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GOOGLE BOOKS AND YOUTUBE: PRESERVING FAIR USE ON THE WORLD'S LEADING INTERNET VIDEO COMMUNITY¹

Meghan McSkimming^{*}

I. INTRODUCTION

Thousands of years after the Library of Alexandria was destroyed, man has used technology to change the way the world interacts with creative works.² In the face of constantly evolving technology, copyright law is experiencing a tumultuous upheaval. In the past, accessing printed, audio, or visual materials required physical possession of an object, like a book, CD, or DVD. Today, the Internet makes information instantly accessible.

In 2004, Google—following the current trend away from a print-based market—undertook a massive and unprecedented endeavor with its “Google Library Project.”³ Without first seeking copyright holders’ permission,⁴ Google created agreements with research libraries, scanned their print collections, and compiled a searchable digital library.⁵ Google would display a few lines of text as Internet search results, but not the entire book.⁶ To the average Internet user, being able to obtain the digital versions of books is highly desirable.

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¹ GREG JARBOE, *YOUTUBE AND VIDEO MARKETING: AN HOUR A DAY* 20 (2d ed. 2012).

² See Beverly A. Berneman, *Putting the Google Book Settlement in Perspective: Will Looking for a Book Ever Be the Same Again?*, in *UNDERSTANDING COPYRIGHT LAW* 2009 291, 291–93 (E. Leonard Rubin et al. eds., 2009) (beginning her discussion of the Google Books Settlement in a historical context and analogizing the Google Books project to a modern-day library of Alexandria).

³ Gregory K. Leonard, *The Proposed Google Books Settlement: Copyright, Rule 23, and DOJ Section 2 Enforcement*, 24 *ANTITRUST* 26, 26 (2010), available at http://www.nera.com/nera-files/PUB_Google_Books_Settlement_0710.pdf.

⁴ Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 *J. MARSHALL REV. INTELL. PROP. L.* 227, 227 (2010).

⁵ Leonard, *supra* note 3, at 26.

⁶ See *infra* Part III (explaining in greater detail the general information in this introductory paragraph).

It is convenient to search through thousands of books online, and without ever stepping foot into a library or bookstore. Copyright holders, however, were not pleased; they brought claims of copyright infringement against Google.⁷ The parties ultimately reached a settlement,⁸ but the District Court for the Southern District of New York did not approve the agreement.⁹

With these digital resources increasing the immediacy and ease of access to the everyman, copyright law is at a crossroads. Some believe that the expansion of copyright law should be curtailed.¹⁰ For example, Professor Lawrence Lessig states that “[i]f technology creates efficient ways to charge commercial users of copyright, then that’s good . . . but [not if] we evolve into a permission culture, where every single use of music creates an obligation to pay.”¹¹ Indeed, with the advent of websites like YouTube, the general public’s interaction with creative works has most likely increased.¹² YouTube enables users to upload any video, copyrighted or otherwise, to the site for viewing by others, without a license or permission from rightsholders.¹³ From its beginnings as a personal video-sharing site, YouTube is now “the world’s leading video community on the Internet.”¹⁴ YouTube reports staggering statistics. Each month, more than 800 million unique users watch videos on the site and users upload seventy-two hours of video per minute.¹⁵

This massive collection of videos provides the public with convenient, on-demand access to video and music, but is fraught with legal uncertainty. Members of the public may believe that a YouTube video is in the public domain¹⁶ simply because it is on the site and

⁷ *Id.*

⁸ Order Granting Preliminary Approval of Amended Settlement Agreement at 2, *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-cv-08136-DC), ECF No. 772.

⁹ *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669–70 (S.D.N.Y. 2011).

¹⁰ John Bowe, *The Music-Copyright Enforcers*, N.Y. TIMES, Aug. 6, 2010 (Magazine), at 5.

¹¹ *Id.*

¹² See *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited July 31, 2012).

¹³ See *Using Copyrighted Material in Your Video*, YOUTUBE, http://www.youtube.com/t/copyright_permissions (last visited Feb. 11, 2012).

¹⁴ JARBOE, *supra* note 1, at 20.

¹⁵ *Statistics*, *supra* note 12.

¹⁶ The public domain is [t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to

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available online.¹⁷ Thus, these individuals might believe that they can use the online content as they wish.¹⁸ The doctrine of fair use complicates the matter. Fair use creates an exception to general copyright principles and allows the use of copyrighted material, in certain circumstances, to further the policy purposes of “public discourse and education[.]”¹⁹ YouTube users’ rampant uploads of copyrighted material prompted Viacom’s March 2007 lawsuit,²⁰ in which the rightsholder asserted direct and indirect infringement²¹ claims against the website.²² The key issue in the case was the statutory interpretation of the Digital Millennium Copyright Act (DMCA) of 1998’s safe harbor for service providers, codified at 17 U.S.C. §§ 512(c)(1)(A)(i) and (ii).²³ The court determined that YouTube needed “actual or constructive knowledge of specific and identifiable infringements of individual items” to be held liable, instead of a “general awareness” of the presence of infringing

use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.

BLACK’S LAW DICTIONARY 1349 (9th ed. 2009).

¹⁷ See Elizabeth Townsend Gard, *Conversations with Renowned Professors on the Future of Copyright*, 12 TUL. J. TECH. & INTELL. PROP. 35, 68 (2009).

¹⁸ See *id.*

¹⁹ Bruce E. H. Johnson & Maya Yamazaki, *Copyright and the Internet*, in UNDERSTANDING COPYRIGHT LAW 2010 637, 639 (E. Leonard Rubin et al. eds., 2010).

²⁰ Complaint at 1, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Nos. 07 Civ. 2103, 07 Civ. 3582).

²¹ To state a claim “of direct infringement: (1) [an individual] must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Contributory copyright infringement occurs when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. . . .” *Id.* at 1019 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Vicarious liability can be found where the defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Id.* at 1022 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996)).

²² First Amended Complaint for Declaratory and Injunctive Relief and Damages and Demand for Jury Trial at 19–28, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Nos. 07 Civ. 2103, 07 Civ. 3582) [hereinafter First Amended Complaint].

²³ See 17 U.S.C. § 512(c)(1)(A)(i)–(ii) (2006); *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010). See *infra* Part II.C for a discussion of the federal statutory safe harbor.

content.²⁴ If similar litigation arises in the future, there could be a different and fairer resolution.

This Comment will argue that YouTube's current methods of handling potentially infringing content are insufficient and that an ultimate resolution of copyright claims against YouTube might include a settlement of future litigation that establishes a private body to make fair use determinations of copyrighted work. Part II of this Comment presents an overview of the sources of copyright law, including the fair use exception, interpretive case law, and the DMCA. Part III presents background information about the Google Books litigation, a general overview of the terms of the failed Google Books Settlement, and examples of other settlements of mass torts. Part IV discusses the main YouTube copyright infringement case, *Viacom International Inc. v. YouTube, Inc.*,²⁵ from the Southern District of New York, and methods that YouTube and the rightsholders have used to deal with use of copyrighted material. Part V presents the potential application of a settlement-based analog to the Book Rights Registry²⁶ in the YouTube context.

II. THE FOUNDATIONS OF COPYRIGHT LAW

A. Background

Copyright law is rooted in the Constitution's Patent and Copyright Clause that grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²⁷ The Copyright Act of 1976 defines copyright protection today.²⁸ Enacted pursuant to the constitutional provision, the Act protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."²⁹ Copyright, however, does not protect the underlying idea or concept expressed in the creative work.³⁰ The Act gives the copyright holder the

²⁴ *YouTube*, 718 F. Supp. 2d at 523.

²⁵ 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

²⁶ See *infra* Part III.B for a description of the Book Rights Registry.

²⁷ U.S. CONST. art. I, § 8, cl. 8.

²⁸ See 17 U.S.C. §§ 101–810 (2006).

²⁹ § 102(a).

³⁰ See § 102(b).

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exclusive right to reproduce his work, to create “derivative works” based upon it, to distribute it through multiple different methods, to stage a performance of the work (if applicable), to display it to the public, and to perform the work through digital audio transmission.³¹ Although these copyright principles may seem basic in the abstract, the doctrine of fair use significantly complicates the matter.

B. Fair Use

1. An Overview of the Statutory Fair Use Factors

The general right to copyright is subject to a very important exception—the doctrine of fair use. The Copyright Act of 1976 provides that use of a copyrighted work in certain instances is a permissible, non-infringing fair use;³² examples include “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”³³ To determine whether a use falls under this exception, courts consider four factors:

- (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.³⁴

Because Congress foresaw that new technology would alter the definition of fair use, it left the statute open to judicial interpretation, allowing the law to develop through individual cases and specific sets of facts.³⁵ As the legislative history reveals, “[t]he bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”³⁶ Additionally, the statute defines fair use broadly so that the courts can adapt the doctrine to specific sets of facts.³⁷ Fair use analysis is an “equitable rule of reason,” in which courts should balance the interests of the

³¹ See § 106(1)–(6).

³² See § 107.

³³ *Id.*

³⁴ § 107(1)–(4).

³⁵ Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 801 (2010).

³⁶ H.R. REP. NO. 94-1476, at 66 (1976).

³⁷ *Id.*

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rightsholders and the public.³⁸

2. Courts' Applications of the Fair Use Factors

Indeed, courts reach varying results when interpreting these four factors. The Supreme Court has stated that when a court considers “the purpose and character of the use,” the key issue is “whether the new work merely ‘supersede[s] 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[.]”³⁹ Put differently, the inquiry is whether and to what degree the work is “transformative.”⁴⁰ The Ninth Circuit explains that a transformative use is one that changes copyrighted material or transforms the copyrighted work into a “new creation” by using it in a “different context.”⁴¹ The court notes that the more the new work transforms the copyrighted material, “the less important the other factors, including commercialism, become.”⁴²

When examining “the nature of the copyrighted work,”⁴³ the Second Circuit states that courts should consider that copyright law protects the reasonable expectations of the rightsholder and creator.⁴⁴ It notes that the Supreme Court had declared that copyright was meant to protect “creative expression for public dissemination.”⁴⁵ The Supreme Court in fact provides guidance on this issue, stating that it is more likely that fair use occurs “‘in factual works than in fictional works,’ whereas ‘a use is less likely to be deemed fair when the copyrighted work is a creative product.’”⁴⁶ Thus, the more creative and expressive the work product is, the

³⁸ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 & n.40 (1984).

