright infringement is consistent with the German approach to liability.¹⁶⁰

4. Italy

Italy enacted the E-Commerce Directive by Legislative Decree No. 70 in 2003.¹⁶¹ The text of the decree mirrors that of the directive, verbatim in many parts.¹⁶² Italian law does not specify notice-and-takedown procedures for ISPs to follow when illegal content appears on their services.¹⁶³

154. See ESTELLE DERCLAYE, RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 234 (2009) (explaining the general structure of copyright infringement suits in Germany).

155. See *id.* at 234–35 ("In recent decisions, however, the courts rather tend to consider persons who violate a duty of care when enabling infringement as joint tortfeasors.").

156. O'Brien, *supra* note 144.

157. LG Hamburg, Sept. 9, 2010, 8. Zivilkammer, 308 O 27/09 (Ger.).

158. See Christopher Lawton, *German Court Rules Against Google in Copyright Case*, WALL ST. J. (Sept. 7, 2010), <http://blogs.wsj.com/digits/2010/09/07/german-court-rules-against-google-in-copyright-case/> (last visited Mar. 2, 2011) (explaining the court's reasoning) (on file with the Washington and Lee Law Review).

159. See *Zivilkammer*, 308 O 27/09 at ¶ 77 (noting that the court would not impose liability where YouTube did not have "actual knowledge" of the copyright infringement).

160. See *supra* notes 154–55 and accompanying text (explaining the general approach to secondary liability in Germany).

161. Giovanni Maria Riccio, *Study on the Liability of Internet Intermediaries*, EUROPEAN UNION COUNTRY REPORT—ITALY 2 (2007), available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/italy_12nov2007_en.pdf.

162. See *id.* (detailing the provisions of the decree that are verbatim copies of the text of the E-Commerce Directive).

163. See *id.* at 4 ("There are no specific notice and takedown . . . procedures in place in

In 2008, the media company Mediaset filed a lawsuit for infringement against YouTube because of its content illicitly appearing on the site.¹⁶⁴ The Italian court ruled in favor of Mediaset and ordered YouTube to find and remove all Mediaset content from the site.¹⁶⁵ The Italian court applied what is essentially strict liability to YouTube, a violation of the E-Commerce Directive it chose to implement.¹⁶⁶ Despite the E-Commerce Directive, Italy introduced draft laws in 2010 that would make companies like YouTube responsible for its users' actions when it comes to copyright infringement.¹⁶⁷ Some have found both the ruling and the proposed law suspicious given that the Italian Prime Minister Silvio Berlusconi's family has controlling ownership of Mediaset.¹⁶⁸

the Italian legal system . . .").

164. See Dawn Kawamoto, *Italian Company Sues YouTube*, CNET.COM (July 20, 2008), http://news.cnet.com/8301-1023_3-10002413-93.html?part=rss&subj=news&tag=2547-1_3-0-20 (last visited Mar. 2, 2011) ("Italian media company Mediaset announced on Wednesday that it has filed a lawsuit against YouTube and owner Google, alleging that the video-sharing site distributed and exploited its commercial property.") (on file with the Washington and Lee Law Review).

165. Reti Televisive Italiane contro YouTube, Trib. Roma, 24 novembre 2009, n.54218/08 (It.); see also Michael Day, *Mediaset Beats YouTube in Court*, VARIETY.COM (Dec. 16, 2009), <http://www.variety.com/article/VR1118012827?refCatId=19> (last visited Mar. 2, 2011) ("A Rome court ordered the video-sharing site to remove all illicitly uploaded Mediaset content on Wednesday.") (on file with the Washington and Lee Law Review).

166. See *supra* note 128 and accompanying text (noting that the E-Commerce Directive bars Member States from imposing an obligation on ISPs to monitor their services for infringement).

