

# Choosing an Internet Shaped by Freedom: A Legal Rationale to Rein in Copyright Gate Keeping

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## INTRODUCTION:

The friction between copyright protection and internet freedom has hit a political boiling point. Last spring, public outcry shut down the Stop Online Piracy Act (SOPA), the Protect IP Act (PIPA), and the Anti-Counterfeiting Trade Agreement (ACTA),<sup>1</sup> and prompted the unveiling of the Electronic

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1. See Larry Magid, *What Are SOPA and PIPA And Why All the Fuss?*, FORBES, Jan. 18, 2012, <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all->

Communication Privacy Act Modernization Act and the Global Free Internet Act in the House of Representatives.<sup>2</sup> Furthermore, Verizon and MetroPCS have challenged FCC net neutrality rules in Federal Court.<sup>3</sup> Until Congress can decide the future of the internet, courts are faced with making sense of an increasingly dysfunctional body of law regarding online service providers (OSPs). The freewheeling, fast-evolving nature of the internet has facilitated significant contradictions between copyright gate keeping initiatives and the FCC's net neutrality rules.<sup>4</sup> This article argues that in order to avoid dysfunctional and contradictory applications of the law, courts should avoid interpretations of copyright law that undermine the FCC's net neutrality rules. Additionally, this article will explain why the Second Circuit's recent interpretation of the DMCA knowledge requirement on a 12(b)(6) motion should be reversed.<sup>5</sup>

In 2011, the FCC's net neutrality rules were finally printed in the Federal Register.<sup>6</sup> Originally adopted in 2005 on a trial basis,<sup>7</sup> their purpose is to preserve internet freedom and openness and avoid most internet gate keeping

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the-fuss/ (noting that the laws pit the tech industry against the entertainment industry); Erik Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules*, FORBES, Jan. 28, 2012, <http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered-down-tpp-still-dangerous-on-ip-rules/> (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); David Meyer, *ACTA Rejected by Europe, Leaving The Treaty Near Dead*, ZDNET, July 4, 2012, <http://www.zdnet.com/acta-rejected-by-europe-leaving-copyright-treaty-near-dead-7000000255/> (noting that massive protests in Europe prompted the European parliament to reject the treaty).

2. Electronic Communications Privacy Act Modernization Act of 2012, H.R. 6339, 112th Cong. (2011); Global Free Internet Act of 2012, H.R. 6530, 112th Cong. (2011) (One goal of this act would be to encourage other countries to "refrain from compelling Internet service providers and other intermediaries to restrict the free flow of information on the Internet."). See also Tom Watson, *Freshly-Minted Declaration of Internet Freedom Demands 'Free and Open Internet'*, FORBES, July 02, 2012, <http://www.forbes.com/sites/tomwatson/2012/07/02/freshly-minted-declaration-of-internet-freedom-demands-free-and-open-internet/> (mentioning the new internet privacy and freedom laws in response to public demand).

3. VERIZON, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee. Independent Telephone and Telecommunications Providers et al., Interveners., 2013 WL 210111 (C.A.D.C.), 1. See also Kenneth Corbin, *FCC Chief Says Broadband Key to Economic Success, Defends Net Neutrality*, CIO, Sept. 25, 2012, [http://www.cio.com/article/717232/FCC\\_Chief\\_Says\\_Broadband\\_Key\\_to\\_Economic\\_Success\\_Defends\\_Net\\_Neutrality](http://www.cio.com/article/717232/FCC_Chief_Says_Broadband_Key_to_Economic_Success_Defends_Net_Neutrality); 2011 WL 6837548 (S.E.C. No - Action Letter), 35 (Verizon sought to exclude a shareholder proposal to voluntarily operate its wireless broadband network consistent with the FCC's net neutrality rules. On February 13, 2012, the S.E.C. issued this action letter denying Verizon's request.).

4. See generally, c.f. Monica Horten, *Where Copyright Enforcement and Net Neutrality Collide – How EU Telecoms Package Supports Two Corporate Political Agendas for the Internet*, DIGITAL COMMONS @ AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, <http://digitalcommons.wcl.american.edu/research/16/> (2010) (an example of how European net neutrality and copyright enforcement materially effect and conflict with each other).

5. The Copyright Act, 17 U.S.C. § 512(c) & (d); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33–35 (2d Cir. 2012).

6. Preserving the Open Internet 47 C.F.R. § 8 (2011).

7. *The History of the Open Internet Proceeding*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/topic/open-internet#history>; 47 C.F.R. § 8.1 (2011).

by service providers.<sup>8</sup> The net neutrality rules require transparency, no blocking, and no unreasonable discrimination against websites (including BitTorrent) and content (including copyrighted content where there is no direct evidence the copyright holder approves of the dissemination).<sup>9</sup> Despite this, copyright cases have turned file sharing services into a pariah and have chided OSPs like YouTube for keeping a high number of copyrighted works on their networks without direct proof of copyright owner authorization.<sup>10</sup> As many OSP platforms are being shaped to avoid copyright liability, FCC rules made to ensure net neutrality are being needlessly undermined.<sup>11</sup> In response, the Supreme Court should broadly apply three rationales to ease the friction between telecommunications and copyright law: (1) The Ninth Circuit's statutory interpretation of the DMCA safe harbor in *UMG Recordings, Inc. v. Shelter Capital Partners LLC & Veoh Networks, Inc.* that requires specific knowledge,<sup>12</sup> (2) Judge Kozinski's dissent in *Perfect 10 v. Visa*,<sup>13</sup> which focuses vicarious liability on the unjust enrichment of parties facilitating copyright infringement instead of the dissemination of copyrighted works alone, and (3) requiring plaintiffs to thoroughly prove direct infringement (i.e. applying an analysis of fair use and the idea/expression dichotomy) before admitting evidence to prove willful blindness, volition, knowledge or an intent to encourage infringement.

The FCC heavily regulates internet service providers (ISPs) and copyright law puts the brunt of secondary liability on OSPs, creating the impression that the FCC is nearer to the "core" and copyright law is nearer to the "edge" of internet regulation.<sup>14</sup> However, because "communications" and "copyrighted content" are often one-in-the-same in an online context, changes must be made to avoid an impending clash between the two.<sup>15</sup> FCC net

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8. FEDERAL COMMUNICATIONS COMMISSION, CHAIRMAN JULIUS GENACHOWSKI, REMARKS ON PRESERVING INTERNET FREEDOM AND OPENNESS (2010) (available at <http://www.fcc.gov/document/federal-communications-commission-chairman-julius-genachowski-remarks-preserving-internet-f>) (hereinafter *FCC Remarks on Internet Freedom*).

9. Preserving the Open Internet 47 C.F.R. § 8 (2011).

10. *YouTube*, 676 F.3d at 32–33 (2d Cir. 2012) (The plaintiffs alleged "secondary copyright infringement based on the presence of unauthorized content on the website. . ."). See also *Liberty Media Holdings, LLC v. BitTorrent Swarm*, 277 F.R.D. 669, 670 (S.D. Fla. 2011) (an attempt to sue torrent users jointly as a "swarm").

11. If copyright law forces OSPs to close off the very public benefits derived from an open internet that the FCC is seeking to preserve by promulgating net neutrality rules, the FCC has effectively been undermined by copyright law.

12. See generally *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (The superseding decision still requires specific knowledge and that the entire statute must be read in such a way that gives each provision effect).

13. See generally *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007) (Kozinski, J., *dissenting*).

14. Preserving the Open Internet, 76 FR 59192-01 (Within its explanation of the net neutrality rules, the FCC labels online service providers, like Facebook and YouTube "edge service providers" and internet service providers like Comcast that provide a connection to internet broadband itself "core service providers."); The Copyright Act, 17 U.S.C. § 512(a) (The DMCA safe harbor gives a broad protection to internet service providers for providing transitory digital network communications.).

15. Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications*

neutrality regulation is meant to protect both end users and OSPs from anticompetitive behavior that slows down innovation, yet copyright law is becoming a back door that circumvents these protections. This circumvention is made possible by acquisitions and exclusive transfers of IP rights, with OSPs, ISPs, and content owners being affiliated or under common ownership.<sup>16</sup> For example, the ISP Comcast owns as subsidiaries both NBC and Xfinity. It is therefore in Comcast's interest to use NBC's copyright portfolio to shape the online playing field in Xfinity's favor.<sup>17</sup> Another example is Google/YouTube's deal with Comcast/NBC for the right to be the exclusive online provider for the 2012 summer Olympics. Because of their agreement, an online viewer had to purchase an unrelated Comcast cable subscription in order to watch the Olympics online.<sup>18</sup> In this scenario, Comcast was able to hire YouTube through copyright licensing to carry out anticompetitive behavior that would have attracted FCC antitrust scrutiny had Comcast simply required the purchase of an unrelated cable subscription themselves.<sup>19</sup> In this way copyright law may be used as a back door for ISPs to circumvent FCC regulation if they create, purchase or enter into exclusive contracts with an OSP.<sup>20</sup> In fact, reports have surfaced that users may have their internet access slowed or blocked via copyright alert systems put into effect by all major ISPs by way of deals they

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*Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L.J. 207, 212 (2003) (“[T]he internet seamlessly blends content and conduit.”).

16. Who Owns the Media?, Free Press, <http://www.freepress.net/ownership/chart> (showing the high consolidation of media industries).