³⁹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C. D. Mass. 1841)).

⁴⁰ Campbell, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

⁴¹ Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007) (quoting Wall Data, Inc. v. L.A. Cty. Sheriff's Dept., 447 F.3d 769, 778 (9th Cir. 2006)).

⁴² Kelly v. Arriba Soft Corp. 336 F.3d 811, 818 (9th Cir. 2003) (citing Campbell, 510 U.S. at 579).

⁴³ See Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 612 (2d Cir. 2006) (quoting 17 U.S.C. § 107(2)).

⁴⁴ See *id.* (citing Leval, *supra* note 40, at 1122).

⁴⁵ Bill Graham Archives, 448 F.3d at 612 (quoting Campbell, 510 U.S. at 586).

⁴⁶ A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630, 640 (4th Cir. 2009) (quoting Stewart v. Abend, 495 U.S. 207, 237 (1990) (internal quotation marks and alteration omitted)).

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greater the degree of copyright protection it receives.⁴⁷

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” requires examination of both quantitative and qualitative factors.⁴⁸ The Fourth Circuit notes that the greater the amount of copyrighted material used, the less likely the use is a fair one.⁴⁹ The court emphasizes, however, that examination of the quantity is not the end of the inquiry.⁵⁰ Courts must also consider the copyrighted material’s “quality and importance.”⁵¹ In other words, they must consider whether the material was “the heart of the copyrighted work.”⁵² Thus, the amount of legal reproduction of a copyrighted work depends on “the purpose and character of the use.”⁵³

Finally, the Supreme Court has characterized the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” as the “single most important element of fair use.”⁵⁴ This is the case because copyright law’s main purpose is to allow creators to reap the rewards of their labor and thereby encourage creativity.⁵⁵ Thus, it is not necessary to prohibit uses that do not affect “the potential market for, or value of” the copyrighted material.⁵⁶ Therefore, courts must “determine whether the defendants’ use of plaintiffs’ works ‘would materially impair the marketability of the work[s] and whether it would act as a market substitute’ for them.”⁵⁷ As discussed later, the DMCA and the technology that YouTube uses to comply with the statute inadequately address this fair use exception.⁵⁸

These fair use provisions have been applied in major Supreme Court cases addressing new technologies that had similarly disruptive effects in markets for creative products. In *Sony Corp. of America v.*

⁴⁷ *Id.* at 640 (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)).

⁴⁸ *Id.* at 642 (quoting *Campbell*, 510 U.S. at 587).

⁴⁹ *Id.* (quoting *Bond*, 317 F.3d at 396).

⁵⁰ *Id.* (citing *Campbell*, 510 U.S. at 587).

⁵¹ *Id.* (quoting *Campbell*, 510 U.S. at 587) (internal quotation marks and omitted).

⁵² *iParadigms*, 562 F.3d at 642 (citing *Sundeman v. The Seajay Soc’y, Inc.*, 142 F.3d 194, 205 (4th Cir. 1998) (internal quotation marks omitted)).

⁵³ *Id.*

⁵⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

⁵⁵ *iParadigms*, 562 F.3d at 642 (quoting *Leval*, *supra* note 40, at 1124).

⁵⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

⁵⁷ *iParadigms*, 562 F.3d at 643 (quoting *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003)).

⁵⁸ *See infra* Parts II.C, III.B.

Universal City Studios, Inc., Universal, Walt Disney, and other rightsholders sued Sony for copyright infringement.⁵⁹ Sony manufactured Betamax video tape recorders, which are devices used by the public to record television broadcasts of Universal's copyrighted works.⁶⁰ Universal sought monetary relief, equitable accounting of profits, and an injunction against the production and marketing of the tape recorders.⁶¹ The issue was whether the sale of these tape recorders violated any of Universal's rights as a copyright holder.⁶²

Significantly, the district court found that the average owner of the tape recorder engages in "time-shifting," the term used to describe recording a program when it is aired in order to watch the program later.⁶³ Time shifting actually increased the number of people who viewed the program, so this was favorable to the rightsholders of the content.⁶⁴ Rightsholders who objected to this practice could not demonstrate "impair[ment] . . . [of] the commercial value of their copyrights or . . . cre[ation of] any likelihood of future harm."⁶⁵ The Supreme Court concluded that this constituted fair use of the copyrighted material.⁶⁶

As to the first fair use factor, "the commercial or nonprofit character of an activity," the Court pointed to the district court's finding that time shifting for use in the home was a "noncommercial, nonprofit activity."⁶⁷ Analyzing the second factor, "the nature of the copyrighted work," in conjunction with the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the Court noted that the viewer had already been given the opportunity to view the work for free because it was broadcast on television.⁶⁸ Thus, the Court held that copying the entire work did not weigh against a finding of fair use.⁶⁹

When discussing the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," the Court

⁵⁹ *Sony*, 464 U.S. at 420.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 423.

⁶⁴ *Id.* at 443.

⁶⁵ *Sony*, 464 U.S. at 421.

⁶⁶ *Id.* at 455.

⁶⁷ *Id.* at 449.

⁶⁸ *Id.*

⁶⁹ *See id.* at 450.

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observed that copyright law incentivizes an individual to engage in creative activity.⁷⁰ The Court noted, however, that a use that does not affect the “market for, or value of, the copyrighted work” does not need to be made illegal, because individuals still have the same incentive to create new works after such a use.⁷¹ Thus, the Court explained, to challenge a noncommercial use, the proponent must demonstrate by a preponderance of the evidence that “some meaningful likelihood of future harm exists.”⁷²

In *Sony*, the Court held that the respondents did not demonstrate that time-shifting created this meaningful likelihood of future harm.⁷³ It ruled that the district court’s factual findings amply supported a fair use determination.⁷⁴ The district court found that the rightsholders did not show potential future harm, rejecting their numerous contentions.⁷⁵ The court rejected claims (1) that time-shifting viewers were not counted in viewership, decreasing revenues and ratings, because technology accounts for these viewers; (2) that live viewership will decrease as audiences watch taped programs because there were no facts to support the assertion; (3) that time-shifting will decrease the amount of people who watch reruns because time-shifting “should aid plaintiffs rather than harm them”; and (4) that box office sales and rental revenue would decrease because there was no merit to the assertion.⁷⁶ Finally, no actual harm had been suffered.⁷⁷

The *Sony* case provided the backdrop for the Ninth Circuit’s fair use analysis in *A&M Records, Inc. v. Napster, Inc.*⁷⁸ In *Napster*, rightsholders in the recording industry sued Napster for contributory and vicarious copyright infringement.⁷⁹ Napster allowed users to search for MP3 files located in the files of other computers connected to the Napster network.⁸⁰ After locating the desired music, users could download a copy of the MP3 and share the music “peer-to-

⁷⁰ *Id.*

⁷¹ *Sony*, 464 U.S. at 450.

⁷² *Id.* at 451 (emphasis in original).

⁷³ *Id.*

⁷⁴ *See id.* at 451–55.

⁷⁵ *Id.* at 452–53.

⁷⁶ *Id.*

⁷⁷ *Sony*, 464 U.S. at 454.

⁷⁸ 239 F.3d 1004 (9th Cir. 2001).

⁷⁹ *Id.* at 1011.

⁸⁰ *Id.* at 1012.

peer.”⁸¹ Rightsholders claimed that Napster users engaged in direct copyright infringement by copying and distributing an MP3.⁸²

Napster, however, claimed that its activity was fair use.⁸³ The Ninth Circuit, examining the district court’s findings for clear error,⁸⁴ concluded that the lower court did not err when it found that Napster users’ actions were not fair use.⁸⁵ When examining the purpose and character of the use, the district court found that downloading an MP3 is a non-transformative commercial use.⁸⁶ The district court found a commercial use because sending an MP3 to another cannot be a personal use and because recipients of the files were able to obtain the MP3 without purchasing them.⁸⁷ The Ninth Circuit found no clear error in the lower court’s holdings.⁸⁸

Next, when analyzing the nature of the use, the Ninth Circuit found no clear error in the district court’s determination that the files were “creative in nature . . . which cuts against a finding of fair use”⁸⁹ The court then considered the district court’s analysis of the third factor, the portion of the work used.⁹⁰ The district court determined that there was “wholesale copying” of copyrighted material because the MP3 files must be copied in order to be transferred.⁹¹ The Ninth Circuit acknowledged the *Sony* case, stating that “under certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety.”⁹² Here, however, the court agreed with the district court’s finding that copying mitigated against finding fair use.⁹³ Finally, in analyzing the

⁸¹ *Id.* Peer-to-peer music sharing allows users with the same or similar file sharing programs to create a network of computers and share files with other users on that network. Fed. Trade Comm’n, *Peer-to-Peer Filing Sharing: A Guide for Business*, BUREAU OF CONSUMER PROTECTION BUSINESS CENTER, <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business#Whatis> (last visited Apr. 10, 2012).

⁸² *Napster*, 239 F.3d at 1013.

⁸³ *See id.* at 1014–19.

⁸⁴ *Id.* at 1015.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Napster*, 239 F.3d at 1015.

⁸⁹ *Id.* at 1016 (citing *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000)).

⁹⁰ *Id.*, 239 F.3d at 1016.

