

## Copyright Infringement Liability for Video Sharing Networks: *Grokster* Redux or Breaking New Ground under the Digital Millennium Copyright Act

By Jeffrey C. Brown

Ever since Johannes Gutenberg invented the printing press, copyright law has constantly evolved to keep pace with the steady march of technology that has made copyright infringement much easier to accomplish and, consequently, more difficult to control. Recent examples of that evolution can be found in Congress' enactment of the Digital Millennium Copyright Act of 1998 (DMCA) and its subsequent interpretation by the courts in copyright infringement lawsuits brought by the entertainment industry against the peer-to-peer (P2P) networks like Napster, Aimster, and Grokster.

As most know by now, such networks allowed users of their proprietary software to freely copy and distribute protected content over the Internet while avoiding payment to the copyright holder. According to John Dudas, the Director of the US Patent and Trademark Office, Internet piracy costs US businesses as much as \$250 billion a year.<sup>1</sup> It now seems, however, that the era of blatant copyright infringement of music and other content through file-sharing technologies is on the wane, as recently demonstrated by Kazaa's (Sharman Network Ltd.) payment of \$115 million dollars to the recording industry in the *MGM v. Grokster*<sup>2</sup> case on remand by the US Supreme Court.

Now, a new battle has begun on a slightly different front. This time, the target is video-sharing network YouTube, Inc., which operates the popular Web site *youtube.com*. Unlike *A&M v. Napster*,<sup>3</sup> *In re Aimster Copyright Litigation*,<sup>4</sup> and *MGM v. Grokster*,<sup>5</sup> in which the courts found that those networks actively had encouraged their users to infringe copyrighted material, the outcome of *Robert Tur d/b/a Los Angeles News Service v. YouTube, Inc.*,<sup>6</sup> and similar cases may turn less on issues relating to contributory and vicarious copyright infringement under common law and more on the safe harbor provisions of the DMCA. Either way, cases like *Tur v. YouTube*<sup>7</sup> have the potential to further refine the legal landscape governing Internet-based file-sharing networks.

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### The Parties and the Works at Issue

Robert Tur d/b/a Los Angeles News Service claims copyrights in various audiovisual works, including footage of the O.J. Simpson freeway chase and the beating of truck driver Reginald Denny during the 1992 Los Angeles riots. Tur alleges that the Los Angeles News Service is "a duly accredited news gathering and reporting organization, owned and operated by Plaintiff Tur."<sup>8</sup> Tur's complaint specifically identifies several videos, including the Denny attack, as examples of copyrighted works posted and viewed on *youtube.com* without Tur's permission. Tur further alleges that *youtube.com* receives "more than 60,000 uploads" of copyrighted and uncopyrighted videos daily and is viewed by "6 million unique users per day."<sup>9</sup> According to Tur, this popularity allows YouTube to generate revenue based on an advertising business model.

In addition, Tur alleges that, because users upload videos directly to YouTube's servers, this "allows it to have actual knowledge of what particular copyrightable files are being distributed, played and copied through its service."<sup>10</sup> Tur alleges that, despite YouTube's actual knowledge of copyright infringement, it failed "to develop any substantial filtering tools or other mechanisms to diminish the infringing activity."<sup>11</sup> In sum, Tur alleges that YouTube is liable for direct, contributory, and vicarious copyright infringement and seeks damages, attorneys' fees, and an injunction.<sup>12</sup>

YouTube, Inc., was founded in February 2005 and owns *youtube.com*, one of the most popular Web sites on the Internet. The Internet ranking service, Alexa Internet, Inc., ranks *youtube.com* as the tenth most accessed Web site on the Internet.<sup>13</sup> Similar to the file-sharing concept of Napster and its progeny, *youtube.com* allows its users to upload and share video clips on its computer network without charge. Unless YouTube approves the user for a so-called Director's Account, an uploaded video is limited to 10 minutes in length or 100 megabytes in size. Once uploaded, the video is immediately accessible to anyone on the Internet.