17. Brief of Respondent-Appellee at 14, 15, 50, 57, 75, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.). See also Marguerite Reardon, *Franken: Comcast Thumbs Nose at Net Neutrality Rules*, CNET, May 7, 2012, [http://news.cnet.com/8301-13578\\_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/](http://news.cnet.com/8301-13578_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/) (noting that Comcast might be violating net neutrality rules by exempting its Xfinity video service from monthly data caps).

18. Brent Rose, *How to Watch Every Second of the Olympics (Updated)*, GIZMODO, July 28, 2012, <http://gizmodo.com/5928992/how-to-watch-every-second-of-the-olympics> (explaining how if you had a subscription to cable you can access the 2012 Olympics, but if you didn't then you either had to purchase one or you would have to buy a VPN number to access the internet in the U.K. to see the Olympics because the BBC didn't require the purchase of a cable subscription to view the Olympics online).

19. FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction*, Jan. 18, 2011, available at <http://transition.fcc.gov/transaction/comcast-nbcu.html#orders> (Noting that FCC approval of the Comcast/NBC merger was made on the condition that Comcast would fulfill a number of public interest commitments including “Protecting the Development of Online Competition.” Comcast/NBC's exclusive grant of the copyright in the Olympics arguably violates a number of these conditions including “unreasonably withhold[ing] programming from Hulu.”); See also James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 198 (1998) (“In numerous Commission decisions reviewing communications industry mergers, the FCC mentions the Clayton Act, but never uses the Clayton Act as its basis for proceeding.”).

20. Gerry Smith, *Verizon Copyright Alert System Would Throttle Internet Speeds of Repeat Online Pirates*, HUFFINGTON POST, Jan. 11, 2013, [http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy\\_n\\_2459133.html](http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy_n_2459133.html) (Noting that copyright alert systems could presently be put into effect by all major ISPs by way of deals made by the entertainment industry and major internet service providers that could effectively replace DMCA notices. This could be “a shift in strategy” to self help after SOPA and PIPA failed to pass through Congress.).

made with the entertainment industry, as corroborated by the Motion Picture Association of America's comments to the Congressional Internet Caucus Advisory Committee.<sup>21</sup> Copyright law is being shaped into a leveraging mechanism to justify anticompetitive behavior and circumvent FCC regulation that would otherwise stop the internet from being molded by the interests of massive corporations and used against the public interest.

#### PART I: THE PUBLIC INTEREST IN A FREE AND OPEN INTERNET

The US is one of the only countries in the world that does not provide the internet as a public utility.<sup>22</sup> Instead, the US internet service market is divided between private telephone and cable carriers.<sup>23</sup> Since these companies hold a natural "duopoly" on the market and the nature of internet communications as a public good,<sup>24</sup> Congress granted the FCC authority to regulate the telecommunications industry pursuant to a public interest standard.<sup>25</sup> In the wake of increased market consolidation,<sup>26</sup> including vertical

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21. About the Center for Copyright Information, (last visited March 25, 2013), <http://www.copyrightinformation.org/about-cci/> (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). *See also* John Tarnoff, We Don't Need Six Strikes, HUFFINGTON POST, March 7, 2013, [http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes\\_b\\_2831489.html](http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes_b_2831489.html); Ernesto, MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows, TorrentFreak, March 23, 2013, <http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/> ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans.").

22. Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME: BUSINESS & MONEY, Jan. 09, 2013, <http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility/> ("Because the U.S. government has allowed a small group of giant, highly profitable companies to dominate the broadband market, Crawford argues, American consumers have fewer choices for broadband service, at higher prices but lower speeds, compared to dozens of other developed countries, including throughout Europe and Asia."). *See also* Susan Crawford, *U.S. Internet Users Pay More for Slower Internet Service*, BLOOMBERG VIEW, Dec. 7, 2012 <http://www.bloomberg.com/news/2012-12-27/u-s-internet-users-pay-more-for-slower-service.html> ("the U.S. is rapidly losing the global race for high-speed connectivity, as fewer than 8 percent of households have fiber service. And almost 30 percent of the country still isn't connected to the internet at all. False All Americans need high-speed access, just as they need water, clean air and electricity. But they have allowed a naive belief in the power and beneficence of the free market to cloud their vision. As things stand, the U.S. has the worst of both worlds: no competition and no regulation.").

23. Nate Anderson, *So Long, Broadband Duopoly? Cable's High Speed Triumph*, ARSTECHNICA, Jan. 3, 2011, <http://arstechnica.com/tech-policy/2011/01/so-long-broadband-duopoly-cables-high-speed-triumph/> (noting that telephone services may have lost the broadband internet market and that Comcast may have a monopoly on it, however it is unclear because it is not clear whether wireless internet will or will not change the market.).

24. Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711, 718–19 (1986) (Defining public goods and natural monopolies as an "exception to the general rule of favoring private property" that occur when market failure "fails to guide privately owned resources to their socially optimal uses.").

25. 47 U.S.C. § 1302 (the FCC can regulate the telecommunications industry according to "public interest, convenience and necessity").

26. Who Owns the Media?, Free Press, <http://www.freepress.net/ownership/chart> (showing the high consolidation of media industries). *Compare* Jim Chen, *The Echoes of Forgotten*

mergers,<sup>27</sup> and evidence that the monopolistic power of ISPs has been used to limit or remove competition and speech by OSPs and internet users,<sup>28</sup> the FCC adopted prophylactic rules to preserve an open internet, known as the net neutrality rules.<sup>29</sup> Net neutrality is the prohibition of unreasonable discrimination in transmitting lawful internet traffic.<sup>30</sup> These rules are thus intended to prevent blocking, degrading, or favoring internet content or websites, and to preserve the internet as a level playing field for everyone.<sup>31</sup>

Meanwhile, peer-to-peer file sharing technology has become the core of a general category of online distribution that major content owners are seeking to shut down or otherwise control of through copyright law.<sup>32</sup> This has severely crippled the development of beneficial peer-to-peer file sharing projects aimed at increasing learning and knowledge as well as chilled the

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*Footfalls: Telecommunications Mergers at the Dawn of the Digital Millennium*, 43 HOUS. L. REV. 1311, 1316 (2007) (“The prospect that the Commission or the Justice Department would actually bar a merger, however, has diminished to a historic nadir.”), with *In Re AT&T Inc. & Deutsche Telekom AG (Dismissed)* (Nov. 29, 2011), available at <http://www.fcc.gov/document/bureau-order-dismissing-applications-and-bureau-staff-report> (A definite sign of changing times, the FCC has issued an order dismissing the AT&T/T-Mobile merger application because the applicants failed to meet their burden of proving that the merger was in “the public interest.” The main reason AT&T gave for why their purchase of T-Mobile would be in the public interest was an increase in “synergies” that would result in increased access to wireless broadband internet. The FCC did not bite.)

27. FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction*, Jan. 18, 2011, available at <http://transition.fcc.gov/transition/comcast-nbcu.html#orders>. See also Thomas Curtin, *Achieving “The Franchise”: The Comcast-NBC Universal Merger and the New Media Marketplace*, 19 COMM.LAW CONSPECTUS 149, 156 (2010) (explaining that as occurred in the Comcast/NBC Universal merger review, the trend has been a loose review of vertical mergers).

28. Brief of Respondent-Appellee at 15, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.); George S. Benjamin, *Internet Content Discrimination: The Need for Specific Net Neutrality Legislation by Congress or the FCC in Light of the Recent Anti-Net Neutrality Actions by Comcast Corporation*, 39 SW. L. REV. 155, 169 (2009).

29. Preserving the Open Internet 47 C.F.R. § 8.1 (“The purpose of this part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate *without permission*.”) (italics added).

30. *FCC Remarks on Internet Freedom*, *supra* note 6. See also Preserving the Open Internet 47 C.F.R. § 8 (2011) (ISPs are not allowed to block OSP services that compete with their telephony services nor are they supposed to unreasonably discriminate against their services); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 142 (2003) (noting that net neutrality “preserv[es] a Darwinian competition among every conceivable use of the Internet so that [*sic*] only the best survive.”).

31. Preserving the Open Internet 47 C.F.R. §§ 8.5, 8.7.

32. See Geoffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L.J. 733 (Noting a movement towards the view that unauthorized internet downloading is theft “plain and simple” from the Supreme Court’s longstanding view that “interference with copyright does not easily equate with theft.”) (quoting Press Release, Motion Picture Ass’n of Am., Inc., Motion Picture and Music Industries File Suit Against Scour.com (July 20, 2000) available at <http://www.mpaa.org/Press/ScourPressRelease.htm>, Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999) available at <http://www.usdoj.gov/criminal/cybercrime/dagipini.htm> and *Dowling v. United States* 43 U.S. 207, 217 (1985)).

willingness of investors to support new internet software in general.<sup>33</sup> For example, LOCKSS, a peer-to-peer system, was designed so that librarians can quickly and easily determine whether a digital copy of a document remains authoritative and replace damaged copies.<sup>34</sup> With the name and slogan “lots of copies keep stuff safe” contributing institutions naturally may fear copyright liability.<sup>35</sup> Other projects to encourage convenient and easy dissemination of creative works have also been threatened, damaged, or abandoned altogether in the wake of such a pivotal shift in copyright law.<sup>36</sup>

This article argues that the FCC’s net neutrality rules are being undermined by secondary copyright liability standards. The FCC has caught many ISPs blocking and degrading file sharing services over their networks, and the ISPs’ response seems to have been a collective “so what?”<sup>37</sup> For example, they have been caught throttling internet speeds artificially.<sup>38</sup> Online services like Skype and FaceTime that compete with traditional telephone and cable services have struggled to gain internet access, and their services have been degraded when users try to access them online.<sup>39</sup> Netflix and Hulu have been targeted by discriminatory practices perpetrated by ISPs that own

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33. See Rynne E. Perio, *Policing the Android Market*, 29 WTR ENT. AND SPORTS LAW 21, 23 (winter, 2012).

34. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 292 n.209 (2006).

35. See What is LOCKSS?, <http://www.lockss.org/about/what-is-lockss/> (last visited March 10, 2013) (LOCKSS stands for “lots of copies keep stuff safe”). See also Yueyue Wang, *Where Does Fair Use Go? — An Insight into Regulating File-sharing in Research and Education*, BILETA ANNUAL CONFERENCE 1–2 (April, 2007) (available at <http://www.bileta.ac.uk/content/files/conference%20papers/2007/Where%20Does%20Fair%20Use%20Go%20—%20An%20Insight%20into%20Regulating%20File-Sharing%20in%20Research%20and%20Education.pdf>) (noting other academic file sharing services like LionShare, eduCommons, Edutella and The Internet Archive Project.).

36. Perio, *supra* note 29, at 23.

37. Benjamin, *supra* note 25, at 169 (3-2 vote.). See also Tony Bradley, *Comcast Toll on Netflix Screams for Net Neutrality*, PC WORLD, Nov. 30, 2010, [http://www.pcworld.com/article/211964/comcast\\_toll\\_on\\_netflix\\_screams\\_for\\_net\\_neutrality.html](http://www.pcworld.com/article/211964/comcast_toll_on_netflix_screams_for_net_neutrality.html) (explaining how Comcast’s non-neutral stance toward Netflix stems from its apparent moral ground in blocking peer-to-peer file sharing services.).

38. Jessica Fink and Brett Noia, on behalf of themselves and all others similarly situated, Plaintiffs, v. Time Warner Cable, Defendant., 2011 WL 8201423 (S.D.N.Y.) (Alleging that Time Warner Cable uses peer-to-peer file sharing as a justification to throttle internet users’ use of the internet even when they purchased a “roadrunner” service at an extra cost for faster internet service. Also noting that Comcast was publically criticized by the FCC for the “same illegal throttling practice.”). See also Daniel Ionescu, *Is Your ISP Throttling Your Internet Connection?*, PCWORLD, Jan. 29, 2009, [http://www.pcworld.com/article/158552/check\\_ISP\\_speeds.html](http://www.pcworld.com/article/158552/check_ISP_speeds.html); Gerry Smith, *Verizon Copyright Alert System Would Throttle Internet Speeds of Repeat Online Pirates*, HUFFINGTON POST, Jan. 11, 2013, [http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy\\_n\\_2459133.html](http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy_n_2459133.html) (Comcast, Time Warner Cable and Verizon are planning on using their gate keeping power to punish people they view as copyright infringers by blocking or slowing their internet access. If this practice becomes the norm courts may no longer need to decide copyright cases involving the internet.).

39. Brief of Respondent-Appellee at 15, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.). David Kravets, *AT&T: Holding FaceTime Hostage Is No Net-Neutrality Breach*, WIRED: THREAT LEVEL, Aug. 22, 2012, <http://www.wired.com/threatlevel/2012/08/face-time-net-neutrality-flap/>.

competing online video services.<sup>40</sup> ISPs have been accused of blocking online credit card processing that competed with their affiliated services.<sup>41</sup> And perhaps most troubling for the FCC, ISPs are investing in copyright ownership and fighting net neutrality rules to preserve outdated telephone and cable business models instead of investing in universal high speed internet.<sup>42</sup> Most American internet users still connect to the internet through copper wiring, 30% of America does not have internet access at all and ISPs have little incentive to invest in the fiber optic networks needed to bring America up to date.<sup>43</sup>

In fact, in order to justify their ability to unilaterally slow and block end user internet connections, a coalition has been formed between major copyright owner interest groups and ISPs.<sup>44</sup> They plan on policing and punishing people they claim are infringers without courts or the law.<sup>45</sup> This amounts to a power grab by ISPs and the content industries to take copyright and the internet out of the government's hands by circumventing net neutrality rules as well as any other limits to copyright protection recognized by the law.<sup>46</sup> The public interest that justifies private ownership of telecommunication networks and copyright protection is not only being removed from government oversight by private individuals, it is being yielded by them as if the public interest in telecom and copyright law does not exist.<sup>47</sup>

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40. Jeffrey Van Camp, *Netflix CEO Calls Out Comcast for Breaking Net Neutrality*, DIGITAL TRENDS, April 16, 2012, <http://www.digitaltrends.com/movies/netflix-ceo-calls-out-comcast-for-breaking-net-neutrality/> (Noting that the video watched on Xfinity will not count toward an internet user's monthly data cap when watching it on Hulu or Netflix will.); Bradley, *supra* note 32 (noting that Comcast requires Netflix to pay extra for uninterrupted streaming of movies when it has a competing on demand video service.).

41. Brief of Respondent-Appellee at 15, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.) (available at <http://www.fcc.gov/document/verizon-v-fcc-usa-no-11-1355-dc-cir.>).

42. Greg Sandoval, *RIAA Chief: ISPs to Start Policing Copyright by July 1*, CNET, March 14, 2012, [http://news.cnet.com/8301-31001\\_3-57397452-261/riaa-chief-isps-to-start-policing-copyright-by-july-1/](http://news.cnet.com/8301-31001_3-57397452-261/riaa-chief-isps-to-start-policing-copyright-by-july-1/) (noting that all the major internet providers made a deal with the music industry to police piracy for them).

43. Crawford, *supra* note 20.

44. About the Center for Copyright Information, (last visited March 25, 2013), <http://www.copyrightinformation.org/about-cci/> (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). See also John Tarnoff, *We Don't Need Six Strikes*, HUFFINGTON POST, March 7, 2013, [http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes\\_b\\_2831489.html](http://www.huffingtonpost.com/john-tarnoff/we-dont-need-six-strikes_b_2831489.html); Ernesto, *MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows*, TorrentFreak, March 23, 2013, <http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/> ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans.").

45. *Id.*

46. *Cf. Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (developing fair use defense for a wide variety of images used by search engines).

47. See *International News Service v. Associated Press* 248 US 215, 250 (1918) (Brandeis dissenting) ("But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain cases where the public policy has seemed to demand it.").

This article argues for a return of copyright law to the public interest concerns from which it sprang. This return is necessary in order for copyright to coexist with net neutrality.<sup>48</sup> In fact, the purpose of granting copyright protection is to relieve our fear of underproduction of public goods by spurring the creation and dissemination of new creative works.<sup>49</sup> Historically speaking, creative works were publicly owned goods to which we granted authors *limited* monopolies in order to increase the excludability of otherwise non-excludable works.<sup>50</sup> Copyright was not characterized as a grant of personal property—it was, after all, of limited duration. Instead, the underlying good, the creation and dissemination of useful information to increase knowledge and learning,<sup>51</sup> is a public good and the grant of copyright protection has always been balanced against the public's interest in it.<sup>52</sup>

By giving some copyright owners too heavy a hand in shaping the internet, secondary copyright liability threatens to destroy the public's interest in a free and open internet. It is imperative that in shaping copyright's secondary liability doctrine, courts return to the public interest that underlies both copyright and telecommunications law. Such a return would ease the friction already inherent between these two areas of federal regulation.

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48. Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUM. L. REV. 831, 851 (1966) (noting that some scholars believed that as technology progressed copyright protection would actually be reduced because the general public would realize that creators depend on works that come before them.).

49. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031–32 (2005). *But see* Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990) (“Old rhetoric about IP equating to monopoly seemed to have vanished, replaced by a recognition that a right to exclude IP is no different in principle from the right to exclude in physical property.”).

50. Lydia Pallas Loren, *The Evolving Role of “For Profit” Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 256 (2010) (“The ‘free riding’ permitted by the Copyright Act is not an accident, but rather is integral to the design of an effective system meant to promote progress. The rights granted to copyright owners come at a cost borne by the public in reduced access, use, and enjoyment of copyrighted works.”); Lemley, *supra* note 40, at 1031–32 (describing the public goods problem that copyright is supposed to solve); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object of conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”)). *See also* Rose, *supra* note 22, at 718–19 (basing a public interest in inherently public goods, like public access and use of navigable waterways, and beaches, on property law itself. Because internet access and information itself fit Rose’s analysis of “inherent public goods,” failure of copyright law to recognize the public’s interest in the internet and free flow of ideas through it, risks harm to an interest that predates and underlies copyright law. The FCC’s public interest standard recognizes this interest.).

51. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 at 442–43 (1984). *See also* *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 20 (1908) (Holmes, J., *concurring*).

52. *Sony*, 464 U.S. at 429 (“First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.”) (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909))(internal quotation marks omitted); Lemley, *supra* note 40, at 1031–32. *See also* Rose *supra* note 22, at 718–19.