⁹¹ *Id.*

⁹² *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

⁹³ *Id.*

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“effect of the use on the market,” the district court found that Napster hurts the market by reducing college-student CD purchases and hinders the rightsholders’ entry in to the digital-music market.⁹⁴

Napster contended that the district court erred by not deeming sampling⁹⁵ and space-shifting fair uses.⁹⁶ For purposes of this Comment and in light of the *Sony* case, the more relevant of these uses is space-shifting, which “occurs when a Napster user downloads MP3 music files in order to listen to music he already owns on audio CD.”⁹⁷ Napster pointed to *Sony*, claiming that the Supreme Court had previously held that space-shifting is fair use.⁹⁸ The Ninth Circuit, however, held that the district court erred when it decided that *Sony* did not control.⁹⁹ The court explained that “the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user.”¹⁰⁰ The Ninth Circuit emphasized that in *Sony* the Supreme Court noted that the copyrighted recorded materials were for personal use and not shared with members of the public.¹⁰¹

C. *New Technology: The Digital Millennium Copyright Act*

As the previous section illustrates, applying existing law to new technology is a difficult endeavor. Congress responded to this complex situation with legislation by passing the Digital Millennium Copyright Act of 1998 and extending copyright protection to Internet material.¹⁰² The DMCA’s purpose was “to make digital networks safe places to disseminate and exploit copyrighted materials.”¹⁰³ While protecting copyrighted works and explaining service providers’ liability, the DMCA allows the emerging market for these works to develop and allows for Internet access to creative

⁹⁴ *Napster*, 239 F.3d at 1016.

⁹⁵ Sampling occurs when “users make temporary copies of a work before purchasing” it. *Id.* at 1014.

⁹⁶ *Id.* at 1017.

⁹⁷ *Id.* at 1018.

⁹⁸ *Id.* Napster also cited *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys, Inc.*, 180 F.3d 1072 (9th Cir. 1999), to support its claim. *Id.* at 1019.

⁹⁹ *Id.* at 1019.

¹⁰⁰ *Napster*, 239 F.3d at 1019.

¹⁰¹ *Id.*

¹⁰² Johnson & Yamazaki, *supra* note 19, at 639.

¹⁰³ S. REP. NO. 105-190, at 2 (1998) (codified at 17 U.S.C. § 512 (2006)).

works.¹⁰⁴ A statutory safe harbor for Internet service providers is built into the DMCA so that in certain cases, the providers can avoid liability.¹⁰⁵ In order to invoke its protection, “a service provider must reasonably implement a system that terminates accounts of repeat infringers.”¹⁰⁶ The procedure must: (1) not obstruct “standard technical measures” that copyright owners use “to identify or protect” their works; (2) be the product of collaboration between rightsholders and service providers; (3) be available to parties who need it; and (4) not be substantially costly or burdensome to the service providers.¹⁰⁷ This means that the procedures the service providers implement must be a product of a compromise between the service providers and the rightsholders.

A frequently litigated issue is whether another safe harbor, set forth in 17 U.S.C. § 512(c), applies.¹⁰⁸ This provision is referred to as the “notice and take down provision.”¹⁰⁹ The provision allows service providers to avoid liability when they store information uploaded by users.¹¹⁰ To invoke this protection, the service provider must meet certain qualifications. It must “not have actual knowledge” that material or an activity is infringing a copyright¹¹¹ and also must not know of “facts and circumstances from which infringing activity is apparent.”¹¹² Alternatively, if the service provider becomes aware of the infringing material on the site, it must “expeditiously” remove or prevent access to the content.¹¹³ The provider must not profit from

¹⁰⁴ See *id.*

¹⁰⁵ 17 U.S.C. § 512. A “service provider” is “a provider of online services or network access, or the operator of facilities therefor[.]” which includes 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.” § 512(k)(1)(B). This statute is at the core of *Viacom International, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), where the court concluded that YouTube qualified for this safe harbor. See discussion *infra* Part IV.

¹⁰⁶ Johnson & Yamazaki, *supra* note 19, at 641 (citing § 512(i)).

¹⁰⁷ § 512(i)(2).

¹⁰⁸ See Johnson & Yamazaki, *supra* note 19, at 641 (citing cases analyzing whether the safe harbor applies).

¹⁰⁹ Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection Over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 655–56 (2009) (citing Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Serv., Inc., 351 F.3d 1229, 1234 (D.C. Cir. 2003)).

¹¹⁰ § 512(c)(1).

¹¹¹ § 512(c)(1)(A)(i).

¹¹² § 512(c)(1)(A)(ii).

¹¹³ § 512(c)(1)(A)(iii).

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the infringement.¹¹⁴ Finally, if the service provider is notified of infringing material on the site, it must remove the material.¹¹⁵ The service provider must appoint a “designated agent” must be appointed to handle infringement notifications, and his contact information must be available online and at the Copyright Office.¹¹⁶

Courts have interpreted the safe harbor and applied it to many situations. In *Perfect 10, Inc. v. CCBill LLC*,¹¹⁷ the defendants were web hosts that posted pictures, stolen by others, from the plaintiff’s website.¹¹⁸ The plaintiff, who was “the publisher of an adult entertainment magazine and the owner of” an adult website,¹¹⁹ argued that usage of site names like “illegal.net” were red flags that signified infringing use.¹²⁰ The Ninth Circuit refused to place the burden on the service provider to determine if pictures on their server were illegal.¹²¹ Similarly, in *UMG Recordings, Inc. v. Veoh Networks, Inc.*,¹²² the Central District of California stated that if a service provider needed to investigate whether its website contained infringing material, then its minimal knowledge did not rise to the level of a red flag.¹²³ In *Corbis Corp. v. Amazon.com, Inc.*,¹²⁴ the Western District of Washington stated that “[t]he issue is not whether Amazon had a general awareness [but rather] . . . whether Amazon actually knew that specific . . . vendors were selling items that infringed Corbis copyrights.”¹²⁵

The recent trademark case, *Tiffany (NJ) Inc. v. eBay, Inc.*,¹²⁶ is also analogous to the cases discussed above. The issue in that case was whether eBay was liable for contributory trademark infringement.¹²⁷ The court considered whether eBay knew or had reason to know that sellers were infringing Tiffany’s trademark by selling counterfeit

¹¹⁴ § 512(c)(1)(B).

¹¹⁵ § 512(c)(1)(C). The notification requirements are set forth in § 512(3).

¹¹⁶ See § 512(c)(2).

¹¹⁷ 488 F.3d 1102 (9th Cir. 2007).

¹¹⁸ *Id.* at 1108.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1114.

¹²¹ *Id.*

¹²² 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

¹²³ *Id.* at 1108.

¹²⁴ 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

¹²⁵ *Id.* at 1108.

¹²⁶ 600 F.3d 93 (2d Cir. 2010).

¹²⁷ *Id.* at 97–98; see *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010).

goods while still allowing the sellers to use the site.¹²⁸ The district court found that eBay had generalized notice of users who sold counterfeit goods but dismissed the case, holding that general knowledge was not enough to “impose upon eBay an affirmative duty to remedy the problem.”¹²⁹ The Second Circuit agreed, requiring “knowledge of which particular listings are infringing or will infringe in the future” for a service provider to be liable for contributory trademark infringement.¹³⁰ Although this was a trademark case, in both the *YouTube* and *Tiffany* cases, there was evidence that much of the material on each site was illegal—either infringing video or audio on YouTube or counterfeit Tiffany merchandise on eBay.¹³¹ The Second Circuit noted that the service providers’ duties under the DCMA are analogous to those in the trademark infringement context.¹³² That statute requires removal of infringing material only when the owner identifies such material; however, “general knowledge” of infringement occurring on the site “does not impose a duty on the service provider to monitor or search its service for infringements.”¹³³ These cases indicate that the service provider, even when generally aware of a large amount of infringing activity, is not required to locate individual instances of infringement and remove the infringing content from its service.¹³⁴

D. Looking to the Future

Some commentators argue that copyright law requires large-scale reform.¹³⁵ Professor Pamela Samuelson, for example, desires to use the experience gained since 1976 to make a broad change to the copyright law and adapt it to new technologies to protect purely digital works and industries.¹³⁶ The process would take many years of preparation, however, before Congress could even be asked to

¹²⁸ *Tiffany*, 600 F.3d at 97–98; see *YouTube*, 718 F. Supp. 2d at 525.

¹²⁹ *Tiffany*, 600 F.3d at 107 (citing *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 508 (S.D.N.Y. 2008)).

¹³⁰ *Id.*

¹³¹ See *YouTube*, 718 F. Supp. 2d at 524.

¹³² *Id.* (quoting *Tiffany*, 600 F.3d at 97–98).

¹³³ *Id.*

¹³⁴ See *YouTube*, 718 F. Supp. 2d at 524–25.

¹³⁵ See e.g., Warren B. Chik, *Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 J. MARSHALL REV. INTELL. PROP. L. 240 (2011); Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391 (2005); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007).

¹³⁶ Samuelson, *supra* note 135, at 555.

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legislate.¹³⁷ Therefore, this type of reform may be years in the future.¹³⁸ Samuelson predicts that neither the Copyright Office nor Congress will take action in the next decade.¹³⁹ She believes that the United States is facing more serious problems, like global conflict, climate change, and more pressing reforms of tax and immigration law.¹⁴⁰

In addition, the industries that are protected under the current law are not entirely dissatisfied with the existing framework.¹⁴¹ Importantly, those dealing with copyrights—for example artists, businesspeople, or attorneys—are familiar with the system and may fear being subject to a new regime.¹⁴² Individuals with the most influence over potential copyright legislation would likely not want to change the current law, as they would be averse to establishing a new system that could displace their advantage and shift the balance of power.¹⁴³ Finally, to modify the Copyright Act of 1976 would cost both time and money and would require policymakers to address controversial issues, much like those grappled with during the legislative process leading up to the DMCA.¹⁴⁴

III. GOOGLE BOOKS AND THE FAILED SETTLEMENT

A. *The Google Books Controversy*

Though the court did not approve the proposed settlement that followed the Google Books litigation, a single provision of the settlement could provide a model for the resolution of copyright claims in the YouTube context. In order to understand this proposed settlement, it is necessary to first explain the Google Books Search,

¹³⁷ *Id.* at 556. Samuelson explained that a copyright reform project focused on revision of the 1976 Act would require a considerable investment of effort from many people, would cost a good deal of money, and would bring to the surface many highly contentious issues, such as those that manifested themselves in the legislative struggles that led to the Digital Millennium Copyright Act of 1998. Even modest reform efforts . . . have encountered difficulties in reaching consensus.