In contrast to some of the allegations in the complaint, YouTube asserts that users upload about 65,000 clips and log about 70-100 million views of videos each day.<sup>14</sup> It also asserts that "it proactively works with content

owners to help them identify and expeditiously take down any videos that content owners claim to be infringing of their copyrights.”<sup>15</sup> YouTube admits that “it sells advertising,” but it also works with content owners like NBC and others “to strike business deals to the benefit of the content owners.”<sup>16</sup> YouTube makes the point that it “goes above and beyond the requirements of the DMCA” to discourage copyright infringement.<sup>17</sup>

### The DMCA’s Four Safe Harbors

Not surprisingly, YouTube seeks shelter from copyright infringement liability under the safe harbor provisions of the DMCA. Under those provisions, a service provider is not liable for monetary, injunctive, or other equitable relief relating to material online so long as the service provider does not adopt an “ostrich-like” approach to copyright infringement, as the court criticized in *Aimster*, and follows the notice and take-down provisions of the DMCA.

The first step for YouTube is to qualify as a “service provider,” which is likely given the courts’ tendency to construe this term broadly.<sup>18</sup> The DMCA defines a service provider as:

[A] provider of online services or network access, or the operator of facilities therefor, and includes an entity described in sub-paragraph (A).<sup>19</sup>

Subsection A reads:

As used in subsection (a) [for transitory digital network communications], the term ‘service provider’ means 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 users’ choosing, without modification to the content of the material as sent or received.<sup>20</sup>

A service provider fitting this definition may then qualify, under certain circumstances, for one or more of the four safe harbors of the DMCA.<sup>21</sup>

The first safe harbor, “Transitory Digital Network Communications,” applies when the service provider would be liable for providing a connection to transmit infringing material through its system or network.<sup>22</sup> The second safe harbor, “System Caching,” limits copyright infringement liability for intermediate and temporary storage (or caching) of copyrighted material on the service provider’s system.<sup>23</sup>

The third safe harbor, for “Information Residing on Systems or Networks at the Direction of Users,” shelters the service provider from liability so long as the service

provider does not know, or have reason to know, about infringing activity or material on its network and “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”<sup>24</sup>

The third safe harbor also contains the so-called notice and take-down provisions of the DMCA. Those provisions require the service provider to (1) designate an agent to receive notifications of claimed infringement, (2) identify that agent to the Copyright Office, and (3) “respond expeditiously to remove, or disable access to, the material that is claimed to be infringing.”<sup>25</sup> The fourth safe harbor, for providers of “Information Location Tools,” protects service providers that refer or link users to infringing material or infringing activity.<sup>26</sup>

YouTube seeks protection under the third safe harbor because the videos uploaded to its Web site are presumably stored on its proprietary computer network. If true, that exposes YouTube to direct copyright infringement under the so called server-test enunciated in *Perfect 10 v. Google*.<sup>27</sup> Under that test, infringing material that is transmitted directly from the accused’s server constitutes a display of a copy in violation of the exclusive rights of the copyright holder.<sup>28</sup>

Despite YouTube’s exposure to direct copyright infringement, it appears to have taken the steps necessary to insulate itself from liability by admonishing the users of its Web site not to “upload copyrighted material for which the user does not own the rights or have permission from the owner” or upload “TV shows, music videos, music concerts, or commercials without permission unless they consist entirely of content the user created.” YouTube also posts information on its Web site to receive notification of claimed copyright infringement and has designated an agent for that purpose.<sup>29</sup> Finally, to partially satisfy the conditions for eligibility of § 512(i) of the DMCA, YouTube threatens to terminate a user’s access to its Web site if the user is determined to be a repeat infringer. YouTube defines a repeat infringer as a user who has been notified of infringing activity more than twice and/or has had a user submission removed from the Web site more than twice.<sup>30</sup>

Interestingly, Tur did not allege that he notified YouTube about his infringement claim and that YouTube neglected to remove the infringing material. YouTube leaps on this oversight and suggests that Tur’s failure to provide such notice bars his lawsuit.<sup>31</sup> According to YouTube spokesperson Julie Supan, “Mr. Tur chose to file a federal lawsuit” instead.<sup>32</sup> James D. Nguyen, an intellectual property litigation partner at Foley & Lardner LLP’s Los Angeles office said, “[i]f the plaintiff had given YouTube notice of the Reginald Denny beating video appearing on YouTube and demanded its removal,



# File Sharing

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YouTube most certainly would have complied.”<sup>33</sup> YouTube has stated publicly that it did just that after hearing of the lawsuit.<sup>34</sup>