## PART II: CONTRIBUTORY AND VICARIOUS LIABILITY ONLINE

In the early 1990's, some states sought to use OSPs as gatekeepers to block child pornography and other content considered harmful to minors.<sup>53</sup> Their efforts were undone when *Stratton Oakmont, Inc. v. Prodigy Services Co.* found that the Communication Decency Act of 1996 preempted this kind of third party gate keeping. *Prodigy's* holding was designed to encourage "Good Samaritan blocking and screening of offensive material."<sup>54</sup> This relied on the institution of "more insistent direct regulation" against the child pornography industry.<sup>55</sup> If the combination of limiting secondary liability and encouraging direct enforcement is seen as sufficient to protect our children, it should also be seen as sufficient protection for copyright owners. Nevertheless, where advocates for sexually exploited children have failed to convince lawmakers to extend secondary liability to OSPs for gate keeping purposes, the content industry has succeeded.<sup>56</sup> Perhaps copyright law justifies online gate keeping because the content industry is "more organized and more demonstrably harmed than parents whose kids" were harmed by the online pornography industry.<sup>57</sup> Maybe gate keeping initiatives brought about by private copyright policing are seen by courts as less detrimental to internet freedom than if the government directly required internet gate keeping. Whatever the policy difference may be, courts have continued to empower OSP gate keeping initiatives through contributory and vicarious copyright infringement.

Copyright law infers secondary liability for infringement from the common law.<sup>58</sup> Secondary infringement comes in two forms: (1) Contributory infringement, which is based in tort law negligence; and (2) vicarious infringement, which is grounded in the tort and agency law concept of *respondeat superior*.<sup>59</sup> Both have a threshold requirement that there be at least one direct infringer, so fair use and other copyright defenses can limit secondary infringement.<sup>60</sup> This comment will briefly discuss contributory liability and will spend considerable time addressing vicarious liability,

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53. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 22 (2006).

54. Zittrain, *supra* note 30, at 262.

55. *Id.* at 262.

56. *Id.* at 266 (Noting that §512(c) represents "a trend toward gatekeeping had compuserve's distributor liability become the norm for OSPs instead of being trumped by the CDA.").

57. *Id.* at 263.

58. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Services, Inc.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 1995) ("The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of others.") (quoting *Sony*, 464 U.S. at 434).

59. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001). *See also* Trevor Cloak, *The Digital Titanic: The Sinking of Youtube.com in the DMCA's Safe Harbor*, 60 VAND. L. REV. 1559, 1573 (2007).

60. Cloak, *supra* note 21, at 1576 n.115.

especially because vicarious liability was expressly extended in §512(c) & (d) to the activities of OSPs online.<sup>61</sup>

### *Contributory Liability*

Contributory infringement requires that a defendant both had knowledge of direct infringement and materially contributed to or induced the infringement.<sup>62</sup> In *Perfect 10 v. Amazon*, the Court noted that Google could be held contributorily liable “if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10’s copyrighted works, and failed to take such steps.”<sup>63</sup> Thus, an absence of “simple measures” on the part of a search engine, along with the knowledge of infringing activity, could result in liability.<sup>64</sup> However, if a search engine manages to stay within the §512(d) safe harbor, it is protected from contributory liability.<sup>65</sup> The Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* held that an OSP “infringes contributorily by intentionally inducing or encouraging direct infringement.”<sup>66</sup> This differs from the holding in *A&M Records v. Napster*, where the Ninth Circuit found contributory liability because Napster provided “the site and facilities.”<sup>67</sup> The *Grokster* standard is also more lenient to OSPs than the one a Ninth Circuit District Court applied previously in *Religious Tech. Ctr. v. Netcom On-Line Commc’n Services, Inc.*, which found material contribution in a mere “failure to cancel [a user’s] infringing message and thereby stop an infringing copy from being distributed worldwide. . . .”<sup>68</sup> Overall, the “material contribution” prong of contributory liability appears to ask whether gate keeping policies are in place (i.e. “simple measures”) rather than focusing on how specifically an OSP aided or abetted infringement.<sup>69</sup> However, if an OSP can manage to stay within the bounds of §512(c) or (d), it will be shielded from all contributory liability claims.<sup>70</sup>

### *Vicarious Liability*

To be vicariously liable, a defendant must have had the right and ability to control the infringer’s acts and must have received a direct financial

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61. The Copyright Act, 17 U.S.C. § 512(c) & (d).

62. Jeffrey P. Cunard & Richard S. Lee, *Cyberliability 2007: Selected Developments*, 918 PLA/PAT 715, 725 (2007) (*hereinafter* Cunard); Cloak, *supra* note 21, at 1576 n.115.

63. Cunard, *supra* note 24, at 723–24.

64. *Id.*

65. *Id.* at 724.

66. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

67. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

68. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Services, Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995).

69. *Id.*

70. The Copyright Act, 17 U.S.C. § 512(c) & (d).

benefit from the infringement.<sup>71</sup> The *Grokster* Court stated that one “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”<sup>72</sup> In *Perfect 10*, vicarious liability failed because Google and Amazon did not have the legal right or ability to stop or limit the infringing conduct on third party websites.<sup>73</sup> FCC action against online gate keeping should be interpreted as a limit on the legal right and ability of OSPs to remove content from their networks as well.<sup>74</sup>

In *Perfect 10 v. Visa*, the Court recognized that credit card payment systems “do not help locate and are not used to distribute the infringing images.”<sup>75</sup> The Court distinguished credit card payment systems from Google because “Google’s search engine itself assists in the distribution of infringing content to Internet users, while defendant’s payment systems do not” and “location services are more important and more essential—indeed, more ‘material’—to infringement than payment services are.”<sup>76</sup> Ultimately, payment processing is “an additional step in the causal chain” and was actually characterized as a roadblock to infringement, unlike search engines that make infringement “fast and easy.”<sup>77</sup> It is surely a relief for Google and Amazon that they do not have the legal “right and ability” to limit the infringing conduct on third party websites.<sup>78</sup> Conversely, courts have not yet defined what is different about *Grokster*, *Aimster*, *Napster*, and similar OSPs that gives them a legal right and ability to regulate our online activities. It is also notable that the majority in the *Perfect 10 v. Visa* case did not apply the test for contributory infringement set out in the *Perfect 10 v. Amazon* case requiring “simple measures.” This perhaps indicates that the Court treats systems they do not perceive as proper gatekeepers differently than those they do without explaining why or how.<sup>79</sup>

*Perfect 10 v. Visa* included a ringing dissent by Judge Kozinski, who did not see a meaningful distinction between payment systems and search engines with regard to online secondary infringement.<sup>80</sup>

[T]here is no “additional step.” Defendants participate in every credit card sale of pirated images; the images are delivered to the buyer only after the defendants approve of the transaction and process the payment. This is not just economic

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71. *Netcom*, 907 F. Supp. at 1375 (quoting *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963)). See also *Cloak*, *supra* note 21, at 1573 (noting that vicarious liability extends beyond the employee employer relationship that respondeat superior relies on.).

72. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

73. *Cunard*, *supra* note 24, at 724.

74. *Id.*

75. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 796 (9th Cir. 2007).

76. *Id.* at 797 n.8.

77. *Id.* at 811.

78. *Id.* at 812.

79. *Id.* at 801–02.

80. *Id.* at 810–11 (Kozinski, J., *dissenting*).

incentive for infringement; it's an essential step in the infringement process.<sup>81</sup>

Kozinski also noted that “[i]f it mattered whether search engines or credit cards are more important to peddling infringing content on the Internet, the cards would win hands down.”<sup>82</sup> Kozinski perceived the issue of unjust payment for infringing distribution of copyrighted works as more pressing than the increased dissemination of copyrighted works.<sup>83</sup>

This differing opinion, if applied to peer-to-peer file sharing, torrent file sharing, and social networking sites like YouTube and Facebook, would rightfully put the brunt of copyright legal analysis on the second prong of vicarious liability analysis: how and whether these services make money directly from infringing distribution of copyrighted works. Kozinski ties his rationale back to *Fonovisa*,<sup>84</sup> and notes that shutting down the way infringing websites are paid could remove the incentive for developing these systems in the first place.<sup>85</sup> If Judge Kozinski’s approach is taken seriously, *Grokster*’s blanket supposition that selling advertising space on a highly accessed site suffices as direct financial gain will need to be fleshed out or abandoned.<sup>86</sup> Likewise, other facts about how and why companies make money online will need to be considered.

For example, courts have yet to consider “network benefits,” which the public receives by large portions of society being connected to networks. When most people have internet or telephone subscriptions, the value of owning phones and computers skyrockets. These benefits also make selling advertising space valuable on a website like Facebook or YouTube. Courts should take care in separating out the monetization of the general benefits of networking as not constituting direct profits for vicarious infringement.<sup>87</sup> The benefits

81. *Id.*

82. *Id.* at 814.

83. *Id.* at 812 (noting that “if infringing images can’t be paid for, there can be no infringement.”).

84. *Id.* at 814 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir.1996)).

85. *Id.* at 815, 817–18 (“If cards don’t process payment, pirates don’t deliver booty.”).

86. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 926 (2005).