167. See *ISP Cleared of Copyright Infringement*, BBC NEWS (Feb. 4, 2010), <http://news.bbc.co.uk/2/hi/technology/8498100.stm> (last visited Mar. 2, 2011) ("In Italy, meanwhile, the government is proposing new laws which would make video channels such as YouTube directly responsible for copyright infringement if their users upload copyrighted material.") (on file with the Washington and Lee Law Review); see also *YouTube, EU E-Commerce Rules Under Threat*, EURATIV.COM (Jan. 27 2010), <http://www.euractiv.com/en/infosociety/youtube-eu-commerce-rules-threat/article-189261> (last visited Mar. 2, 2011) ("The European Commission is concerned about a draft Italian law requiring video-sharing platforms such as YouTube to check that user-generated content is lawful before it is posted. Many fear that the move—a clear breach of the E-Commerce Directive—could set a dangerous precedent . . .") (on file with the Washington and Lee Law Review).

168. See Jeff Israely, *Berlusconi vs. Google: Will Italy Censor YouTube?*, TIME.COM (Jan. 22, 2010), <http://www.time.com/time/world/article/0,8599,1955569,00.html> (last visited Mar. 2, 2011) ("The billionaire Prime Minister just happens to own the country's only major private television network, which critics say is a conflict of interest much more troubling for the country than any of his private dalliances or verbal faux pas.") (on file with the Washington and Lee Law Review).

V. Creating Specificity Regarding Secondary Liability in International Law

The differing approaches to secondary liability make it extraordinarily difficult for companies like YouTube to operate internationally. Now is the appropriate time for an international solution to this issue for several reasons. First, a lack of specificity and clarity has had a negative effect on courts attempting to apply the law in this area of liability, creating confusion about when ISPs are liable for their users' activities.¹⁶⁹ Second, the Internet's growth since the WCT and WPPT treaties were passed provides a better understanding of how Web 2.0 works and how it interacts with legal structures. Third, safe harbor provisions are the best way to protect the new Internet interactions of Web 2.0. Fourth, the desirability of legal uniformity in an industry as borderless as the Internet means an international response is the best solution to the uncertainty created by the lack of a liability standard.

Both the DMCA and the E-Commerce Directive display intent to protect innovation by providing a safe harbor for companies that serve as conduits for user interaction and user-generated content.¹⁷⁰ The DMCA provides a clear structure, clarified even further by case law, for determining when ISP awareness of infringement is sufficient to trigger liability.¹⁷¹ The E-Commerce Directive provides for limited liability but lacks clear procedures.¹⁷² As a result, despite the passing of the E-Commerce Directive, uncertainty as to when ISPs are liable for unauthorized user activity has continued in the European Union.¹⁷³ This uncertainty can increase costs for new ISPs to enter the market, discourage old ISPs from entering new markets, and dampen support for new innovations in technology related to user-generated content. Kim Walker, a

169. See the case studies in Parts III–IV for a demonstration of how a lack of specificity in the law results in incompatible judicial decisions.

170. See E-Commerce Directive, *supra* note 124, art. 14 (noting that disparity in Member State law regarding secondary liability of ISPs prior to the passing of the directive had "prevent[ed] the smooth functioning of the internal market"); see also *supra* notes 60–62 and accompanying text (explaining the U.S. Congress's concerns and intentions in passing the safe harbor provision of the DMCA); *supra* notes 124–29 (detailing how the E-Commerce Directive addresses ISP liability).

171. See STERLING, *supra* note 123, at 547–48 ("In short, section 512 [of the DMCA] provides a legally defined scheme embracing statutory provisions on limitations of liability and related procedures.").

172. See *id.* at 547 ("[N]o rules are laid down in the Directive as to what constitutes actual knowledge, or how the service provider might obtain it.").

173. See *supra* Part IV.B (detailing the variation in European court judgments about secondary liability).

partner at the law firm Pinsens Masons in London, explained the problem for companies with global operations when discussing the YouTube case in Spain. She said, "The issue of when a host was liable has been getting a bit vague, and some hosts in Europe have been getting a little bit nervous."¹⁷⁴ Multiply that nervousness by operation in multiple countries across multiple continents, and it is easy to see the difficulty for such companies.