## Networks’ Acceptance of User Uploads

A case like *Tur v. YouTube* will surely cover some of the same legal ground as *Sony v. Universal Studios*,<sup>35</sup> *Napster*, *Aimster*, and *Grokster*. Those cases, however, focused on copyright infringement within the context of contributory copyright infringement and vicarious copyright liability, often referred to collectively as secondary copyright liability. In contrast to direct copyright infringement, in which the accused infringer itself is found to have violated one of the exclusive rights of the copyright holder, either intentionally or innocently, contributory copyright infringement and vicarious copyright liability require some evidence of intent or control, respectively. One infringes contributorily by intentionally inducing or encouraging direct infringement.<sup>36</sup> Vicarious liability requires one to profit from another’s direct infringement, while declining to exercise a right to stop or limit the infringement.<sup>37</sup> Secondary copyright liability does not exist without an instance of direct copyright infringement.<sup>38</sup>

The common thread running through the earlier cases is the concept that a distributor of a product that facilitates copyright infringement, like the Betamax VCR in the case of *Sony v. Universal City Studios* or the P2P file-sharing software provided by Napster, Aimster, and Grokster, might be immune from liability by extension of the staple-article-of-commerce doctrine borrowed from patent law.<sup>39</sup> Indeed, the court in *Sony* predicated its decision on the notion that the Betamax VCR was “capable of substantial noninfringing uses.”<sup>40</sup>

The P2P networks also sought to extend, without success, the protection of *Sony* to their file-sharing software. The courts found, however, that the P2P networks actively encouraged their users to illegally share copyrighted material, a fact not found in *Sony*. Thus, by providing the tools and know-how to pirate music, the P2P networks could not escape exposure to secondary copyright infringement liability.

In contrast to the abundance of pirated content found on the P2P networks, many of the videos on *youtube.com* are home movies or animations submitted by the author and owner of the work. Tur admits in his complaint that “substantial use of YouTube’s website...is made by users uploading their own home-made videos.”<sup>41</sup> Under a broad reading of *Sony*, such “substantial” non-infringing use supports a finding of non-infringement. Yet, the Supreme Court in *Grokster*, in its dissection of its earlier opinion in *Sony*, discarded *Sony*’s reasoning when there is evidence, through “state-

ments or actions,” that the defendant intentionally had encouraged copyright infringement.<sup>42</sup>

In *MGM v. Grokster*, a unanimous Supreme Court declined to apply the reasoning of *Sony* to Grokster’s and StreamCast’s (Morpheus) file-sharing software and vacated and remanded the Ninth Circuit’s affirmation of summary judgment in favor of the P2P networks. The rule of *Sony*, as clarified in *Grokster*, was to bar secondary liability “based on presuming or imputing intent to cause infringement *solely* from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.”<sup>43</sup>

The Supreme Court in *Grokster* distinguished *Sony* on the basis that Grokster and Morpheus, unlike Sony, engaged in substantial efforts to attract and encourage users to download copyrighted materials. In fact, both companies created Napster-compatible software to capitalize on the anticipated demise of Napster and make the transition to Grokster and Morpheus systems more convenient. Based on these blatant attempts to lure known copyright infringers to their networks, and by providing the tools to continue infringement, the *Grokster* court rejected altogether the applicability of *Sony*’s safe harbor to Grokster and Morpheus, notwithstanding the real and potential use of their P2P software for non-infringing purposes. As stated in *Sony*, such alternative legal uses of a product implicate the staple-article-of-commerce doctrine.

Under patent law, the staple-article-of-commerce doctrine protects the distributor of a component of a patented device from patent liability if that component is suitable for use in other non-infringing ways. As applied to copyright infringement, however, that doctrine offers no protection to the defendant whose words and deeds show “a purpose to cause and profit from third party acts of copyright infringement.”<sup>44</sup>