87. Compare *Rose* supra note 20, at 770 (Giving a private property rationale for limiting the capture of rents when they are derived from public participation in commerce itself: “The individuals involved in commerce help themselves, but they also help others as well, and they need encouragement to do so; thus the cost of the locations necessary for commerce—particularly transport facilities—should be kept at a minimum, and perhaps be borne by the organized community at common expense. Nineteenth-century doctrine attempted to maintain public access to these locations, even at the expense of exclusive ownership rights. It was, after all, the ‘publicness’ of commerce—the increasing returns from greater participation—that attached an ever-increasing value to a road or waterway, beyond any alternative use of the property; and private owners could not be permitted to capture the rents created and enhanced by commerce itself. In an odd Lockeanism, the public *deserved* access to these properties, because ‘publicness,’ nonexclusive open access, created their highest value.”), with *Fonovisa*, 545 U.S. at 263–64 (noting that direct financial benefit includes “acts as a ‘draw’ for customers.”), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (discussing this in a digital context and failing to mention the possibility that direct copyright infringement can be incidental to the reasons why most users access various OSP websites, or the internet in general.). See also

conferred by copyright holders may be somewhat incidental to the profitability of OSP business models. Selling advertising space should not be enough to infer a direct financial benefit from the infringement itself without considering the value to consumers of open and unrestricted networking and communications over OSPs. The FCC has recently vowed to protect this openness because of its real value to the public.<sup>88</sup>

### *The Volition Requirement*

Unlike contributory liability, there is no need to show knowledge of direct infringement to prove vicarious infringement.<sup>89</sup> However, there still needs to be a showing of “volition,” as online services that are automatic and indiscriminate may not be held liable.<sup>90</sup> The Seventh Circuit in *Aimster*, noting the defendant’s “ostrich like refusal” to discover infringement, decided that willful blindness was sufficient to find volition.<sup>91</sup> Even *Grokster* noted that secondary liability may not be imposed solely because of the design or distribution of a system when it is capable of substantial lawful use.<sup>92</sup> If a distributor discovers that it has been used for infringement after the fact, it may not be held liable. It must have had specific knowledge of infringement at the time the system contributed to the infringement and failed to act upon that information.<sup>93</sup> However, in *Grokster*, specific knowledge was interchangeable with evidence the defendant encouraged or promoted infringement and willfully blinded itself to infringing activity on its network.<sup>94</sup>

*Grokster* marks a significant shift away from prioritizing the dissemination of copyrighted works above granting copyright protection.<sup>95</sup> The *Grokster* Court recognized that its decision would heighten the costs of disseminating copyrighted content.<sup>96</sup> Unlike the *Napster* Court, *Grokster* found liability even when actual knowledge of infringement was lacking because of

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Cloak, *supra* note 21, at 1588 (noting that legislative history states that in determining whether an ISP received a direct financial benefit, “courts should take a common-sense, fact based approach, not a formalistic one” which this article argues should include a discussion of network benefits when appropriate.).

88. See *FCC Remarks on Internet Freedom*, *supra* note 6.

89. Cloak, *supra* note 21, at 1573.

90. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 490–92 (1984).

91. Kreimer, *supra* note 15, at 89 (“ostrich-like refusal to discover the extent of which a system is being used to infringe copyright” combined with deliberate design that made knowledge impossible was tantamount to Guilty Knowledge) (quoting *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003)).

92. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

93. *Id.* at 930.

94. *Id.* (“Thus, where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s Staple Article Rule will not preclude liability.”).

95. *Id.* at 928–29 (noting that the tension between the value of digital dissemination and offering artistic protection is the subject of *Grokster* and mentioning that promoting “creation” is the primary purpose of offering copyright protection).

96. *Id.* (Noting that the stronger the secondary copyright liability, the higher the cost to technological innovation and dissemination.).

the decentralized nature of Grokster software.<sup>97</sup> Specific knowledge to prove volition was replaced by “evidence of unlawful objective” citing Grokster’s actions to capture Napster consumers.<sup>98</sup> The Court also cited evidence that 90% of the files downloaded were “copyrighted works” to support a finding of sufficient knowledge of Grokster’s “unlawful objective.”<sup>99</sup> However, the Court failed to mention how much of the 90% were transfers disapproved of by copyright owners.<sup>100</sup> *Sony*’s rationale should not have been brushed aside. Certain copyright owners should not be allowed to shape the internet by burdening OSPs with gate keeping responsibilities, when other copyright owners do not disapprove of having their works copied. The existence of “Mr. Rogers” type copyright holders should be reaffirmed as a rational basis for limiting secondary copyright liability for OSPs today.<sup>101</sup> Courts should recognize that one man’s online piracy and theft is another man’s free publicity and opportunity.

#### *Direct Infringer Required*

Secondary infringement can be limited by fair use and the idea/expression dichotomy if certain uses by OSP users are not considered copyright infringement. If there is no direct infringer, then there can be no secondary infringer. This is how Sony escaped liability for selling VHS recording devices with which users could record television without the express authorization of the copyright holder.<sup>102</sup> Recording live TV on a VHS was found to be a fair use. If lawmakers clarify uses online that do not constitute direct infringement, it could remove some of the chilling effects resulting from broad secondary liability enforcement on OSPs.

Traditionally, the U.S. Supreme Court has refused to grant copyright protection if it meant stifling new innovation in tools of creation and dissemination.<sup>103</sup> This line of case law ending with *Sony* characterized the grant of copyright protection as a social cost. These cases reasoned that dissemination and technological innovation should not be stifled by the social costs linked to the monetization of copyrights—effectively prioritizing the

97. *Id. Cf. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 at 442–43 (1984); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021–22 (9th Cir. 2001); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Services, Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

98. *Grokster*, 545 U.S. at 925, 937–40 (noting that Grokster inserted codes on its website that caused their website to appear on search engines when consumers searched for “napster” or “free file sharing, and the obvious observation that Grokster is a derivative of the name Napster. Also noting internal StreamCast e-mails about positioning itself to capture the flood of the 32 million former Napster users.).

99. *Id.* at 922 (citing a determination from a statistician hired by the plaintiff).

100. *Cf. Sony*, 464 U.S. at 445 (Noting Mr. Rogers’s approval of time shifting of his copyrighted material); *infra* note 183, and accompanying text.

101. *See infra* note 183 and accompanying text; Zittrain, *supra* note 30, at 295; The Patent Act, 35 U.S.C. § 271.

102. *Sony*, 464 U.S. at 442.

103. *Id.* at n.11. *See White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 20 (1908) (Holmes, J., *concurring*).

dissemination of content above encouraging the creation of content. Ever since the dawn of the internet, courts have been moving away from this rationale. This trend away from *Sony* culminated in the Supreme Court's findings in *Grokster* and has reverberated in most copyright cases involving the internet since.

There is no reason why *Sony* should not hold greater or equal emphasis in future internet copyright cases. *Sony* is still valid law, and cases so seldom cite its rationales that it can seem arcane and foreign. Therefore, a review of *Sony*'s findings is in order: (1) Copyright protection is entirely statutory and is not based on any sort of natural property right;<sup>104</sup> (2) the reward authors receive in controlling creative works is a "secondary consideration" to the public benefit derived from the dissemination of an author's creative works;<sup>105</sup> (3) it is ultimately the legislature's responsibility to balance grants of private copyright control with society's competing interest "in the free flow of ideas, information and commerce";<sup>106</sup> (4) Copyright law has "developed in response to significant changes in technology" and so the facts of this case do not warrant a significant departure from past copyright decisions just because of new technology that makes copying easier;<sup>107</sup> and finally (5) "respondents have no right to prevent other copyright holders from authorizing [time shifting] for their programs."<sup>108</sup>

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104. *Sony*, 464 U.S. at 429 n.10 (citing H.R. Rep. No. 2222 60<sup>th</sup> Cong. 2d Sess. 7 (1909)) ("enactment of copyright legislation is not based on any natural right the author has with his writings but actually is based upon "the ground that the welfare of the public will be served and progress of science and useful arts will be promoted. . .") (Also noting that the 1909 Congress considered two questions when enacting the 1909 Copyright Act: (1) "how much will the legislation stimulate the producer and so benefit the public" and (2) how much will the monopoly granted be detrimental to the public goal of Congress to ensure that through copyright – the "benefit to the public [] outweighs the evils of the temporary monopoly [of copyright]."); *Sony*, 464 U.S. at 431 (noting that protection given by copyright is wholly statutory and that the only remedies for infringement are "those prescribed by congress") (quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)).

105. *Sony*, 464 U.S. at 429 ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the product of his creative genius.") (citing *Fox Film Corp. v. Doyal* 281 U.S. 123, 127 (1932)).

106. *Id.* at 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on one hand, and society's competing interest in the free flow of ideas, information and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.") (citing H.R. Rep. No. 2222, 60<sup>th</sup> Congress, 2d Sess. 7 (1909)); *Sony*, 464 U.S. at 431 (emphasizing that because of Congress's "Constitutional authority and institutional ability" should "accommodate. . .the varied permutations of competing interests that are inevitably implicated by such new technology." Also the Court noted a recurring theme of the judiciary's "reluctance to expand copyright protection without explicit legislative guidance" citing a number of pre-1976 Supreme Court cases).

107. *Id.* at 430 ("From its beginning, the law of copyright has developed in response to signification changes in technology. . .Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection."); *Sony*, 464 U.S. at n.12 cites Forward to B. Kaplan, *An Unhurried View of Copyright* at vii-viii (1967) (noting a balance between a publisher disseminating ideas and an author controlling them that has existed before the United States was formed.); *Sony*, 464 U.S. at n.11 (gives a short

Evidence of note that influenced the *Sony* fair use finding appears in telecommunications law. “First Amendment policy of providing the fullest possible access to the information through public airwaves” is strikingly similar to the FCC’s current stance on ensuring internet openness.<sup>109</sup> Also Mr. Rogers,<sup>110</sup> the copyright owner of Mr. Rogers’ Neighborhood, testified that he had absolutely no objection to home taping for non-commercial use and expressed the opinion that it is a real service to families to be able to record children’s programs and show them at appropriate times.<sup>111</sup>

The Court based its finding of fair use largely on a discussion of patent law’s “staple article of commerce”<sup>112</sup> doctrine. Drawing inspiration from this doctrine, the Court concluded that the fact that an article of commerce can be used for infringement does not necessitate secondary liability on the producer of the article. Furthermore, the Court noted that Patent law has this doctrine despite its higher standard—in comparison to copyright law—of expressly codified secondary liability.<sup>113</sup> Copyright law loosely draws its theories of secondary liability from common law sources.<sup>114</sup> They also justified their use of the staple article of commerce doctrine by emphasizing that Copyright and Patent law both have the primary goal of dissemination of information to the public.<sup>115</sup>

A large part of the *Grokster* opinion focused on *Sony*’s use of patent law’s staple article of commerce doctrine.<sup>116</sup> It listed a number of patent cases and concluded that “where an article is ‘good for nothing else’ but

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history of the effect of technology on copyright law beginning with player pianos in 1908 through cable and microwave retransmission technology that inspired modifications to the copyright act. Also, it was of note that when the music publishing industry sued the inventors of player pianos, a new copying technology, the Court sided with copying technologies in *White Smith v. Apollo* (1908)).