Id.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Samuelson, *supra* note 135, at 556.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

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the litigation that resulted, and the main provisions of the failed settlement agreement.

As mentioned in Part I, Google scanned the collections of major research libraries, which prompted copyright holders to file suit in the Southern District of New York.¹⁴⁵ Two actions were originally filed in 2005¹⁴⁶: a class action brought on September 20 by The Authors Guild and other authors on behalf of those whose books were in the University of Michigan's library, and another suit brought on October 19 by five book publishers.¹⁴⁷ The cases were consolidated.¹⁴⁸ The plaintiffs claimed that Google infringed plaintiffs' copyrights by scanning the full text of millions of copyrighted books and creating a database of searchable digital books without rightsholders' permission.¹⁴⁹ Through Google's search engine, users could enter relevant information, like title or author, and search results would include "snippets" of the scanned books.¹⁵⁰ Before the court could rule on the merits, however, the parties reached a settlement agreement in October 2008,¹⁵¹ and the court granted preliminary approval of the proposed amended settlement in November 2009.¹⁵²

Some commentators saw the case as an important tool for clarifying fair use in digital technologies.¹⁵³ As noted in Part II.B, fair

¹⁴⁵ Band, *supra* note 4, at 234.

¹⁴⁶ *Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement Before the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) [hereinafter *Hearings*] (statement of Marybeth Peters, Register of Copyrights), available at <http://judiciary.house.gov/hearings/pdf/Peters090910.pdf>.

¹⁴⁷ Band, *supra* note 4, at 234. The Authors Guild describes itself as "the nation's leading advocate for writers' interests in effective copyright protection, fair contracts and free expression . . . [providing] legal assistance and a broad range of web services to its members." ABOUT: HISTORY OF THE AUTHORS GUILD, <http://www.authorsguild.org/about.html> (last visited Oct. 20, 2010).

¹⁴⁸ Band, *supra* note 4, at 234.

¹⁴⁹ *Id.* at 227.

¹⁵⁰ *Id.* at 231–32.

¹⁵¹ Press Release, Google, Authors, Publishers, and Google Reach Landmark Settlement: Copyright Accord Would Make Millions More Books Available Online, GOOGLE.COM (Oct. 28, 2008), http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html.

¹⁵² Order Granting Preliminary Approval of Amended Settlement Agreement at 2, *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-cv-08136-DC), ECF No. 772.

¹⁵³ MICHAEL M. LAFEVER & LINDSEY D. SAUNDERS, COPYRIGHT PROTECTION IN THE DIGITAL AGE: GOOGLE BOOK SETTLEMENT AND BEYOND, ABA INTELLECTUAL PROPERTY ROUNDTABLE 3–4 (2008), available at http://www.abanet.org/litigation/committees/intellectual/roundtables/1108_outline.pdf.

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use is doctrinally unclear,¹⁵⁴ and with such high stakes involved in litigation, like costs and damages, guidelines for digital technology have not been established by courts through cases.¹⁵⁵ Because Google had the financial capability to litigate such a case and was willing to take risks, the potential for a judicial resolution to the fair use issue was promising.¹⁵⁶

B. The Proposed Settlement

As Allan Adler, vice president of the Association of American Publishers, remarked:

[T]his proposed settlement is really unprecedented in its scope and nature [W]hat we have here is not only a settlement agreement that will resolve the pending litigation, but it's designed deliberately to establish and create a going forward model for publishers and authors and other rightsholders in books to work with one of the giants of the online world to move books online for purposes of providing access to a new readership.¹⁵⁷

The expansiveness of the settlement is related to the certified class in the litigation, which includes "all persons and entities that, as of January 5, 2009, own a U.S. copyright interest in one or more Books or Inserts that are 'implicated by a use' authorized by the Amended Settlement."¹⁵⁸ A person owns a copyright "implicated by a use" if Google will be using the book in its book search.¹⁵⁹

Correspondingly, the proposed settlement was complex and comprised of many detailed parts. An in-depth description is beyond the scope of this Comment; a brief overview, however, is needed to give context to the provision of the settlement that would have created the Book Rights Registry.¹⁶⁰ Generally, Google could still have both displayed portions of protected material and continued to

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Objection of Scott E. Gant to Proposed Settlement, and to Certification of the Proposed Settlement Class and Sub-Classes at 8, *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 1:05-cv-08136-DC), ECF No. 143 (alterations in original) (quoting Allan Adler, Vice President of the Association of American Publishers).

¹⁵⁸ *FAQs*, GOOGLE BOOK SETTLEMENT, <http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704#q2> (last visited Feb. 11, 2012) [hereinafter *FAQs*].

¹⁵⁹ *Id.*

¹⁶⁰ *See infra* Part III.C (discussing the Book Rights Registry in greater detail).

copy more books from those libraries that offered their collections.¹⁶¹ The Book Rights Registry would have recorded generated revenue and, in turn, would have paid the rightsholders.¹⁶² Entities like libraries or schools could have purchased subscriptions to the entire database of scanned books for use by their patrons or students.¹⁶³ Further, a rightsholder could create a licensing agreement with other companies, even if his work was included in Google Books.¹⁶⁴ Additionally, if a rightsholder did not want to be included in the settlement, he could opt-out of all of the settlement's terms, including the database of scanned books, the Book Rights Registry, and the copyright payment plan.¹⁶⁵ Similarly, if he did not want a work displayed through the search or included in the collection, he could restrict access to it whenever he desired to do so.¹⁶⁶

C. *The Book Rights Registry*

The Book Rights Registry would have been vital to the success of the settlement agreement because it would have administered the agreement's provisions and acted as an intermediary between rightsholders and Google.¹⁶⁷ Google described the Book Rights Registry as a not-for-profit and independent organization whose sole purpose would have been to "locat[e] rightsholders, collect[] and maintain[] accurate rightsholder information, provid[e] a way for rightsholders to request inclusion in or exclusion from the project, distribut[e] payments earned from online access provided by Google, and represent[] rightsholders' interests in connection with similar programs that may be established by other providers."¹⁶⁸ To receive payments, authors and publishers would have had to take part in the Book Rights Registry.¹⁶⁹ The board of directors of the Book Rights Registry would have been comprised of both author and publisher representatives.¹⁷⁰ The Authors Guild and the Association of American Publishers would have appointed these directors.¹⁷¹ This

¹⁶¹ See *Hearings*, *supra* note 146, at 4 (statement of Marybeth Peters).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *FAQs*, *supra* note 158.

¹⁶⁸ *FAQs*, *supra* note 158.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 671.

¹⁷¹ ISABEL HOWE, HOW THE AUTHORS GUILD V. GOOGLE SETTLEMENT WILL WORK,

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registry would not only have benefitted the Google Books Project, but also would have been used in similar potential projects by other corporations.¹⁷² Google would have paid \$34.5 million to cover start-up costs,¹⁷³ and continued funding would have come from its revenue.¹⁷⁴ The settlement allocated forty-five million dollars for payments to rightsholders, ranging from sixty dollars for a rightsholder of a whole book, or “principal work,” and smaller amounts for smaller items included within works.¹⁷⁵

The Google Book Search litigation illustrates the conflict between, on the one side, copyright holders and a print-based market and, on the other, new technologies and the digital age. The litigation between Viacom and YouTube exposes similar tension among the Internet video-hosting website, the end-users who upload content to the site, and the rightsholders of copyrighted material on the website. As discussed below, this tension cannot be easily resolved.¹⁷⁶

D. *The Google Book Settlement’s Eventual Rejection*

On March 22, 2011, the Southern District of New York rejected the proposed settlement.¹⁷⁷ In doing so, the court evaluated the proposal by applying the *Grinnell* factors.¹⁷⁸ Circuit courts typically use these factors to determine whether a settlement is fair and, in turn, whether it should be approved.¹⁷⁹ The court applied the *Grinnell* factors to determine whether the settlement was “fair, reasonable, and adequate” as required by Federal Rule of Civil Procedure 23(e).¹⁸⁰ These factors are:

- (1) the complexity, expense, and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of

<http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/how-the-settlement-will/How%20the%20Settlement%20Will%20Work.pdf> (last visited Feb. 11, 2012).

¹⁷² *FAQs*, *supra* note 158.

¹⁷³ *Id.*

¹⁷⁴ *HOWE*, *supra* note 171.

¹⁷⁵ *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 672 (S.D.N.Y. 2011).

¹⁷⁶ See discussion *infra* Part IV.

¹⁷⁷ *The Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011).

¹⁷⁸ *Id.* at 674.

¹⁷⁹ Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 35, 111 n.221 (2003).