When the applicable WIPO treaties were negotiated in the late 1990s, there was still a significant amount of uncertainty regarding what forms of Internet interaction would be successful.¹⁷⁵ An example of this uncertainty was reflected in the WIPO delegation's rejection of a proposal to include in the WCT clarification that online publication fulfilled the Berne Convention's publication requirement.¹⁷⁶ One of the possible reasons for its rejection was the question regarding the proposal's effect on ISP liability.¹⁷⁷ In addition, the push from the United States' delegates for strong protections for content owners created negotiating problems with countries that saw the United States as pushing a big business agenda.¹⁷⁸ The user movement (Silke von Lewinski's way of conceptualizing Web 2.0) was in its infancy during the WIPO treaty negotiations in the 1990s but has since gained a foothold in both the academic community and the attitudes of regular Internet users.¹⁷⁹ Websites that typify the movement—Facebook, Wikipedia, Flickr—only emerged in the early years of the new

174. Pfanner, *supra* note 133.

175. See LEWINSKI, *supra* note 24, at 431 (pointing out that WIPO member countries "published documents on the possible consequences of digital technology for their national laws only from mid-1994").

176. See *id.* at 484–85 (describing the proposed addition to the treaty).

177. See *id.* at 485 (theorizing why the delegation rejected the proposal based on the recorded discussion at the negotiations).

178. See MAY, *supra* note 25, at 66 (explaining that the U.S. representatives' push in favor of American intellectual property producers drove much of the negotiating process); see also LEWINSKY, *supra* note 24, at 598 ("[T]he gap between the systems of protections in the USA and in the rest of the world, has always subsisted and hindered the adoption of international protection as long as the USA participated in the negotiations.").

179. See LEWINSKI, *supra* note 24, at 590–93 (describing the beginning of the user movement and its growth in recent years). Lewinski is generally critical of the user movement that he describes as rooted in "the direct contact of individual users with copyright uses that were previously performed only by publishers, broadcasters, or other professionals." *Id.* at 591. Lewinski criticizes the user movement as being biased in favor of a removing too many of the protections of authorial expression in favor of user freedom and questioning the entire system of protection rather than seeking to fine tune it for new technology. *Id.* at 592–93. Lewinski emphasizes the need to balance the rights of the authors with the rights of the users. *Id.*

millennium.¹⁸⁰ In the years since the treaty negotiations, the way users see the Internet and conceptualize how they interact with it has changed.

Scholars have characterized these interactions as Web 2.0,¹⁸¹ the user movement,¹⁸² and the Read/Write culture.¹⁸³ At the heart of all these definitions is the concept of the Internet as a place of interaction where users participate in art and culture rather than simply consuming the culture approved by the cultural gatekeepers of newspapers, record producers, museum curators, and their ilk. Whether one embraces this as a welcome addition to our culture¹⁸⁴ or worries about the implications of this change for cultural attitudes about author protection,¹⁸⁵ the truth is that the Internet has already changed. This change and its effect on Internet interaction require a corresponding adjustment in the legal structure of liability.

It is true that digital technology and the Internet have made unauthorized copying and distribution of copyrighted works much easier and arguably more common.¹⁸⁶ The problem of easy online copyright infringement extends far beyond the part of the Internet occupied by YouTube. The 2010 *Cooks Source* scandal amply illustrates this unfortunate ease of theft. In 2010, an independent blogger realized that the magazine *Cooks Source* had published a 2005 article of hers without permission.¹⁸⁷ After notifying the editor of the problem and requesting

180. See, e.g., Facebook, *Facebook Profile*, FACEBOOK.COM, <http://www.facebook.com/facebook?sk=info> (last visited Mar. 2, 2011) (listing its year of founding as 2004) (on file with the Washington and Lee Law Review); Flickr, *Press Page*, FLICKR.COM, <http://www.flickr.com/press.gne> (last visited Mar. 2, 2011) (listing its year of creation as 2004) (on file with the Washington and Lee Law Review); Wikipedia, *Wikipedia: About*, WIKIPEDIA.COM, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Mar. 2, 2011) (listing its year of creation as 2001) (on file with the Washington and Lee Law Review).