108. *Sony*, 464 U.S. at 493 (J. Blackmun with Marshall, Powell and Rehnquist *dissenting*) (The dissent argues that this is “confusing liability with the difficulty of fashioning an appropriate remedy.” However, this dissent rings hollow in the context of its place in history with the continued success of broadcasted creative works to generate economic value for its owners.).

109. *Id.*

110. Funding for Mr. Rogers’ Neighborhood was provided through not for profit business models, so Mr. Rogers’ Neighborhood was not dependant on a wealth maximizing business model as other television programs at that time may have been. For a discussion about copyrighted material with an alternative incentive, other than wealth maximization, see generally Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection* 69 LA. L. REV. 1 (Fall 2008) (Discussing whether copyright holders that were not incentivized by a traditional wealth maximization principle to create should help guide lawmakers in shaping a more realistic copyright protection.).

111. *Sony*, 464 U.S. at 445 n.27.

112. The Patent Act, 35 U.S.C. § 271.

113. The Patent Act, 35 U.S.C. § 271(b) & (c); *Sony*, 464 U.S. at 435.

114. *Sony*, 464 U.S. at 435.

115. *Id.*

116. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005) (“For the same reasons *Sony* took the staple-article doctrine of patent law as a model for its copyright safe harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

infringement, there is no public interest in its unlicensed availability.”<sup>117</sup> The Court found that an article with substantial non-infringing uses could be liable for contributory infringement without specific knowledge of infringement if the distributor of such technology is caught promoting its infringing uses.<sup>118</sup> Thus, after *Grokster*, constructive knowledge of the potential for infringement may stand in the place of specific knowledge, and *Sony*’s staple article doctrine will not stand in the way of liability.<sup>119</sup> Scholars have argued that the proper interpretation of *Grokster* will make only the slightest adjustment to *Sony* and will still allow broad immunity to software providers.<sup>120</sup> However, the fear that *Grokster* would broaden the liability of software providers has had chilling effects.<sup>121</sup> The *Grokster* Court noted that underscoring the evidence of intentional facilitation of infringement was *Grokster*’s failure to filter out infringing material from their site, indicating that any evidence of gate keeping would have weighed against a finding of liability.<sup>122</sup> This is probably why Google had already removed Music Junk, Music Wizard, Music Zilla, and Groove Shark when it received notice of infringements even though *Sony* might still have protected Google’s distribution of these applications.<sup>123</sup>

Along with this majority opinion, Justice Ginsberg, joined by Justices Souter and Kennedy, reasoned that *Sony* protection be removed entirely for devices “overwhelmingly used to infringe.”<sup>124</sup> Justices Breyer, Stevens, and O’Connor took an alternative approach, arguing that *Sony* should remain unmodified for internet software tools.<sup>125</sup> The concurrence defended its stance by noting that unauthorized copying likely diminished music industry revenue, though it is not clear by how much.<sup>126</sup> They further noted that copyright owners may still bring suit against direct infringers, citing evidence that because of the record industry suits for direct infringement, the number of consumers downloading on Napster was reduced by 12 million, and those that continued downloading reported downloading fewer files.<sup>127</sup> Also, in 2004, online consumers who used paid services rose from 24% to 43% while the number using free services plummeted.<sup>128</sup> Lastly, it mentioned lawful use of

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117. *Id.* at 932–33, 936.

118. *Id.* at 934–35.

119. *Id.* (“Thus, where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s Staple Article Rule will not preclude liability.”).

120. Zittrain, *supra* note 30, at 293 n.212, 296 (*Grokster* “[s]uggests most code cannot of itself easily be labeled contraband unless it flunks *Sony*’s generous test; only the activity surrounding its promotion can give rise to liability.”).

121. Perio, *supra* note 29, at 22.

122. Zittrain, *supra* note 30, at 291.

123. Perio, *supra* note 29, at 23.

124. *Grokster*, 545 U.S. at 948–49.

125. *Id.* at 961 (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and other useful arts.”) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

126. *Id.*

127. *Id.* at 962.

128. *Id.* at 964.

downloading technology and noted that “finger printing” and watermarking technology could be used to fill in the gaps.<sup>129</sup>

One thing was made clear: Peer-to-peer file sharing is not considered the type of dissemination that is deemed a “public benefit” such that fair use in the line of *Sony*’s rationale is permitted.<sup>130</sup> One might guess that this is because of the possible supplanting nature of peer-to-peer file sharing to traditional content industry business models; however this has not been explicitly stated in the case law thus far.<sup>131</sup> From the rationales of recent cases, it seems that the Court’s stance toward technological dissemination itself has taken a new turn. The future is uncertain, but if the Court adopts the Ginsberg concurrence, entire forms of dissemination with untold public benefits attached to them may fall by the wayside, and massive investments in the American tech industry could be laid to waste because of copyright dead hand control. Of course, this also depends on how the DMCA safe harbors for OSPs are interpreted going forward.

### PART III: DMCA SAFE HARBORS

The DMCA took effect on October 28, 1998.<sup>132</sup> It was “intended to balance the need for response to potential infringement with the end users[’] legitimate interests in not having material removed without recourse.”<sup>133</sup> As such, the DMCA creates “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital network environment.”<sup>134</sup> It also facilitates the removal of infringing material without the time and expense of getting an injunction.<sup>135</sup> However, an OSP failing to comply with the DMCA cannot be cited as evidence of infringement.<sup>136</sup> All in all, the DMCA is best compared to an alarm company sticker for OSPs in that it reduces the amount of third party suits brought against them.<sup>137</sup> With the passage of the DMCA, Congress decided to strike a balance between encouraging experimental technology and protecting copyright holders from infringement online.<sup>138</sup>

§512 safe harbors do not protect OSPs for violations of §1201(a)(2).<sup>139</sup> §1201 prohibits most distributions of tools that circumvent technological

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129. *Id.* at 964–65.

130. *Id.*

131. *Cf. Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)).

132. Ian C. Ballon, *DMCA Liability Limitations for Social Networks, Blogs, Websites and Other Service Providers*, 978 PLI/PAT 641, 649–50 (2009).

133. *Id.* at 650, n.950.

134. *Id.* at 650.

135. *Id.* at 657.

136. *Id.* at 650. *Cf. supra* notes 25–26 and accompanying text.

137. *Id.* at 658.

138. *Cloak*, *supra* note 21, at 1569. *Cf. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 492 (1984) (about copyright law delineating a balance when considering infringement between the dual goals of creation and dissemination).

139. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 217, 220 (S.D.N.Y. 2000) (§1201 of the DMCA is a prophylactic measure to stop the spread of hacking tools that destroy DRM.).

measures that protect access to copyrighted works.<sup>140</sup> It does not discriminate between effective and ineffective technological measures when allocating liability and can even spread liability for distributing easily accessible hacks to simple technological measures.<sup>141</sup> §512 also does not apply to violations of §1202, which prohibits providing false “Copyright Management Information” (CMI),<sup>142</sup> or removing or altering CMI.<sup>143</sup> CMI can include the title of the work and the name of the author among many other types of information copyright owners use to monitor their works.<sup>144</sup> This could be a roundabout codification of a “right of attribution” for online activities.<sup>145</sup> It is an open question as to whether this section will preempt contractually created rights to attribution online via creative commons licensing.<sup>146</sup>

The FCC has recognized YouTube as one of the internet’s great success stories.<sup>147</sup> To be sure, YouTube facilitates free speech globally, especially in countries whose governments try to suppress the speech of its citizens.<sup>148</sup> Yet early on, YouTube was targeted by major players in the content industry despite the substantial benefits it confers on that industry as well.<sup>149</sup> This comment will now focus on how the Ninth and Second Circuits differ in their interpretations of the §512(c) safe harbor when considering a 12(b)(6) motion to dismiss.

Both Circuits recently emphasized the words “by reason of” to infer a broad inclusion of the types of activities protected by §512(c).<sup>150</sup> They found that “by reason of” in §512(c) extends protection to functions performed “for the purpose of facilitating access to user-stored material.”<sup>151</sup> The plaintiffs in both cases tried to read in a narrowing “proximate cause” requirement from an antitrust law use of “by reason of.”<sup>152</sup> Ordinarily, courts can presume that

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140. *Id.* at 216.

141. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 437 (2d Cir. 2001) (Noting that liability still exists even if a 14 year old can create the circumvention tool and even when the tool has been widely disseminated over the internet.)