¹⁸⁰ *Authors Guild*, 770 F. Supp. 2d at 674.

discovery completed;
 (4) the risks of establishing liability;
 (5) the risks of establishing damages;
 (6) the risks of maintaining a class action through trial;
 (7) the ability of defendants to withstand greater judgment;
 (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
 (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation.¹⁸¹

The court noted that most of these factors indicated that the settlement should be approved.¹⁸² There was extensive negotiation between highly competent parties and litigating the case would be complicated and would require a great amount of time and money.¹⁸³ The litigation had already been pending for years.¹⁸⁴ Additionally, there was a high probability that the plaintiffs would lose at trial and that the class itself could not be maintained.¹⁸⁵ Thus, the court concluded that the financial elements of the settlement were reasonable in light of the risks presented.¹⁸⁶ The court stated, however, that the second *Grinnell* factor, the reaction of the class to the settlement, was key.¹⁸⁷ The court explained that “[n]ot only are the objections great in number, some of the concerns are significant. Further, an extremely high number of class members—some 6800—opted out.”¹⁸⁸

The court noted multiple practical problems that rendered the settlement impossible. It stated that there was “a substantial question as to the existence of antagonistic interest between named plaintiffs and certain members of the class.”¹⁸⁹ Additionally, it found the second part of the settlement problematic because it would “transfer to Google certain rights in exchange for future ongoing arrangements . . . and would release Google (and others) from liability for certain *future* acts.”¹⁹⁰ The court specified that Congress—not a private settlement agreement—should determine treatment of

¹⁸¹ *Id.* (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted)).

¹⁸² *Id.* at 675.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Authors Guild*, 770 F. Supp. 2d at 675–76.

¹⁸⁶ *Id.* at 676.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (emphasis in original).

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orphan works.¹⁹¹ Additionally, the settlement “would release claims well beyond those contemplated by pleadings.”¹⁹² The court noted that the case truly centered on claims about scanned clips of books and not the wholesale online availability of copyrighted books in the future, as contemplated by the settlement.¹⁹³ The court also stated that the interests of the class members were not adequately represented because while academics favored availability of information, others, like the named plaintiffs The Authors Guild and the Association of American Publishers, did not.¹⁹⁴ The opt-out provision raised significant concerns.¹⁹⁵ The court focused on the fact that to avoid being covered by the settlement rightsholders would have to opt out; otherwise, they would lose their rights without ever agreeing to transfer them.¹⁹⁶ The court asserted that rightsholders should not have to affirmatively protect their works after Google copied them without their consent.¹⁹⁷ It also stated that the settlement would allow Google to dominate the search market, raising antitrust concerns.¹⁹⁸ Finally, the court noted that international legal implications were unclear and this uncertainty was enough, in light of the other issues, to be problematic.¹⁹⁹

While the settlement in its current form has been rejected, it seems the greater legal implications of the opt-out provision and Google’s unauthorized copying activities were most problematic. A settlement utilizing private ordering to determine appropriate usage of copyrighted works on YouTube, as discussed *infra*, does not have the broad-ranging implications of the Google Books Settlement. Other settlements, however, provide examples of mechanisms used to make binding determinations on class members.

¹⁹¹ *Authors Guild*, 770 F. Supp. 2d at 677–78.

Orphan works are works that are protected by copyright but for which a potential user cannot identify or locate the copyright owner for the purpose of securing permission. They do not include works that are in the public domain; works for which a copyright owner is findable but refuses permission; or works for which no permission is necessary, i.e., the use is within the parameters of an exception or limitation such as fair use.

Hearing, *supra* note 146, at 8 (statement of Marybeth Peters).

¹⁹² *Authors Guild*, 770 F. Supp. 2d at 678.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 679–80.

¹⁹⁵ *Id.* at 681.

¹⁹⁶ *Id.* at 681–82.

¹⁹⁷ *Id.* at 682.

¹⁹⁸ *Authors Guild*, 770 F. Supp. 2d at 682–83.

¹⁹⁹ *Id.* 684–85.

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D. Other Settlement Examples

In other cases, settlements have included a private body or council that administers claims or makes threshold determinations about plaintiffs. These bodies could serve as a model for the settlement if future copyright litigation arises in the YouTube context.

1. Vioxx Litigation

The ultimate resolution of the Vioxx litigation involved a settlement in which a committee determined claimants' awards.²⁰⁰ This litigation itself arose out of a study of the drug, entitled the Vioxx Gastrointestinal Outcomes Research,²⁰¹ or "VIGOR," and what the drug's pharmaceutical manufacturer, Merck, did after its release.²⁰² Scientists at Merck voiced concerns about Vioxx's blood clotting effect years before the study.²⁰³ Released in 2000, VIGOR revealed that patients taking Vioxx were approximately five times more likely to suffer a heart attack than people taking Naproxen.²⁰⁴ After VIGOR was published in the *New England Journal of Medicine*, Merck did not take any investigatory action or warn doctors of the risk.²⁰⁵ Instead, the drug company resisted the FDA's attempts to require a warning, continued to expand marketing of the drug, and purposefully downplayed any safety concerns.²⁰⁶ Finally, in 2004, another study showed that Vioxx caused an increased risk of heart disease and Merck removed the drug from commerce.²⁰⁷

After multidistrict litigation, the parties reached a settlement.²⁰⁸ Merck established a four billion dollar compensation fund for patients that suffered heart attacks and a \$850 million dollar fund for those who suffered strokes.²⁰⁹ Plaintiffs had to enroll in a program to become eligible for proceeds from the fund.²¹⁰ Individuals and those

²⁰⁰ Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Disclosure*, 96 CORNELL L. REV. 265, 279 (2011).

²⁰¹ W. John Thomas, *The Vioxx Story: Would it Have Ended Differently in the European Union?*, 32 AM. J.L. & MED. 365, 369 (2006).

²⁰² *Id.* at 276–78.

²⁰³ *Id.* at 276.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Erichson & Zipursky, *supra* note 200, at 277.

²⁰⁸ *Id.* at 277–78.

²⁰⁹ *Id.* at 279.

²¹⁰ *Id.*

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suing on behalf of a decedent were required to show that they or the decedent suffered a heart attack or stroke and took a particular dosage of the drug over a certain amount of time.²¹¹

Importantly, a “gate committee” then assessed each of the plaintiff’s cases to decide whether he or she was eligible to receive compensation.²¹² The committee was composed of three drug company representatives and three plaintiff representatives.²¹³ After the threshold determination of eligibility, a claims administrator assigned each plaintiff a certain number of points.²¹⁴ The administrator awarded points based on the severity of the heart attack or stroke and the duration of the plaintiff’s usage of the drug.²¹⁵ The more severe the health effects and longer the plaintiff ingested Vioxx, the more points he or she would be given.²¹⁶ Conversely, plaintiffs who were overweight or had a family history of heart disease or diabetes, and that were at a higher risk for heart attack or stroke were given fewer points than others.²¹⁷ These point totals translated into dollars awarded per plaintiff.²¹⁸

2. Breast Implant Litigation

Similarly, through the settlement process in *Lindsey v. Dow Corning Corp.*, a settlement office was created to make determinations about claims.²¹⁹ Plaintiffs injured by implantation of silicone breast

²¹¹ *Id.*

²¹² *Id.*

²¹³ Erichson & Zipursky, *supra* note 200, at 279.

²¹⁴ *Id.* If the claims administrator denies a plaintiff eligibility, a committee reviews the decision. *Description of Settlement Agreement*, OFFICIAL VIOXX SETTLEMENT, <http://www.officialvioxxsettlement.com/documents/Description%20of%20Settlement.pdf> (last visited Feb. 11, 2012). If the committee agrees with the administrator’s determination, the plaintiff can pursue a tort claim, suffer dismissal of his claim after thirty days of inaction, or appeal the decision to a Special Master. *See id.* The Special Master reviews the entire claim de novo. *Id.* If the Special Master also deems the plaintiff ineligible, the plaintiff’s claim is dismissed and is given no legal recourse. *Id.* If, however, the plaintiff wins this appeal of last resort, the claim proceeds. *Id.*

²¹⁵ *Id.*

²¹⁶ Erichson & Zipursky, *supra* note 200, at 279.

²¹⁷ *Id.*

²¹⁸ *See id.* To obtain the dollar value per point, the entire amount of the fund was divided by the total points awarded. *Id.* Each plaintiff’s total points were then multiplied by this dollar amount to determine how much money each would receive. *Id.*

²¹⁹ *See* THE OFFICE OF THE SETTLEMENT FACILITY-DOW CORNING TRUST, CLAIMANT INFORMATION GUIDE: DOW CORNING BREAST IMPLANT CLAIMANTS (CLASS 5) 26 (2002), available at <http://www.tortcomm.org/downloads/CLASS%205%20CLAIMAINT>

implants filed suit against the manufacturer, Dow Corning.²²⁰ After the 1994 settlement, Dow Corning's declaration of bankruptcy, and a revised settlement in 1995, the plaintiffs accepted \$3.2 billion dollars in settlement funds in 1998.²²¹ The settlement involved various classes of claimants classified according to national citizenship or residence, location of the implant surgery, and what type of implant received.²²² For example, members of Class 5 were the "Domestic Dow Corning Breast Implant Claimants."²²³ These women had received a breast implant made by Dow Corning and were United States citizens, resident aliens, or had undergone surgery in the United States.²²⁴ These plaintiffs were eligible to receive different amounts of compensation—a \$5,000 explant payment, a \$25,000 rupture payment, and a \$2,000 expedited release payment.²²⁵

Alternatively, the Medically Contraindicated Exception to the rupture payment is, as its name implies, an exception to the required demonstration of proof for this \$25,000 payment.²²⁶ A plaintiff can receive this money without having her implants removed if she satisfies six criteria.²²⁷ The claims administrator makes the

%20INFORMATION%20GUIDE.pdf [hereinafter CLAIMANT INFORMATION GUIDE].

²²⁰ JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 75–76 (1998), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/\\$file/Tidmarsh.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/$file/Tidmarsh.pdf).

²²¹ FRONTLINE: BREAST IMPLANTS ON TRIAL, <http://www.pbs.org/wgbh/pages/frontline/implants/cron.html> (last visited Jan. 15, 2011).

²²² CLAIMANT INFORMATION GUIDE, *supra* note 219, at 2–3.