The concurring opinion by Justice Ginsburg, with whom Justices Rehnquist and Kennedy joined, also rejected the Ninth Circuit’s broad reading of *Sony*. Justice Ginsburg concluded that the Ninth Circuit had “misapplied” *Sony* by limiting secondary copyright infringement liability to “a hardly-ever category.”<sup>45</sup> In other words, the Ninth Circuit had “misperceived” *Sony* as standing for the proposition that “a product need only be *capable* of substantial noninfringing uses” to negate secondary liability.<sup>46</sup> Justice Ginsburg criticized the Ninth Circuit’s reliance on “anecdotal evidence of noninfringing uses” to support its decision that the P2P networks were immune from secondary copyright liability.<sup>47</sup> In Justice Ginsburg’s view, the evidence actually showed that the defendants’ P2P software was “overwhelmingly used to infringe and this infringement was the overwhelming source of revenue from the

products.”<sup>48</sup> Moreover, the evidence was “insufficient to demonstrate...that substantial or commercially significant non-infringing uses were even likely to develop over time.”<sup>49</sup> Therefore, Justice Ginsburg concluded that the Ninth Circuit should not have affirmed summary judgment in favor of Grokster and Morpheus.

Justice Breyer, on the other hand, concluded that the Ninth Circuit had correctly interpreted and applied *Sony*. He suggested that *Sony*'s reasoning is still viable and useful precedent despite the existence of new technology that makes copyright infringement of all types of media profoundly easier than the limited abilities of the now practically defunct VCR. Consequently, Justices Breyer, Stevens, and O'Connor believed that the Ninth Circuit had correctly decided the matter under the reasoning of *Sony*, but agreed “that the distributor of a dual-use technology may be liable for the infringing activities of third parties where [it] actively seeks to advance the infringement.”<sup>50</sup> At bottom, the Supreme Court ruled that Grokster's and Morpheus's intent to induce copyright infringement and profit from such activity disqualified them from *Sony*'s protection and exposed them to secondary copyright infringement liability.

## Secondary Copyright Infringement Liability and the DMCA

The DMCA incorporates the elements of secondary copyright infringement as proscribed conduct under the third and fourth safe harbor provisions. A service provider can limit its liability if it (1) *does not* have actual or constructive knowledge of infringing activity or material on the system or network or takes expeditious steps to remove or disable infringing material upon having such knowledge and (2) *does not* receive direct financial benefit from the infringing activity when it has the right and ability to control such activity.<sup>51</sup> Although these requirements suggest that secondary infringement liability is excluded from protection under the DMCA, the court in *Napster* and leading commentators suggest otherwise.<sup>52</sup> In addition, the aforementioned proscribed language is missing from the first and second safe harbors. Thus, at a minimum, the DMCA appears to shelter from secondary liability those service providers whose networks transmit or cache infringing content.

## YouTube's Rankings as Evidence of Knowledge

YouTube's exposure to secondary infringement liability may ultimately depend on whether YouTube turned a blind eye to any infringing videos on its Web site. In the case of *Tur v. YouTube*, Tur did not notify YouTube of his infringement claim. Yet, the question remains whether YouTube became aware of Tur's videos by other means.

*Youtube.com* includes a five-star rating system that allows users to rate videos posted to the Web site. The Web site also provides daily, weekly, monthly, and all-time rankings of the most viewed videos. A cursory review of the Web site shows that popular videos on *youtube.com* typically enjoy more than 100,000 views per week. Tur alleges that the “Beating of Reginald Denny” was viewed 1,000 times in one week.<sup>53</sup> Consequently, the extent to which *youtube.com*'s ranking systems brought the Reginald Denny video to its attention (or not) might be a critical factor in determining whether YouTube had actual or constructive knowledge of any Tur video on its Web site. Given YouTube's position that it first discovered and removed Tur's videos upon being sued, any knowledge beforehand might expose it to contributory copyright infringement if it failed to “expeditiously” remove any such video.

## Vicarious Liability

A useful case for analyzing the direct-financial-benefit element of vicarious liability is *Perfect 10 v. Google*,<sup>54</sup> which addressed the issue under federal common law, as opposed to whether Google qualified for protection under the DMCA.<sup>55</sup> In *Perfect 10*, Google was accused of infringing copyrighted photographs of Perfect 10's natural models by displaying thumbnail versions of the photographs in response to user-directed image searches on *google.com*. In some cases, the original photographs that Google had converted and displayed in thumbnail form were illegally stored on third-party Web sites that Google's Web crawler had found and indexed. Google also provided links to those Web sites, and there was evidence that some of the directly infringing Web sites were members of Google's AdSense program. Google's AdSense program allowed it and its partners to split advertising revenue when a Google advertisement was displayed on the partner's Web site.