142. The Digital Millennium Copyright Act 17 U.S.C. § 1202(a) (2000).

143. The Digital Millennium Copyright Act 17 U.S.C. § 1202(b) (2000); *Cunard*, *supra* note 24, at 754.

144. The Digital Millennium Copyright Act 17 U.S.C. § 1202(a) & (b) (2000).

145. *Id.*

146. See generally *The Licenses: Attribution*, CREATIVE COMMONS ORGANIZATION, <http://creativecommons.org/licenses/>.

147. See *infra* note 219 and accompanying text. See also *Cloak*, *supra* note 21, at 1592 (noting that subjecting YouTube to liability would destroy a major American facilitator of creativity and information.).

148. *Id.*

149. See generally *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

150. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1031 (9th Cir. 2011) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 7 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 38–39 (“by reason of” ensures that the statute does not “confine the word ‘storage’ to narrowly to fit the statute’s purpose.” Thus the YouTube’s functions considered in this case fall within the §512(c) safe harbor.)

151. *YouTube*, 676 F.3d at 39 (quoting *Shelter Capital*, 667 F.3d at 1088). See also *Shelter Capital*, 667 F.3d at 1031–35 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 7-9 of the superseding decision extends this finding.)

152. *Shelter Capital*, 667 F.3d at 1031 (compares §512 to the Racketeer Influenced and

“similar language in similar statutes should be interpreted similarly.”<sup>153</sup> However, both Circuits found the statutes to be too dissimilar to carry over a narrowed reading of “by reason of” in §512(c).<sup>154</sup> The Second Circuit followed the Ninth Circuit in finding that §512(c) “is clearly meant to cover more than mere electronic storage lockers.”<sup>155</sup> However, the Second Circuit remanded YouTube’s function of content syndication (a function that links videos to others by similar interest) for a finding of whether it fits into the safe harbor.<sup>156</sup>

#### *Section 512(m): Protection of Privacy*

To be eligible for DMCA protection, OSPs must meet three threshold eligibility requirements: (1) “adopt[] and reasonably implement” a termination policy for repeat infringers;<sup>157</sup> (2) “inform subscribers” that such a termination policy exists;<sup>158</sup> and (3) “accommodate and. . .not interfere with standard technical measures” used by copyright owners to protect or track their own works.<sup>159</sup> However, the threshold requirements of §512(i) are balanced against the provision in §512(m). §512(m) puts the burden of monitoring copyrighted content online on content owners “except to the extent consistent with a standard technical measure complying with the provisions of subsection (i).”<sup>160</sup> §512(m) also removes a condition of safe harbor protection if the conduct it requires is “prohibited by law.”<sup>161</sup> This means that the conditions of §512 safe harbors in their entirety should be subject to the FCC open internet policies and could also be limited by any new telecommunications regulation from Congress.<sup>162</sup>

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Corrupt Organizations Act 18 USC §§ 1961–1968 which also contains the “by reason of” language.”) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 6 of the superseding decision extends this finding.).

153. *Shelter Capital*, 667 F.3d at 1031 (quoting *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir.2004)) (Page 6 of the superseding decision extends this finding.).

154. *Id.*

155. *YouTube*, 676 F.3d at 39 (quoting *Shelter Capital*, 667 F.3d at 1031 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

156. *Id.* at 17.

157. §512(i)(1)(A) (It remains to be seen whether a similar analysis of requiring “simple measures” will be inferred into this requirement of the statute from common law contributory liability cases.). *See also* Cunard, *supra* note 24, at 724.

158. *Id.*

159. §512(i)(1)(B). *See also* Cloak, *supra* note 21, at 1570.

160. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m). *See also* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1039, 1042 (9th Cir. 2011) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 11-13 of the superseding decision extends this finding.); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 40–41 (2d Cir. 2012).

161. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m)(2).

162. *See infra* notes 211–12 and accompanying text; *supra* note 120 and accompanying text; *Shelter Capital*, 667 F.3d at 1037–39, 1042 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Pages 11-13 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 23, 33.

*Actual Knowledge*

Along with its codification of vicarious liability, §512(c) & (d) require that an OSP does “not have actual knowledge” of infringing conduct over its network, “red flag knowledge” (i.e. “is not aware of facts or circumstances from which infringing activity is apparent”), and “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.”<sup>163</sup> Failing to expeditiously remove content once an OSP has gained actual or red flag knowledge results in the OSP falling out of the safe harbor. Some interpret the DMCA to require copyright owners to monitor online locations for future acts of infringement and argue that OSPs need only respond to substantially complying notifications for material online at the time of notification.<sup>164</sup> However, an exchange between the founders of YouTube about the treatment of copyrighted content residing on their network absent any notification has been used to inform the DMCA knowledge requirement analysis in *Viacom v. YouTube*.<sup>165</sup>

It remains to be seen how courts will choose which common law principles should be imported into §512. *Grokster*'s willful blindness rationale has been extended to the statutory interpretation of §512 by the Second Circuit in *Viacom v. YouTube*.<sup>166</sup> The Ninth Circuit in *Shelter Capital* construed the §512 knowledge requirements narrowly and required a showing of “specific knowledge” of infringing activity occurring on an OSP's network that could be used for substantial non-infringing purposes. The Second Circuit found that requiring “specific knowledge” was inappropriate.<sup>167</sup>

*“Red Flag Knowledge”*

Nimmer coined the term “red flag knowledge,” which has been criticized as a high bar for safe harbor protection, especially for developing, “middle class” tech startups providing online services.<sup>168</sup> On one hand, courts read the statutory language imposing vicarious liability “in its proper context” as a part of statutory safe harbors meant to protect OSPs from copyright liability.<sup>169</sup> On the other hand, they are required to interpret the statute so that

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163. The Digital Millennium Copyright Act 17 U.S.C. §§ 512(c)(1)(i-iii) & 512(d)(1)(A-C) (2000).

164. Ballon, *supra* note 93, at 656; Cloak, *supra* note 21, at 1585 (noting that direct notice is almost always required to satisfy “actual knowledge.”).

165. See *infra* note 155 and accompanying text.

166. See *infra* note 138 and accompanying text.

167. *Shelter Capital*, 667 F.3d at 1043 *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.); *YouTube*, 676 F.3d at 36.

168. Cloak, *supra* note 21, at 1585–86; Zittrain, *supra* note 30, at 292 (noting a fear persists, despite the enactment of the DMCA, that “middle class” software providers may be “frozen out” of the market by broadly applied secondary liability for copyright infringement).

169. *Shelter Capital*, 667 F.3d at 1039 *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 15 of the superseding decision extends this finding.). See also *YouTube*, 676 F.3d at 26–28.

“all its language is given effect.”<sup>170</sup> The Second Circuit disagreed with the Ninth Circuit in *Viacom v. YouTube* because it prioritized its duty to ensure that the “red flag” knowledge provision §512(c)(1)(A)(ii) was not rendered superfluous above the overall intent of Congress to provide protection for OSPs.<sup>171</sup> The Ninth Circuit decided not to require less than specific knowledge because anything less would shift the burden of policing copyright infringement online to OSPs, which would negate the benefits of complying with the safe harbor’s requirements.<sup>172</sup>

The role of §512(m) is somewhat of a wildcard. It places the onus of internet copyright policing on the content owner.<sup>173</sup> It also limits or removes safe harbor conditions when they require unlawful action.<sup>174</sup> The Second Circuit cited a number of cases that resist requiring OSPs to identify material as infringing,<sup>175</sup> noting that §512(m) is inconsistent with the broad common law duty to seek out infringing activity based on general awareness.<sup>176</sup> However, the Second Circuit found that because §512 does not “speak directly” to the willful blindness doctrine, §512(m) does not abrogate the doctrine.<sup>177</sup> The Court thus found that willful blindness was an appropriate doctrine to apply to OSPs.<sup>178</sup> However, there seems to be no meaningful difference between applying a willful blindness doctrine and requiring OSPs to monitor user activities online for infringing activity. Ironically, §512(m) and §512(c)(1)(C) are being rendered superfluous by the Second Circuit in its effort to give the entire statute “effect.” The Ninth Circuit did not consider applying the willful blindness doctrine and steered clear from imposing “investigative duties on service providers.”<sup>179</sup>

170. *Shelter Capital*, 667 F.3d at 1039 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 15 of the superseding decision extends this finding.). See also *YouTube*, 676 F.3d at 31.

171. *YouTube*, 676 F.3d at 31–32.

172. *Shelter Capital*, 667 F.3d at 1037 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding. Regarding red flag knowledge, the Ninth Circuit acknowledged that willfully bury their heads in order to “avoid obtaining such *specific knowledge*.”) (italics added).

173. *Shelter Capital*, 667 F.3d at 1037–38 (declining “to shift [that] substantial burden from the copyright owner to the provider.”) (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) .

174. The Digital Millennium Copyright Act 17 U.S.C. § 512(m)(2) (2000).

175. *YouTube*, 676 F.3d at 34–35.

176. *Id.* at 35. (“Writing in the trademark infringement context, we have held that ‘[a] service provider is not . . . permitted willful blindness. When it has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of particular infringing transactions by looking the other way.’”) (quoting *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010).

177. *Id.* at 35 (“A person is ‘willfully blind’ or engages in ‘conscious avoidance’ amounting to knowledge where the person ‘was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’”) (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

178. *Id.*

179. *Shelter Capital*, 667 F.3d at 1039, 1042 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) (quoting *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir.