²²³ *Id.* at 3. This group is different from those who are Disease Claimants in Class 5, who, under the "The Disease Payment Option," sought payments of \$12,000–\$300,000. To recover, they must submit medical records demonstrating that they suffer from certain enumerated diseases caused by the implants. THE OFFICE OF THE SETTLEMENT FACILITY-DOW CORNING TRUST, DISEASE CLAIMANT INFORMATION GUIDE: DOW CORNING BREAST IMPLANT CLAIMANTS (CLASS 5) 2–3 (2002), *available at* http://www.tortcomm.org/downloads/Disease%20CIG_ENG_5.pdf.

²²⁴ CLAIMANT INFORMATION GUIDE, *supra* note 219, at 3.

²²⁵ *Id.* at 5. The explant payment is payment to those demonstrating that the implant was removed within a certain time period; the rupture payment is an additional payment to those demonstrating that the removed implant had ruptured; and the expedited release payment simply requires proof of implantation of a Dow Corning implant. *Id.*

²²⁶ *See id.* at 26–28.

²²⁷ *Id.* The criteria are: specific proof that Dow Corning is the manufacturer; a doctor's statement and diagnosis accompanied by medical documentation of the "serious chronic medical condition" that makes surgical removal impossible; objective findings in the medical records that the Claims Administrator can use to make an independent determination as to "the severity of the condition and diagnosis;" a specific type of MRI; a rupture revealed by the MRI; and "[t]he serious

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determination as to whether the criteria are satisfied and makes, in the appropriate situation, the ultimate finding of medical contraindication.²²⁸ After examining the required documents, the claims administrator may find that “removal of [the] breast implants is likely, in the exercise of reasonable medical judgment, to result in significant complications or have a significant adverse effect on [the claimant’s] medical condition.”²²⁹

3. Contaminated Blood Litigation

Like the Vioxx and breast implant litigation, the settlement of *Walker v. Bayer Corp.* also involved an extrajudicial process that facilitated settlement.²³⁰ This case arose out of the contamination of America’s blood reserves with human immunodeficiency virus (HIV).²³¹ Prior to 1985, approximately sixty-three to eighty-nine percent of those afflicted with severe hemophilia contracted HIV from transfusions of inadequately screened blood.²³² The class included not only those who contracted HIV from infected blood or substances made from infected blood, but also their partners, infected children, those who claimed to suffer emotional distress due to a loved one’s infection, the parents or guardians of minors or incompetents, and representatives of deceased class members.²³³

Each individual who was infected by HIV receives \$100,000.²³⁴ The settlement administrator, however, cannot make payment on the claim until both class counsel and the defendants reach an agreement as to whether the claim should be paid.²³⁵ If all parties agree, then the claim is paid.²³⁶ If the parties disallow the claim or cannot reach an agreement on its merits, then the claim is not paid; this decision, or lack thereof, is appealable²³⁷ to a special master who resolves the claim disputes.²³⁸ If the special master also disallows the

chronic medical condition must be present at the time of the MRI discovery of the Rupture and at the time [of submission of the r]upture claim.” *See id.* at 26–27.

²²⁸ *See id.* at 27.

²²⁹ CLAIMANT INFORMATION GUIDE, *supra* note 219, at 27.

²³⁰ TIDMARSH, *supra* note 222, at 95.

²³¹ *Id.* at 91.

²³² *Id.*

²³³ *Id.* at 92.

²³⁴ *Id.* at 93.

²³⁵ *Id.* at 95.

²³⁶ TIDMARSH, *supra* note 222, at 95.

²³⁷ *Id.*

²³⁸ *Id.*

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claim, the claimants are excluded from the class and can sue the defendants individually.²³⁹

These settlements—of mass tort suits involving pharmaceuticals, breast implants, and contaminated blood—provide background for the YouTube litigation and most importantly, the potential resolution of future copyright infringement claims against YouTube users through a similar system of private ordering. The relevance of these settlements is best understood through the lens of the YouTube copyright infringement case.²⁴⁰

IV. YOUTUBE AND COPYRIGHT INFRINGEMENT

This section discusses the case *Viacom International Inc. v. YouTube, Inc.*, in which copyright holders sued YouTube for hosting copyright-protected content uploaded by end-users on its website. Next, it explores YouTube policies and how the site deals with the problem of copyrighted content uploaded by third parties and without permission from rightsholders. Finally, this section contends that these policies and technologies, while useful in identifying copyrighted material, do not adequately allow for fair use of material on the site.

A. *Viacom International, Inc. v. YouTube, Inc.*

Viacom brought claims of direct, inducement of, contributory, and vicarious copyright infringement against YouTube for allowing and facilitating the public display, performance, reproduction, and distribution of its copyrighted material.²⁴¹ YouTube moved for

²³⁹ *Id.*

²⁴⁰ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

²⁴¹ First Amended Complaint, *supra* note 22, at 25–28. These are the four main types of copyright claims. Aric S. Jacover & Christopher C. Mackey, *Basic Copyright Enforcement*, in UNDERSTANDING COPYRIGHT LAW 2008 133, 142–44 (E. Leonard Rubin et al. eds., 2008). To win on a direct infringement claim, the plaintiff must prove that (1) he owns a copyright and (2) one of his rights, protected under the Copyright Act, has been violated. *Id.* The remaining three claims involve third parties. *Id.* Contributory infringement consists of: “(1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement.” *Id.* (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). The three elements of vicarious infringement are: “(1) direct infringement by a primary party, (2) a direct financial benefit to the defendant, and (3) the right and ability to supervise the infringers.” *Id.* at 143 (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001)). Finally, in *MGM Studios, Inc. v. Grokster, Ltd.*, the Supreme Court held 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

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summary judgment, claiming that it qualified for the DMCA's safe harbor provision contained in 17 U.S.C. § 512(c) and was therefore not liable for any infringement.²⁴² Viacom made a cross-motion for partial summary judgment, claiming that YouTube was not in fact entitled to the safe harbor's protection.²⁴³ The court reviewed the safe harbor provision, discussed above.²⁴⁴

The key issue in the case was a question of statutory interpretation.²⁴⁵ The court had to interpret the 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).²⁴⁶ The court had to decide whether knowledge meant "general awareness that there are infringements," where the plaintiff asserted that infringements were prevalent on the site, or whether knowledge meant "actual or constructive knowledge of specific and identifiable infringements of individual items."²⁴⁷ It looked to the legislative history of the DMCA, citing Senate and House Reports at length.²⁴⁸ The statute states that the service provider possesses the requisite knowledge "by actual knowledge of infringement or . . . awareness of facts or circumstances from which infringing activity is apparent."²⁴⁹ Congress described the red flag test as having subjective and objective components.²⁵⁰ The first element, which is subjective, deals with the provider's subjective awareness of the facts and circumstances surrounding infringement.²⁵¹ The second part of the analysis, which is objective, is to determine "whether infringing activity would have been apparent to a reasonable person operating under the same or

infringement by third parties." *Id.* (quoting *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 n.12 (2005)).

²⁴² *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010). For a discussion of the safe harbor provision, see *supra* Part II.C.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 519.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *YouTube*, 718 F. Supp. 2d at 519–24.

²⁴⁹ *Id.* at 520. The relevant statutory provision, § 512(c)(1)(A)(ii), is a "red flag test." *Id.* A service provider does not have to actively patrol its service for infringement, but if it has knowledge of infringement, then it will not be eligible for the safe harbor if it does not act to eliminate or prevent access to the infringing material. *Id.* at 520–21.

²⁵⁰ *Id.* at 520.

²⁵¹ *Id.*

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similar circumstances.”²⁵²

In light of the statute itself and the relevant legislative history, the court concluded that the phrases in question referred to “knowledge of specific and identifiable infringements of particular individual items” and that

[m]ere knowledge of prevalence of such activity in general is not enough. . . . *To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users’ postings infringe a copyright would contravene the structure and operation of the DMCA.*²⁵³

The court reasoned that this was the more practical solution.²⁵⁴ A service provider is unable to know whether the owner had licensed the user’s video, whether it was fair use of copyrighted content, or whether the rightsholder contested the use at all.²⁵⁵ The court pointed to the success of the current policy and cited the example of a mass takedown of about 100,000 videos on Viacom’s request.²⁵⁶ Almost all of the identified videos were removed by the next day.²⁵⁷ The court then recounted relevant case law, all of which supported its holding.²⁵⁸ These cases indicated that the service provider, even when generally aware of a large amount of infringing activity, is not required to locate individual instances of infringement and remove the infringing content from its service.²⁵⁹ The court granted summary judgment to the defendant rightsholders, holding that they qualified for the safe harbor’s protection, and denied all of the plaintiffs’ cross motions.²⁶⁰ The Second Circuit affirmed the District Court’s construction of the provision,²⁶¹ but reversed its grant of summary judgment for the defendants.²⁶²

²⁵² *YouTube*, 718 F. Supp. 2d at 520.

²⁵³ *Id.* at 523 (emphasis added).

²⁵⁴ *Id.* at 524.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *See YouTube*, 718 F. Supp. 2d at 524–25. For a discussion of the cases that the court cited, *see supra* Part II.C.

²⁵⁹ *See supra* Part II.C.

²⁶⁰ *YouTube*, 718 F. Supp. 2d at 529.

²⁶¹ *Viacom Int’l, Inc. v. YouTube, Inc.*, Nos. 10–3270–cv, 10–3342–cv, 2012 WL 1130851, at *7 (2d Cir. Apr. 5, 2012).