Relying on *Napster* and *Fonovisa, Inc. v. Cherry Auction, Inc.*,<sup>56</sup> the court in *Perfect 10* found that Google had received a direct financial benefit from displaying the thumbnails because some of the infringing third-party Web sites appeared to be AdSense partners. The court analogized Google's conduct to that of Napster; in *Napster*, the court found that Napster had a direct financial interest in the infringing activity because the availability of infringing material on its Web site acted as a draw for customers. Since Napster did not generate any revenue at the time but planned to do so in the future, Professor Nimmer has commented that *Napster*'s broad definition of direct financial benefit would encompass even a “future hope to ‘monetize.’”<sup>57</sup>

The court's view in *Perfect 10* was consistent with its earlier ruling in *Fonovisa*, which liberalized the concept

# File Sharing

of “direct financial benefit” in the context of a motion to dismiss. In *Fonovisa*, the Ninth Circuit reversed the trial court’s dismissal of Fonovisa’s claim of vicarious copyright liability. The complaint had alleged that Cherry Auction operated swap meet where third-party vendors routinely sold counterfeit music. The Ninth Circuit held that allegations of Cherry Auction’s “right to terminate vendors for any reason whatsoever” conferred a right and ability to control the activities of the third-party vendors on its premises.<sup>58</sup>

In addition, Fonovisa alleged that Cherry Auction had reaped “substantial financial benefits from admission fees, concession stand fees and parking, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices.”<sup>59</sup> Therefore, there were sufficient allegations of control and “direct financial benefit” to survive a motion to dismiss on the pleadings. Moreover, the court added that the pirated recordings at the Cherry Auction swap meet acted as a “draw” for customers in much the same way as the earlier dance hall cases.<sup>60</sup> Noticeably lacking, however, was any allegation that Cherry Auction had received a percentage of infringing sales or any other monies pegged directly to the sale of the infringing music. Thus, *Fonovisa* stands for the proposition that direct financial benefit also includes a possible, indirect benefit.<sup>61</sup>

This broader view of direct financial benefit finds additional support in the legislative history of the DMCA, which states in part:

In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one. In general, a service provider conducting a legitimate business would not be considered to receive a “financial benefit directly attributable to the infringing activity” where the infringer makes the same kind of payment as non-infringing users of the provider’s service. . . . *It would however, include any such fees where the value of the service lies in providing access to infringing material.*<sup>62</sup>

In contrast to the common sense approach advocated by Congress, other courts have applied a more literal approach in determining whether the infringer enjoyed a direct financial benefit from the act of infringement.

In *CoStar v. LoopNet I*,<sup>63</sup> the court distinguished a broad reading of direct financial benefit from LoopNet’s conduct on the basis that “neither infringing or non-infringing users made any kind of payment.” LoopNet allowed its users to post photographs of real estate on its Web site without charge. LoopNet, like YouTube, generated revenue by selling advertising space on its

Web site.<sup>64</sup> To stay in the safe harbor, LoopNet had to show that it did not receive a direct financial benefit when it had the right and ability to control the infringing activity.<sup>65</sup>

Notwithstanding the *LoopNet I* court’s belief that “the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability,” the court found that LoopNet did not meet either element.<sup>66</sup> By not charging a fee for posting any real estate listing, with or without a photograph, LoopNet’s advertising revenue apparently was not direct enough to satisfy the financial element of vicarious liability. LoopNet also did not have the right and ability to control its users. The court correctly noted that the right-to-control element could not be met merely by the ability to remove or block access to materials, since that would render the DMCA internally inconsistent. The court recognized that the mechanism to remain in the safe harbor, terminating infringers and blocking access, would force service providers to lose their immunity if controlling access is construed as synonymous with the right and ability to control infringing activity.

If the court in *Tir v. YouTube* departs from Ninth Circuit precedent on direct financial benefit, it might do so by distinguishing the concept as applied under the common law from the potentially narrower interpretation under the DMCA. Congress’ common sense approach seems to offer the best solution for maintaining some degree of harmony between the common law and the statute, however.

## The Fair Use Doctrine

In addition to the limits on liability under the DMCA, YouTube also asserted a defense under the fair use doctrine. The fair use doctrine is codified at 17 U.S.C. § 107 and provides that fair use of a copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use of a work in any particular case is fair, the factors to be considered include:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.