181. See *supra* note 50 and accompanying text (explaining the definition and origin of the concept of Web 2.0).

182. See *supra* note 179 and accompanying text (explaining the user movement and its growth in the years after the passage of the WCT and the WPPT).

183. See LAWRENCE LESSIG, REMIX 28–29 (2008) (identifying Read/Write, or RW, culture as one in which users interact with and add to artistic expression by analogizing it to a file with Read/Write permissions that the user can modify).

184. See *id.* at 51–83 (explaining the benefits of RW culture).

185. See *supra* note 179 and accompanying text (raising concerns about the implications the push for greater user-friendliness could have for the protection of authors' copyright).

186. See, e.g., SIVA VAIDYANATHAN, COPYRIGHTS AND COPYWRONGS 152 (2001) ("The digital moment has . . . collapsed the distinctions among three formerly distinct processes: gaining access to a work, using (we used to call it 'reading') a work, and copying a work.").

187. See Rene Lynch, *Cooks Source Magazine v. the Web*, LATIMES.COM (Nov. 4, 2010), <http://latimesblogs.latimes.com/dailydish/2010/11/cooks-source-magazine-vs-the-web.html>

payment, the blogger received an email from the magazine's editor refusing to pay the blogger and asserting that anything posted online is public domain and the practice was common.¹⁸⁸ Subsequent investigation revealed that the magazine had stolen numerous articles and recipes from Internet sources, with a clear disregard for the intellectual property rights of the original authors, by a simple copy-and-paste technique.¹⁸⁹ This type of activity is certainly troubling, and the ease with which it is possible is even more so.

A resulting question is: Are we as a culture willing to make ISPs responsible for policing all the content that flows through their services? To date the answer has been no, and traditionally copyright holders have born the responsibility of enforcing their copyrights.¹⁹⁰ Commentators often frame the discussion in terms of the responsibility of large and wealthy ISPs like YouTube.¹⁹¹ Despite the admitted usefulness of this lens, one which this Note also uses, it is important to remember that ISPs also include Internet access providers, libraries, universities, and start-up companies.¹⁹² Such ISPs provide valuable services, but some lack the resources to employ policing mechanisms like YouTube's Content ID.¹⁹³

(last visited Mar. 2, 2011) (detailing the origins of the controversy) (on file with the Washington and Lee Law Review).

188. *See id.* ("Translation: The magazine believes it can copy and paste anything it finds there—your recipes, Los Angeles Times recipes—into the pages of its own magazine and you can't do anything about it.")

189. *See* Edward Champion, *The Cooks Source Scandal: How a Magazine Profits from Theft*, EDWARD CHAMPION'S RELUCTANT HABITS BLOG (Nov. 5, 2010), <http://www.edrants.com/the-cooks-source-scandal-how-a-magazine-profits-on-theft/> (last visited Mar. 2, 2011) (finding that the magazine had at least six documented instances of lifting articles from websites that included recipes from The Food Network) (on file with the Washington and Lee Law Review).

190. *See* STERLING, *supra* note 123, at 575 (explaining the position of the rights holder with regard to enforcement proceedings and arguing the importance of international harmonization of enforcement mechanisms to alleviate some of the burden on rights holders in the digital environment).

191. *See* Steven Seidenberg, *Copyright in the Age of YouTube*, ABAJOURNAL.COM (Feb. 1, 2009), http://www.abajournal.com/magazine/article/copyright_in_the_age_of_youtube/ (last visited Mar. 2, 2011) ("Even without the burden of doing fair-use analyses, copyright owners are having a tough time policing UGC sites; the volume of posts is overwhelming. Ten hours of video content are put online every minute of every day—more than 250,000 clips per day—and that is just on YouTube.") (on file with the Washington and Lee Law Review).