²⁶² *Id.* at *8–9. The court held that there were “triable issue[s] of fact as to whether YouTube actually knew, or was aware of facts or circumstances that would

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B. Current YouTube Policies and Fair Use

YouTube employs two main technologies to identify copyrighted material: AudioID and VideoID.²⁶³ Copyright holders can identify videos that contain all or part of their copyrighted works.²⁶⁴ Additionally, they can decide what action, if any, should be taken when copyrighted content is identified.²⁶⁵ For example, they can use the videos to generate revenue or to track viewing statistics, or they can completely remove these videos from YouTube.²⁶⁶ In addition to sending YouTube information about the content and providing YouTube with instructions regarding the copyrighted work, the rightsholder must send YouTube files of the work to be identified within users' videos.²⁶⁷ These audio or video files serve as reference material so that YouTube can compare uploaded videos with copyrighted content.²⁶⁸ When copyrighted material is identified, YouTube automatically implements the rightsholder's desired course of action.²⁶⁹

YouTube states that there are numerous benefits of this software.²⁷⁰ It allows rightsholders to make money, to expand the fan base of their works, to prevent copyright infringement, to have an automated procedure in place, and to track data on the videos.²⁷¹ Currently, over one thousand rightsholders use these technologies.²⁷² YouTube states that these technologies allow the fair use of copyrighted content in YouTube videos.²⁷³ Rightsholders are able to create bright-line rules of their own, including "policies [that] depend[] on the proportion of a claimed video that contains their work, or the absolute length of the clip used."²⁷⁴ As an example, YouTube describes a record label that allows users to upload videos

indicate, the existence of particular instances of infringement." *Id.*

²⁶³ YOUTUBE AUDIOID & YOUTUBE VIDEOID,
<http://www.youtube.com/t/contentid> (last visited March 18, 2012).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ AUDIOID & VIDEOID, *supra* note 263.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Shenaz Zack, *Content ID and Fair Use*, BROADCASTING OURSELVES ;), THE OFFICIAL YOUTUBE BLOG (April 22, 2010), <http://youtube-global.blogspot.com/2010/04/content-id-and-fair-use.html>.

²⁷³ *Id.*

²⁷⁴ *Id.*

with song clips of fewer than sixty seconds, but permits YouTube to block videos with more than one minute of a copyrighted song.²⁷⁵ Nonetheless, YouTube acknowledges the limitations of this procedure.²⁷⁶ The company notes that “[r]ights holders are the only ones in a position to know what is and is not an authorized use of their content, and [it] require[s] them to enforce their policies in a manner that complies with the law.”²⁷⁷

Users can contest removal of a video through an automated process, if they believe the video is a proper use of content.²⁷⁸ If a user receives a notice saying that content has been flagged via ContentID, then YouTube tells the user which rightsholder contests his use and allows the user to challenge the rightsholder’s claim.²⁷⁹ To do so, the user must check a box that reads “This video uses copyrighted material in a manner that does not require approval of the copyright holder.”²⁸⁰ After the user objects, YouTube reposts the video.²⁸¹ Then the rightsholder must decide whether he will file a DMCA notification to remove material from YouTube permanently.²⁸² These procedures identify copyrighted material well and allow the rightsholders to dictate YouTube’s course of action. Just because a user posts copyrighted material does not mean that the post is illegal.

YouTube’s policies may not adequately protect the fair use of copyrighted content. The procedure requires a fair use determination by the rightsholder and an assessment of the video by the user. While YouTube provides users with information about what could happen when they use copyrighted material in their videos, it provides scant information about what constitutes fair use. The company tells users that in order to determine whether their videos are infringing upon copyrighted material, the users “need to analyze and weigh four factors that are outlined in the U.S. copyright statute.”²⁸³ This seems to be of little use to those outside of the legal profession. As YouTube acknowledges, “the weighing of these four

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Zack, *supra* note 272.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *General Copyright Inquiries: Using Some Copyrighted Content in Your Videos*, YOUTUBE HELP ARTICLES, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=143457> (last visited Feb. 11, 2012).

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factors is often quite subjective and complex. For this reason, it's often difficult to determine whether a particular use is a 'fair use.'"²⁸⁴ Understandably, YouTube will not assess a user's video to determine whether it is protected under the fair use exception, but instead suggests the user consult an attorney for assistance, and refers the user to various other informational websites.²⁸⁵

Thus, Audio ID and Video ID have their limits, as they are technologies that can identify the underlying copyrighted work, but do not assess the work as a whole to decide whether it falls into the fair use exception.²⁸⁶ Two particular incidents illustrate this shortcoming. During the 2008 presidential campaign, John McCain's campaign requested that YouTube review the McCain team's posted videos prior to responding to DMCA takedown notices and removing them from the website.²⁸⁷ According to Trevor Potter, the campaign's general counsel, many of the removed McCain advertisements constituted fair use of portions of television footage and were thus non-infringing material.²⁸⁸ YouTube's general counsel, Zahava Levine, firmly denied the request.²⁸⁹ She said, "[l]awyers and judges constantly disagree about what does and does not constitute fair-use . . . [and n]o number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair-use."²⁹⁰ Levine stated that the company did not want to risk losing the DMCA safe harbor's protection by failing to quickly remove the videos when a takedown request was received.²⁹¹ She also stated that rightsholders, not YouTube, should bear the burden of deciding whether their video is protected by fair use because the determination is difficult and the rightsholders are better able to make such a determination.²⁹² She noted that the rightsholder and the user "hold all of the relevant information [as to whether the video is infringing], including the

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Fred von Lohmann, *YouTube's Content ID (C)ensorship Problem Illustrated*, DEEPLINKS BLOG (Mar. 2, 2010), <http://www.eff.org/deeplinks/2010/03/youtubes-content-id-c-ensorship-problem>.

²⁸⁷ Sarah Lai Stirling, *YouTube to McCain: You Made Your DMCA Bed, Lie in It*, THREAT LEVEL: PRIVACY, CRIME, AND SECURITY ONLINE (Oct. 15, 2008, 10:25AM), <http://www.wired.com/threatlevel/2008/10/youtube-to-mcca/>.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

source of any content used, the ownership rights to the content, and any licensing arrangements in place between the parties.”²⁹³ If rightsholders do in fact think that their videos are permissible use, then they can issue a DMCA counter-notice and YouTube will re-post the videos.²⁹⁴

Additionally, during December 2008 and January 2009, Warner Music Group sent a massive takedown notice affecting thousands of videos.²⁹⁵ Some, like the Electronic Frontier Foundation, called this a “fair use massacre,” as implicated videos included those using Warner Music’s songs as background tracks and musicians covering a copyrighted song while playing along with the original track.²⁹⁶ This en masse takedown was possible because of the ease and speed of the Content ID automated process.²⁹⁷

John McCain’s well-funded and influential campaign created videos, uploaded them to YouTube, and yet still had problems with the current notice-and-takedown process because the process requires videos that may constitute fair use to be removed. This outcome does not bode well for the average YouTube user, who may not be legally savvy and cannot determine whether his video is a candidate for a fair use defense. Users may fear legal repercussions if they file an objection and the rightsholder contests the objection and sues. Thus, users may avoid filing an objection, even when there is a high probability that their video is permissible under the fair use exception.

V. TOWARDS A VIDEO AND MUSIC RIGHTS REGISTRY THROUGH SETTLEMENT: COULD THE BOOK RIGHTS REGISTRY BE A MODEL?

A. *Progress is Deadlocked*

It is safe to assume that a massive copyright law reform will not occur in the near future. As mentioned above, the odds of reform taking place in the next decade are slim due to more pressing national concerns, like global conflict, climate change, and other

²⁹³ Stirland, *supra* note 287.

²⁹⁴ *Id.*

²⁹⁵ Tarleton Gillespie, *The Politics of “Platforms,”* 12 NEW MEDIA & SOC’Y 3, 13 (2010).

²⁹⁶ Fred von Lohmann, *YouTube’s January Fair Use Massacre*, DEEPLINKS BLOG (Feb. 3, 2009), <http://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre>.

²⁹⁷ *Id.*

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more urgent reforms of tax and immigration law.²⁹⁸ Moreover, there is disagreement as to whether Congress should rewrite the copyright law or whether judicial action, like the Google Books Settlement, is the proper method of change. For example, Professor Stephen Jamar explains the three ways in which user-generated content could be protected, but he is pessimistic about the success of these methods.²⁹⁹ First, the current regime requires rightsholder permission for use of copyrighted work; rightsholders can simply deny this permission.³⁰⁰ Jamar states that this is not ideal because the rightsholders may prevent their work from being used in any way and thereby effectively chill speech.³⁰¹ Second, the courts can create a *per se* rule that “noncompeting, noncommercial, user-generated content distributed online” is fair use, while drawing on other principles—like the fact that copyright protection does not extend to general storylines and characters—to encourage the growth of user-generated content.³⁰² This development would be slow and inconsistent across the circuits.³⁰³ Third, Congress could legislate to increase the user’s rights.³⁰⁴ Jamar notes that the wealthiest and therefore most powerful interests desire longer copyright terms, increased protection, and greater enforcement.³⁰⁵ These interests have historically prevailed.³⁰⁶

B. Potential Solutions that Work Within the System Have Limitations

Potential solutions attempt to work within the existing system; there are, however, significant drawbacks. For example, Rumblefish, a music licensing company, is selling licenses to copyrighted songs, enabling users to receive and edit an entire track of a song.³⁰⁷ The song, however, may only be used for personal videos.³⁰⁸ While purchasing a license ensures that the user is not infringing a copyright, as he now has express permission to use the material, there

²⁹⁸ Samuelson, *supra* note 135, at 556; *see supra* Part II.D.

²⁹⁹ Steven D. Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843, 871 (2010).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 872.

³⁰⁵ Jamar, *supra* note 299, at 872.

³⁰⁶ *Id.*

³⁰⁷ Joseph Plambeck, *For \$1.99, a (Legal) Song To Add to YouTube Videos*, N.Y. TIMES, June 28, 2010, at B6.

³⁰⁸ *Id.*

could be instances where a license is not needed because the video falls within the fair use exception.