## File Sharing

As to the first prong of the first fair use factor, the purpose and character of the use, if the court finds that YouTube's business model is based on generating advertising revenue as a consequence of the popularity of its Web site, it seems unlikely that the court will find the use of any unlicensed content to be non-commercial use. Of course, the factual question remains: What drives *youtube.com*'s popularity and advertising revenue, the licensed or unlicensed content? If unlicensed content serves to draw viewers to *youtube.com* (like the lure of free music did to the P2P networks), which in turn boosts the value of the advertising space on the Web site, the first prong might swing in Tur's favor. Such balancing between licensed and unlicensed content, like the analysis of infringing versus non-infringing use, has the potential to create more uncertainty in what constitutes fair use rather than establish predictable rules of acceptable conduct. Therefore, on the question of purpose of use, courts may find more comfort in deferring to the axiom that any commercial use is presumptively unfair.<sup>67</sup>

On the second prong of the first fair use factor, the character of the use, the display of unlicensed material on *youtube.com* might be considered consumptive as opposed to transformative. In other words, the question before the court will be whether YouTube's display of Tur's videos merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.<sup>68</sup> In this case, it seems that the objective of Tur's videos is to satisfy the viewer's simple desire to be informed (or perversely entertained) by their content, the same objective for the videos if viewed unaltered on *youtube.com*. If so, such a finding suggests a consumptive use, and the first fair use factor seems to tip in favor of Tur.

Under the second fair use factor, the nature of the copyrighted work, works that are creative in nature are closer to the core of intended copyright protection than fact-based works.<sup>69</sup> Photographs that are meant to be viewed by the public for informative and aesthetic purposes are generally creative in nature.<sup>70</sup> On the other hand, works such as news broadcasts and news video, like the beating of Reginald Denny, are more factual in nature and more conducive to fair use.<sup>71</sup> Therefore, to the extent YouTube's alleged infringement is limited to news videos, the second fair use factor appears to weigh slightly in favor of YouTube or to be neutral at best.

Copying an entire work militates against a finding of fair use under the third fair use factor—the amount and substantiality of the portion used in comparison to the whole.<sup>72</sup> Discovery will reveal whether users uploaded entire or partial versions of Tur's videos. Given the 10-minute limitation on uploaded content, it is conceiv-

able that users uploaded the majority, if not all, of the content of a single Tur video, like the Reginald Denny beating. Users might have uploaded only partial versions of other Tur videos. Nevertheless, to the extent that any uploaded video captured the “essence of the work,” this fair use factor seems to tilt in favor of Tur.<sup>73</sup>

Finally, courts have often considered the fourth fair use factor as the most important.<sup>74</sup> If a commercial market exists for Tur's videos as alleged in the complaint,<sup>75</sup> the court might be compelled to find that free access to the same videos on *youtube.com* serves to erode that market. Consequently, a balancing of the fair use factors coupled with the irrefutable commercial nature of YouTube's Web site might compel the court to conclude that any copyrighted work posted on *youtube.com* without permission is not fair use.

### Conclusion

Of course, how these issues eventually play out in *Tur v. YouTube* is anyone's guess. To stay within the safe harbor of the DMCA, YouTube must convince the court, as a matter of law, that it is not liable for secondary copyright infringement. This might depend in large part on whether the court interprets secondary liability under the plain language of the statute, the general methodology of statutory construction, or imports the more developed analysis of federal common law. In any event, any substantive court decision issuing from the case will likely serve as another example of how copyright law must struggle to adapt to new technologies to remain relevant in modern society.

### Epilogue

YouTube is continuing to pursue efforts to minimize its exposure to copyright infringement liability, while increasing its potential advertising revenue. On September 18, 2006, YouTube announced an agreement with Warner Music Group to distribute and license its copyrighted songs and videos through its Web site. The agreement allows YouTube and Warner Music to share revenue in exchange for a blanket license for thousands of Warner's music videos and interviews. In addition, Warner has agreed to license, at least in principle, its music to the many users who upload their homemade videos with Warner music in the background. As part of the deal to extend a license to users, YouTube agreed to implement a royalty-tracking system designed to identify homemade videos using Warner copyrighted material. YouTube says the technology will enable Warner to review the video and decide whether it wants to approve or reject it.