192. *See supra* note 63 and accompanying text (listing some of the types of services that courts have ruled fell under the ISP umbrella and explaining that courts have been liberal in applying the definition).

193. *See* YouTube, Inc., *Audio and Video ID*, YOUTUBE.COM, <http://www.youtube.com/>

In some cases, legitimate uses that are protected as "fair use"—prevalent on the networks of library and university service providers—could be hampered by requiring affirmative policing. Any legal schemes that encompass YouTube's potential responsibilities to copyright holders will also have consequences for the small and less-funded companies.

Together these concerns indicate that the time has come for nations to negotiate an international treaty covering secondary liability for ISPs under the auspices of the WIPO. An international treaty could reach beyond the United States and the European Union to the important and expanding markets in Asia, Africa, and the Americas as well as creating valuable discussion on how properly to structure a new balance of interests in copyright law. The treaty should create a safe harbor for ISPs from secondary liability with *clear and specific* provisions. Those provisions should specify what qualifies as an ISP and what actions the ISP must take to stay within the safe harbor protection. Clear procedures are necessary to give legislatures and businesses certainty about what actions an ISP must take in order to avoid liability.

First, the treaty should clearly define what an ISP is. This Note proposes that a comprehensive definition would best be reached by creating a hybrid of the definitions already present in the DMCA and the EU directives that have addressed service providers. A hybrid definition is necessary to provide clarity and flexibility beyond that offered by the DMCA definition, which does not adequately cover new technology. The DMCA definition, this Note contends, defines an ISP too much in line with the colloquial definition of an ISP as a network access provider. The DMCA defines a service provider as "an entity offering 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."¹⁹⁴ Problematically, it also appears to limit the definition for most of the safe harbor protections to "a provider of online services or network access, or the operator of facilities therefor."¹⁹⁵ American courts have

t/contentid (last visited Mar. 2, 2011) (explaining the program) (on file with the Washington and Lee Law Review). Content ID is a software-based service that YouTube provides to copyright holders. *Id.* It allows them to submit audio or video files which the program checks against uploaded videos for matches. *Id.* If there is a match, YouTube tracks, blocks, or requests a licensing fee depending on the copyright holder's wishes. *Id.* According to YouTube's official description, the use of the program is free, but there is an additional charge for the licensing option. *Id.*

194. 17 U.S.C. § 512 (k)(1)(A).

195. *Id.* § 512 (k)(1)(B).

interpreted the DMCA's definition of service provider broadly yet commented that this broad interpretation is not clear from the text itself.¹⁹⁶ The European Union definition of service provider, called information society services in the directives, is spread among different directives.¹⁹⁷ The definition "covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression, and storage of data, and at the individual request compression) of a recipient of a service" as well as "data processing and storage."¹⁹⁸ This Note proposes combining these definitions into one: an entity offering the transmission, routing, or providing of connections for digital online communications, or an entity providing remunerative services from a distance at the behest and instruction of the user and via means of electronic processing and storage of data. This definition is more comprehensive while providing clarity and allowing flexibility for the ever changing landscape of online services. It is meant to be a starting point, for the negotiating parties to modify as necessary.

Second, the treaty should clearly define what procedures an ISP must follow to qualify for the safe harbor from liability. This Note proposes that the notice-and-takedown procedures laid out in the DMCA¹⁹⁹ and similar to ones adopted in some EU countries²⁰⁰ provide a good base for treaty provisions. These proposed procedures would create a *uniform* and *clear* international standard for liability in a way that would allow global companies to construct standardized operations for dealing with copyright violations on their sites and networks. The ISPs should provide a clear and easy way to contact their designated agent with information that infringing material appears on their service. No ISP should be required to actively police its service. Given that copyright law grants copyright holders what is essentially a monopoly on their content for the life of the author plus seventy years, it is logical to place the responsibility of policy for violations on the content holders.²⁰¹ The content

196. See, e.g., *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1175 (C.D. Cal. 2002) ("Although there appears to be uniform agreement that the definition is broad, or at least broader than the definition of 512(k)(1)(A) concerning conduit-type services, the court has found no discussion of this definition's limits.")