Additionally, it is possible that in the future, YouTube may make agreements with movie studios to show copyrighted content online. For example, Metro-Goldwyn-Mayer posted full-length television episodes and movies, while video pages display advertisements.³⁰⁹ Although the content offered is limited, it could mark a shift in relationships between YouTube and Hollywood.³¹⁰ Analysts have stated that this may signal a period of collaboration between the site and rightsholders.³¹¹ Nevertheless, studios still prefer Hulu—a website that was actually created by movie and television studios—and conclude that YouTube’s site layout is “too cluttered.”³¹² Additionally, YouTube was unable to come to an agreement with Warner, under which the studios would have received advertising revenue and YouTube would post some of the studio’s videos.³¹³ Thus, while Hollywood shows signs of cooperating with the site, the user who wants to use some part of copyrighted work in his own video has little guidance on how to do so without running afoul of copyright law. Deals like this would improve the public’s ability to view the content online, but not its ability to manipulate the video. Finally, advertisement revenue sharing allows rightsholders to profit from their content while not directly addressing the problem of potential infringement.³¹⁴ YouTube emphasizes the distinct appeal of advertising in this context because it is personalized to the user.³¹⁵ For example, instead of removing a video of a copyrighted song, YouTube runs advertisements on the page and prompts the viewer to purchase the song or ringtone.³¹⁶ The revenue generated from the sale of these advertisements would be shared with the rightsholders.³¹⁷

Thus, while copyright law is stuck in developmental limbo, technology will continue to advance and the problems facing

³⁰⁹ Brad Stone & Brooks Barnes, *MGM to Post Full Films On YouTube*, N.Y. TIMES, Nov. 9, 2008, http://www.nytimes.com/2008/11/10/business/media/10mgm.html?_r=1&adxnml=1&ref=technology&adxnmlx=1328988115-julDs/TSo3TMHdH+AtZ0cg.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Tim Arango, *As Rights Clash on YouTube, Some Music Vanishes*, N.Y. TIMES, Mar. 22, 2009, <http://www.nytimes.com/2009/03/23/business/media/23warner.html>.

³¹⁴ See Claire Cain Miller, *YouTube Ads Turn Videos Into Revenue*, N.Y. TIMES, Sept. 3, 2010, at B1.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

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rightsholders and users will grow exponentially more complex. As a practical matter, this deadlock must be resolved. Here, as in the *YouTube* case, the service provider is protected by the DMCA, absent any actual knowledge of specific infringing content.³¹⁸ Additionally, the court notes that YouTube's Content ID systems are effective in identifying and then potentially removing infringing content;³¹⁹ however, this system does not truly leave room for fair use of copyrighted content. In *Viacom v. YouTube*, the Second Circuit emphasized that Congress placed the burden on the rightsholder to determine whether material was infringing.³²⁰ When choosing among the rightsholder, the user, and the service provider to decide who should make this fair use determination, it makes sense to place the burden on the rightsholder, who possesses the most information about the content.

In the YouTube context, however, this can be a problematic approach. First, this process gives the rightsholders a large amount of power to make their own determinations. While rightsholders ideally make these determinations, there is no check by a third party. Essentially, the rightsholders seem to be able to make their own rules. Second, YouTube's approach creates inconsistencies. For example, one record label may decide to send a takedown notice to users whose videos contain more than ten seconds of a copyrighted song, while another could have YouTube issue takedown notices to users using more than sixty seconds of protected content. Therefore, the users are unable to predict what may be taken down, what is permissible, and cannot necessarily expect YouTube to treat the same length or type of content consistently.

C. *Towards a Music and Video Rights Registry?*

If the parties engage in future litigation, a settlement of that litigation could stipulate to a Music and Video Rights Registry (MVRR) that determines "fair use" solely in the YouTube context. Clearly, because an independent registry would have no law-making power, the determinations made by the committee would not be binding in any other context. The MVRR, however, could provide guidelines for users to establish some norms and expectations for both the users and the rightsholders. The MVRR's determinations

³¹⁸ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010); see *supra* Part IV.A.

³¹⁹ *YouTube*, 718 F. Supp. 2d at 524.

³²⁰ *Id.* at 523.

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would be influenced by case law but adapted for use on the site. This provides consistent standards and removes the initial fair use determination from the hands of the rightsholders. Moreover, like the Google Books Rights Registry, the MVRR would seat a board of directors comprised of rightsholders in the music, television, and movie industries. Inclusion of artists, however, would be important as well. While determinations of brightline rules would certainly provoke disagreements, the goal would simply be to set ground rules in this one discrete context with potential for compromise. For example, parties might stipulate that up to sixty seconds of copyrighted material is permissible. Any use of more than sixty seconds may be flagged for review by the MVRR, if the user believes his video is still permissible fair use.

YouTube's process would remain similar to the current procedures, but the MVRR would play an active role. Audio ID and Video ID would still be used and would still be vital to the process because they would initially identify the copyrighted content. Rightsholders would still have the option of establishing certain procedures that YouTube would have to follow if videos using copyrighted content were flagged. Examples of such procedures include leaving the videos online, tracking how many times the video is viewed, or using the videos to earn revenue through advertising. Rightsholders could not create their own bright-line rules requiring YouTube to send takedown notices to users of copyrighted content—for example, rightsholders could not require YouTube to send takedown notices to users whose video includes thirty seconds or more of a protected song; videos would not be automatically removed. YouTube would notify individuals that their videos were potentially infringing a copyright and, instead of going to court, users would submit their video to the MVRR for review. This would allow users who believed they had a legitimate fair use defense to avoid the risk of being sued by a rightsholder. These rightsholders most likely have greater financial resources and time to pursue claims than the average user. Thus, submission to the MVRR would not expose the user to suit and would not deter claims of legitimate fair use.

The second major function of the MVRR would be to facilitate the sale of licenses for music and video use. If the MVRR determines that the content does violate copyright law, then the MVRR would give the user an option to purchase a license from the rightsholder to allow the user to keep the content on the site and to use the copyrighted material. The license could be a flat fee for use of any portion of a song, or the MVRR could charge a fee based on the

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portion of the song used. Finally, if the user refuses to purchase a license, then the video would be taken down.

Major obstacles to the workability of this project are evident. The primary concern would be financing the MVRR's operations. The Google Book Rights Registry would be funded by Google's initial contribution³²¹ and then sustained by the revenue Google receives.³²² Although a part of the giant Google corporation, YouTube itself has not been profitable.³²³ This year, however, it is projected to earn \$1.7 billion dollars.³²⁴ While the MVRR might not be plausible currently, if YouTube revenues continue to increase, then YouTube may be able to make an initial contribution to establish the MVRR and sustain it. If YouTube can sell advertising on the site that is displayed with the copyrighted material, then the proceeds could be used to fund the MVRR. Another major concern is the unmanageable nature of the MVRR's task, as the sheer number of videos posted on the site is massive. A great amount of manpower would be required to view content and make determinations. After some specific rules were decided upon by the board of directors, however, the determinations of fair use might be easier, because fewer videos would have to be reviewed.

The logistical obstacles to establishing the MVRR are great, but still not as problematic as those that are preventing copyright reform. Although idealistic and aspirational, the existence of a body like the MVRR may be more plausible than actual changes in the copyright law. Creating the parameters for use of copyrighted content on YouTube may influence the public's understanding and use of copyrighted content. This may even develop a greater consensus in the public opinion about what is and is not permissible use. Establishing a working definition of fair use may even be the impetus for legal reform.

³²¹ *FAQs, supra* note 158.

³²² HOWE, *supra* note 171.

³²³ Anthony John Agnello, *How Google Will Finally Make YouTube Profitable*, INVESTORPLACE (Sept. 16, 2011, 1:04 AM), <http://www.investorplace.com/2011/09/google-youtube-goog-video-editing-netflix/>. Google's co-founder and CEO, Larry Page, believes that YouTube requires more investment to be profitable. Claire Cain Miller, *Google Results Show Growing Strength*, N.Y. TIMES, July 15, 2011, at B1.

³²⁴ Erick Schonfeld, *Citi: Google's YouTube Revenues Will Pass \$1 Billion in 2012 (And So Could Local)*, TECH CRUNCH (Mar. 21, 2011), <http://techcrunch.com/2011/03/21/citi-google-local-youtube-1-billion/>.

VI. CONCLUSION

The Google Books project digitized the massive libraries of many research universities. Google scanned these books without the publishers' or authors' consent and posted snippets of these books on the Internet, returning them as search results of Google queries. In the wake of the unilateral scanning, rightsholders brought suit against Google for copyright infringement in the Southern District of New York. The court did not decide the merits of the case, as the parties reached a settlement that, although rejected by the court in total, has a meritorious provision. As part of the agreement, Google was to create a Book Rights Registry to act as an intermediary between rightsholders and Google itself. The Registry would have facilitated copyright claims and administer payment to the rightholders.

In a related copyright matter, Viacom sued YouTube for permitting infringing content on its website. Viacom complained that users uploaded copyrighted videos, allowing the public to view them without the rightsholders' consent, in violation of copyright law. The Southern District of New York held that YouTube was protected under the notice and take-down statutory safe harbor, which grants protection from liability if an Internet intermediary has procedures in place by which it effectively removes infringing content at a rightsholder's request. Fair use complicates the matter. Copyrighted material can be used in specific circumstances that are enumerated by the Copyright Act. In its mechanistic take-down of copyrighted content, no fair use determination is made.

In light of the current state of copyright law, including the fair use exception and the DMCA, a provision of the Google Books Settlement may provide a solution to the clash between the law and the digital world. It may serve as a useful model for the future resolution of copyright infringement in the YouTube context, especially in light of prior mass tort settlements. YouTube's current methods regarding copyrighted work do not adequately address the question of fair use. To address this problem, an analog to the Book Rights Registry, created by settlement of potential future litigation, may be able to set basic principles for what is an acceptable use of copyrighted content on the site. While not truly resolving the legal definition of fair use and facing great logistical difficulties, a MVRR would standardize the rules in this context, providing guidance to users and rightsholders without stifling legitimate expression.