The deal with Warner Music comes on the heels of another widely publicized deal with Paris Hilton, whose “branded channel” on *youtube.com* has already logged

# File Sharing

more than 1 million views since its inception in late August.<sup>76</sup> These deals and earlier agreements between YouTube and the major television networks suggest a long-term business strategy that depends less on user submissions and more on synergistic collaboration with the recording and entertainment industries.

The wisdom of YouTube's strategy is further reinforced by the trial court's grant of summary judgment in favor of the plaintiffs in *MGM v. Grokster*. On remand by the Supreme Court and upon further analysis of the facts demonstrating Streamcast's (a/k/a Morpheus) blatant efforts to encourage copyright infringement, the district court concluded that "evidence of Streamcast's unlawful intent is overwhelming." *Tur v. YouTube* and future cases may instruct on how much intent, if any, is enough to put a file sharing network in "a sea of troubles" instead of the sheltering harbor of the DMCA.

## Notes

1. John Reinan, "Feds Take a Nip-It-In-The-Bud Approach to Internet Piracy," *Minneapolis StarTribune*, Sept. 13, 2006 at B2.
2. *MGM v. Grokster*, CV 01-08541, CV 01-09923, (C.D. Cal.).
3. *A&M v. Napster*, 239 F.3d 1004 (9th Cir. 2001).
4. *In re Aimster Copyright Litigation*, 334 F.3d 643, 655 (7th Cir. 2003).
5. *MGM v. Grokster*, 125 S. Ct. 2764 (2005).
6. *Robert Tur d/b/a Los Angeles News Service v. YouTube, Inc.*, Case No.: CV06-4436 (US District Court, C.D. Ca.).
7. Google, Inc., announced on October 9, 2006, that it agreed to purchase YouTube for \$1.65 billion, triggering wide speculation that *Tur v. YouTube* and other copyright infringement disputes involving YouTube may quickly disappear. Even if such speculation holds true, the issues discussed in this article are relevant nonetheless to the scope of protection afforded service providers under the DMCA.
8. Complaint at ¶ 6.
9. Complaint at ¶ 18.
10. Complaint at ¶ 15.
11. Complaint at ¶ 20.
12. Complaint at ¶¶ 22-30. Tur also alleged unfair competition under California law, which is not discussed in this article.
13. As of October 12, 2006, at [www.alexa.com](http://www.alexa.com).
14. Answer at ¶ 18.
15. Answer at ¶ 15.
16. Answer at ¶ 39(iii).
17. Answer at ¶ 39.
18. *Aimster*, 334 F.3d at 655 (Aimster fits the definition of an Internet service provider).
19. 17 U.S.C. § 512(k)(1)(B).
20. 17 U.S.C. § 512(k)(1)(A).
21. 17 U.S.C. § 512.
22. 17 U.S.C. § 512(a).
23. 17 U.S.C. § 512(b). Congress is now contemplating the Copyright Modernization Act of 2006 (H.R. 6052), which would limit copyright infringement exemptions for cache or buffer copies "to the extent that such reproductions are used for the purpose of engaging in noninteractive streaming or terrestrial radio analog broadcasting." Not surprisingly, non-analog broadcasters like digital and satellite music providers have criticized this language as another attempt by the recording industry to stifle competition by imposing onerous royalties on emerging technologies.
24. 17 U.S.C. § 512(c).
25. 17 U.S.C. § 512(c)(1)(C); (c)(2).
26. 17 U.S.C. § 512(d). The DMCA also contains a "Limitation on Liability of NonProfit Educational Institutions." Those provisions relate back to the four safe harbors of the DMCA (subsections (a)-(d)) and insulate, under certain circumstances, the educational institution as a service provider from copyright infringement liability caused by faculty member or graduate student employees. 17 U.S.C. § 512(e).
27. *Perfect 10 v. Google*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).
28. *Id.* at 844.
29. See [www.youtube.com/t/dmca\\_policy](http://www.youtube.com/t/dmca_policy).
30. See [www.youtube.com/t/terms](http://www.youtube.com/t/terms).
31. Answer at ¶ 42.
32. Erik Lawson, "YouTube Lawsuit Emerges in Grokster's Shadow," *IP Law360*, July 19, 2006.
33. *Id.*
34. *Id.*
35. *Sony v. Universal Studios*, 464 U.S. 417 (1984).
36. See *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).
37. *Id.*
38. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).
39. *Sony*, 464 U.S. at 442.
40. *Sony*, 464 U.S. at 456.
41. Complaint at ¶ 16.
42. *Grokster*, 125 S. Ct. at 2779.
43. 3-12 Nimmer on Copyright § 12.04; *Grokster*, 125 S. Ct. at 2778 (emphasis added).
44. *Grokster*, 125 S. Ct. at 2782.
45. *Grokster*, 125 S. Ct. at 2783-2784.
46. *Id.* at 2783-2785 (original emphasis).
47. *Id.* at 2785.
48. *Id.* at 2786.