197. See E-Commerce Directive, *supra* note 124, art. 17 (noting that the appropriate definition was already covered by Directive 98/34/EC of June 22, 1998 and Directive 98/84/EC of Nov. 20, 1998).

198. *Id.*

199. See 17 U.S.C. § 512(c) (2008) (detailing the procedures for ISPs to avoid liability and for content holders properly to notify of infringement).

200. See, e.g., *supra* note 140 and accompanying text (listing France as a country that has chosen to use notice-and-takedown procedures).

201. See 17 U.S.C. § 302(a) (2008) (setting the term of copyright protection at life of

holder should provide the ISP with clear information to identify the material, including the location, so that the ISP can remove the material. All provided information should be reasonably sufficient for each party to carry out their tasks. Within this general structure, this Note argues that the negotiating parties should create more precise directions on how to fulfill the notification and takedown requirements.

Individual countries have taken steps to address the problems created by the cultural changes of the user movement, or Web 2.0.²⁰² Yet the international nature of the issue calls for an international solution. As Siva Vaidyanathan points out in his book *Copyrights and Copywrongs*, "[d]igitization and networking have . . . collapsed the distinctions between local and global concerns" when it comes to copyright.²⁰³ Even websites that are far too small to have international operations in the same way as Facebook or YouTube can be accessed from other countries by a simple click, though certain content can be geo-blocked.²⁰⁴ Though this Note has used YouTube's legal troubles in the United States and Europe as a convenient lens to look at the issue, problems of secondary liability for user-generated content are hardly restricted to YouTube in the United States and the European Union. Copyright holders and ISPs have raised the same questions in countries outside the scope of this Note. For example, in Australia in 2010, a group of content owners sued one of the country's main internet access services, arguing that it was liable for its users' illegal downloading.²⁰⁵ The court ruled there was no liability, saying that "[i]f the ISPs become responsible for the acts of their customers, essentially they become this giant and very cheap mechanism for anyone with any sort of legal

the author plus seventy years in compliance with Berne Convention requirements).

202. See *supra* Part III.A (noting that these steps are exemplified by the DMCA in the US); see also *supra* Part IV.B (noting the choices EU Member States made in implementing the E-Commerce Directive).

203. VAIDYANATHAN, *supra* note 186, at 153.

204. See Daisy Yu, *Geo-Blocking: Jamming a Square Peg in a Round Hole*, ECOMMERCETIMES.COM (July 30, 2010), <http://www.ecommercetimes.com/rsstory/70516.html> (last visited Mar. 2, 2011) (explaining the general workings of geo-blocking) (on file with the Washington and Lee Law Review). Geo-blocking is a type of digital rights management that restricts content availability to certain geographic locations, usually countries. *Id.* Geo-blocking is most commonly used to restrict access to videos to the geographic area for which the content has been licensed. *Id.* Because geo-blocking is done using the IP address of the user, it is fairly simple to circumvent even for Internet users lacking in technical knowledge. *Id.*

205. See Verna, *supra* note 2 ("[I]iNet, Australia's third largest ISP, was taken to court by a group of 34 movie production houses They claimed that iiNet was guilty of copyright infringement for not preventing illegal downloads of films.").

claim."²⁰⁶ In 2011, the Federal Court of Australia dismissed the content owners' appeal of the verdict below.²⁰⁷ As far back as 2006, the Japan Society for Rights of Authors, Composers and Publishers expressed concern over unauthorized anime videos showing up on YouTube.²⁰⁸ Copyright is a global issue that goes beyond the United States and Europe.

VI. Conclusion

Over a decade after the WIPO treaties, it is time to revisit global copyright law regarding ISP liability with the knowledge gained from the battles fought in courts across the WIPO signatory nations. In the years since the treaties' negotiation, two of the main producers and consumers of intellectual property, the United States and the European Union, took different approaches to the same problem, although they had similar intentions.