49. *Id.* at 2786.
50. *Id.* at 2787.
51. 17 U.S.C. § 512(c)(1)(A)(B)(C); 17 U.S.C. § 512(d)(1)(2)(3).
52. *A&M v. Napster*, 239 F.3d 1004, 1025 (9th Cir. 2001) (“We need not accept a blanket conclusion that § 512 of the Digital Millennium Copyright Act will never protect secondary infringers.” See S. Rep. 105-190, at 40 (1998) (“The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious, and contributory infringement.”), reprinted in Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: Congressional Committee Reports on the Digital Millennium Copyright Act and Concurrent Amendments* (2000); see also Charles S. Wright, “Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998,” 75 *Wash. L. Rev.* 1005, 1028-31 (July 2000) (“The committee reports leave no doubt that Congress intended to provide some relief from vicarious liability.”).
53. Complaint at ¶ 12.
54. *Perfect 10 v. Google*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).
55. Google contended that it qualified for protection under each of the four DMCA safe harbors. The court found it unnecessary to deal with the DMCA issues, however, in light of its conclusion that Google was not vicariously or contributorily liable under common law. *Id.* at 853, n.18.
56. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).
57. 3-12 *Nimmer on Copyright* § 12.04[A][1]. Note also that the district court had found that Napster collected no revenues or charged its clientele any fee. But, it eventually planned to “monetize” its user base. *Napster*, 114 F. Supp. 2d at 902.
58. *Fonovisa*, 76 F.3d at 262.
59. *Id.* at 263.
60. *Id.* at 263-264. In the so-called dance hall cases, the operators of dance halls were held liable for infringing performances when the operators (1) could control the premises and (2) obtained a direct financial benefit from the audience, who paid to enjoy the infringing performance. See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-199 (1931); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).
61. In contrast to the court’s reasoning on vicarious liability, its conclusion that “merely providing the means for infringement may be sufficient to incur contributory copyright liability” is probably not sustainable reasoning in view of the Supreme Court’s holding in *Grokster*. See *Fonovisa* at 264; see also *Arista Records, Inc. v. Flea World, Inc.*, 2006 U.S. Dist. LEXIS 14988 (DNJ Mar. 31, 2006) (intent to induce infringement not necessary to find contributory infringement if the defendant knew or should have known of the infringement activity).
62. 3-12B *Nimmer on Copyright* § 12B.04[A][2] (citing *Commerce Rep. (DMCA)*, p.53; *S. Rep. (DMCA)*, p.44). (emphasis added)
63. *CoStar v. LoopNet I*, 164 F. Supp. 2d 688 (D. Md. 2001) (summary judgment on DMCA safe harbor defense denied because of disputed material facts relating to notice and take down provisions).
64. *Id.* at 692.
65. 17 U.S.C. § 512(c)(1)(B).
66. *LoopNet I* at 692.
67. *Sony*, 464 U.S. at 597.
68. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).
69. *Perfect 10* at 849.
70. *Id.*
71. *Elvis Presley Enters. v. Passport Video*, 357 F.3d 896 (9th Cir. 2003) (citing *Sony*, 464 U.S. at 455 n.40).
72. *Id.* at 850.
73. See *Psihoyos v. National Examiner*, 1998 U.S. Dist. LEXIS 9192 (S.D.N.Y. 1998) (The third factor weighs against the Examiner, which took almost all of the Psihoyos’ photo including the essence of his work.).
74. See *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (citing *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).
75. Complaint at ¶ 9.
76. See [www.youtube.com/profile?user=ParisHilton](http://www.youtube.com/profile?user=ParisHilton).