The United States chose to address ISP liability in a very specific way in the DMCA.²⁰⁹ The DMCA offered ISPs a safe harbor from liability in exchange for those ISPs following specific practices to get unauthorized content off their services.²¹⁰ ISPs responded by moving to put in place protections that complied with the legislation, and U.S. courts have turned to those procedural requirements in secondary liability cases. In the largest case of this type since the passing of the DMCA, the *Viacom* judge chose to use the procedural requirements as a test rather than require that YouTube affirmatively seek out any copyright violations on its site.²¹¹ Since this case began, YouTube has developed software programs to assist content holders in locating infringement on the site.

206. *Id.*

207. See Joe Schneider, *Hollywood Studios Lose Appeal on Australian Piracy Lawsuit*, BLOOMBERG.COM (Feb. 24, 2006), <http://www.bloomberg.com/news/2011-02-24/disney-viacom-lose-bid-to-hold-internet-provider-liable-for-users-piracy.html> (last visited Mar. 2, 2011) ("Walt Disney Co. and Viacom Inc.'s Paramount Pictures are among Hollywood's biggest movie studios that lost a piracy lawsuit in Australia as an appeals court upheld a ruling that a local internet provider wasn't responsible for customers illegally downloading films.") (on file with the Washington and Lee Law Review).

208. See Andrew Leonard, *YouTube: I Think I'm Turning Japanese*, SLATE.COM (Dec. 10, 2006), http://www.salon.com/technology/how_the_world_works/2006/12/20/youtube_in_japan (last visited Mar. 2, 2011) (explaining the concerns of Japanese content owners and discussing the level of copyright infringing content on YouTube) (on file with the Washington and Lee Law Review).

209. *Supra* Part III.A.

210. *Supra* notes 61–67 and accompanying text.

211. *Supra* Part III.B.

The European Union and its Member States took a different tack in addressing ISP liability. The European Union chose to emphasize flexibility in its solution, instructing Member States to offer protection for ISPs without specifying how or what procedures ISPs could follow in order to qualify for that protection.²¹² When implementing the resulting E-Commerce Directive, Member States passed varying legislation. Some chose to create procedures for ISPs while others adopted the directive's provisions with little to no change.²¹³ The result was litigation with diametrically opposite outcomes.

The solution to this problem is an international treaty negotiated through the WIPO that contains specific procedures for ISPs to follow if they want to qualify for a safe harbor from liability. The international nature of a treaty addresses the nature of the Internet as non-border space. The specificity addresses the nature of ISPs as a provider of a service. Lacking knowledge of what circumstances trigger liability can have a chilling effect on expansion for all but the richest ISPs, the very ones that are generally pointed to as the origin of all the copyright holders' woes. By defining when and how an ISP generates responsibility for its users' actions, this solution allows for the development of new Web 2.0 applications while still leaving room for prosecution where appropriate.

ISP liability is a significant, current issue for the Internet. User-interaction is a significant part of the most-visited and most famous sites on the Internet. ISP liability also turns up in less well-known areas, affecting libraries and universities among others. It is important to consider what we value about the Internet and what is worth protecting. The interactive nature of the Internet is worth protecting, and that protection is possible without sacrificing artistic expression.

Returning to Ayn's uploaded videos from the introduction, different commentators would suggest that liability for her misdeed should attach to YouTube the moment she uploaded the videos (and YouTube did not "catch" them), the moment another user flagged them as infringing (and YouTube did not take them down), or the moment YouTube allowed Ayn to make a new account. The purpose of this Note is not to suggest where in that line of events liability should attach but rather to say that the where, when, and how of liability needs to be clear enough to give ISPs the tools to avoid it. The international community needs to make the law hard to break, not hard to follow.

212. *Supra* Part IV.A.

213. *Supra* Part IV.B.