The Ninth Circuit cited *Napster*'s holding that without specific information of infringing activity an OSP cannot be held contributorily liable.<sup>180</sup> Thus the Court refused to take a broad view of the knowledge requirement.<sup>181</sup> The Court reiterated that the §512(c)(1)(A)(ii) "red flag knowledge" test is limited by §512(m) by requiring copyright owners to monitor possible infringement online.<sup>182</sup> In a sense, its effect was given and then it was virtually taken away by the statute. Thus, the Ninth Circuit concluded: "Requiring specific knowledge of particular infringing activity makes good sense in the context of the DMCA, which Congress enacted to foster cooperation among copyright holders and service providers in dealing with infringement on the internet."<sup>183</sup> The Second Circuit, however, decided that there was no specific knowledge requirement, and even approved of using the willful blindness doctrine despite the limitations of §512(m).<sup>184</sup>

The Second Circuit interpreted *Shelter Capital* to be "importing a specific knowledge requirement into §512(c)(1)(B) that renders the control provision duplicative of §512(c)(1)(A)."<sup>185</sup> The Court noted that "superfluous language is disfavored."<sup>186</sup> However, the Second Circuit erred in giving too much weight to ensuring effect is given to all the language in the DMCA. As a result of its approach, the Second Circuit is sailing dangerously close to irresolvable paradoxes in its logic. Such a trend could render the safe harbors of §512(c) unworthy of justifying the effort of compliance for most OSPs, which would cast doubt on the entire statute's purpose. The evidence cited by the Court, inspired by *Grokster*'s "evidence of unlawful objective"<sup>187</sup> as valid "red flag knowledge," reveals just how deep the problem goes. The Ninth Circuit, not wavering on its requirement of specific knowledge, seemed to agree somewhat with the Second Circuit by investigating emails for evidence of unlawful objective that also meets a specific knowledge standard.<sup>188</sup>

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2007)).

180. *Id.* at 1037 ("We do not place the burden of determining whether [materials] are actually illegal on the service provider," and "[w]e impose no such investigative duties on service providers.") *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 12 of the superseding decision extends this finding.) (citing *CCBill*, 488 F.3d at 1114).

181. *Id.* at 1038 (*opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.)).

182. *Id.* *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.)).

183. *Id.* at 1037 *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 11 of the superseding decision extends this finding.) (citing S. Rep. N. 105-190 at 20; HR Rep. No. 105-551, pt. 2, at 49 (1998)).

184. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012).

185. *Id.* at 36 ("[U]ntil [the OSP] becomes aware of specific unauthorized material, it cannot exercise its 'power and authority' over the specific infringing item. In practical terms, it does not have the kind of ability to control infringing activity the statute contemplates.") (citing *Shelter Capital*, 667 F.3d at 1041 *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

186. *Id.*

187. *See infra* note 60 and accompanying text.

188. *Shelter Capital*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)).

For instance, the Second Circuit cited a statement from YouTube founder Jawed Karim in March 2006 that “[a]s of today [,] episodes and clips of the following well-known shows can still be found [on YouTube]: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chapelle [sic].”<sup>189</sup> However, this statement was made when streaming video online was the new frontier: Hulu had not yet been founded, Netflix was primarily mailing DVDs, and Blockbuster was still in business.<sup>190</sup> The Court also mentioned a statement by Karim that YouTube might benefit from preemptively removing content that is blatantly illegal and likely to attract criticism.<sup>191</sup> Based on these statements, the Second Circuit found that a reasonable jury may find that the defendant knew about or was willfully blind to Viacom’s material on YouTube and that liability exists once “red flag knowledge” exists.<sup>192</sup> However, this policy would require the taking down of material once it is discovered simply because it is copyrighted and regardless of whether the copyright holder has approved of the use. Instead of requiring proof of authorization, courts should continue to exempt companies like Sony, Google, and Veoh that provide new technology of creation and dissemination from secondary liability as they have in the past.<sup>193</sup>

The Second Circuit continued to cite e-mails between other YouTube founders, which demonstrated red flag knowledge without an expeditious takedown. One from Founder Chad Hurley proposed that YouTube needed to reject clips of Budweiser commercials, to which Steve Chen, the third YouTube founder, responded, “Can we wait a bit longer? Another week or two can’t hurt.” In response, Karim noted that he “added back in all 28 bud videos.”<sup>194</sup> Going back further in time, the Court noted a conversation from 2005 in which Hurley suggested being diligent about “rejecting copyrighted content” specifically regarding a CNN clip of a space shuttle.<sup>195</sup> Chen replied that they should wait for a cease and desist letter. So early on in the history of user-generated content sites, it was not clear that Budweiser objected to the use, without a cease and desist letter.

An inclination to wait for a cease and desist letter is reasonable if an OSP founder has received legal advice regarding the Ninth Circuit’s opinion in *Shelter Capital*, the FCC’s open internet policies, the §512(m)(1) requirement that copyright holders police online infringement, the §512(c)(1)(C) statutory process for take downs beginning with a notice from the copyright owner, and Sony’s reluctance to find liability when some copyright owners do not disapprove of copying and dissemination via a new technology. However, the Second Circuit found that a reasonable juror could conclude otherwise. Proving knowledge of infringement should require some level of knowledge about the

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189. *YouTube*, 676 F.3d at 33.

190. See generally Lore Sjoberg, *The Year in Online Video*, WIRED, Dec. 26, 2006, <http://www.wired.com/culture/lifestyle/news/2006/12/72341> (giving many examples of how YouTube pioneered the online video market).

191. *YouTube*, 676 F.3d at 34.

192. *Id.* at 33–35.

193. See *supra* note 65 and accompanying text.

194. *YouTube*, 676 F.3d at 33–34.

195. *Id.*

traditional contours of copyright (such as fair use and idea/expression dichotomy defenses).<sup>196</sup> Until courts give clearer guidance on the scope of the traditional contours in an online context, there is no way for an OSP to know the difference between censoring free speech and participating in secondary infringement.

Though the Second Circuit acknowledged the District Court's finding that "mere knowledge of [the] prevalence of such activity in general . . . is not enough,"<sup>197</sup> it nevertheless found that a reasonable jury could find that "red flag knowledge" existed. Accordingly, it found that summary judgment was premature.<sup>198</sup> The Second Circuit put forward this confusing standard:

The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.<sup>199</sup>

This comment argues that the Second Circuit's confusing red flag objectivity/subjectivity standard, now possibly extended by the Ninth Circuit in its rehearing of *Shelter Capital*, should be limited via §512(m)(2) and by FCC open internet policies.<sup>200</sup> If it is not, the Second Circuit may be responsible for undermining national goals of internet freedom by enabling gate keeping regimes that benefit massive content holding entities at a high public cost. Still more, the effect of the Second Circuit's holding may be to give a nod to online censorship worldwide most heavily practiced in anti-democratic nations by undermining FCC regulations.<sup>201</sup>

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196. See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

197. *YouTube*, 676 F.3d at 14.

198. *Id.* at 29.

199. *Id.* at 31; (*UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 9 quotes this passage agreeing that there is a difference between red flag and actual knowledge—however it still holds that anything less than specific knowledge could render section 512(m) and section 512 (c)(1)(C) superfluous. "Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge.").

200. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 445 (1984). See also *Shelter Capital*, 667 F.3d at 1036 (noting that there was substantial copyrighted content legally residing on Veoh's network and emphasized Congress's intent to facilitate "quick and easy" dissemination over OSP networks.) (quoting S. Rep. No. 105-190 at 8) *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (extended 10).

201. See e.g., Mark McDonald, *Watch Your Language! (In China, They Really Do)*, INTERNATIONAL HERALD TRIBUNE: RENDEZVOUS, March 13, 2012, <http://rendezvous.blogs.nytimes.com/2012/03/13/watch-your-language-and-in-china-they-do/?ref=internetcensorship> (Commenting on China's "Golden-Shield" law).

*DMCA Vicarious Liability*

Congress must have intended the vicarious liability codified in §512 to represent “something beyond the elements of vicarious liability.”<sup>202</sup> Thus, it is unclear how much of the common law will apply to the statutory interpretation involved when an OSP is protected by §512. Advertising revenue may not constitute a direct financial gain associated with infringing activity as it is analyzed under §512(c)(1)(b).<sup>203</sup> *Hendrickson v. eBay* noted that the right and ability to control cannot simply mean removing or blocking access to infringing files, given that such activity was already required elsewhere in the statute.<sup>204</sup> The Ninth Circuit has noted that Congress was “loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions” and that “by limiting [service providers’] liability it would ensure that the efficiency of the quality of services on the Internet will continue to expand.”<sup>205</sup> In their ordinary operations, most OSPs open themselves up to copyright liability in countless ways.<sup>206</sup> Thus, to effectively gain the cooperation of OSPs, the knowledge requirement must be narrowly construed. Unfortunately, the Second Circuit disagrees. It stated, “[r]ather than embarking upon a wholesale clarification of various copyright doctrines, Congress elected to leave current law in its evolving state and, instead, to create a series of ‘safe harbors[]’ for certain common activities of service providers.”<sup>207</sup> They went on to justify their use of whatever common law interpretations of secondary liability they chose were best, while disregarding others.

The Ninth Circuit in *Shelter Capital*<sup>208</sup> noted that excluding OSPs subject to vicarious liability would undo the benefits of the safe harbor altogether.<sup>209</sup> It interpreted the “right and ability to control” as needing “something more” than the common law definition of vicarious liability.<sup>210</sup> Subsequently, the *YouTube* Court in the Second Circuit agreed with the Ninth Circuit’s interpretation of §512(c) requiring “something more” than the

202. Cloak, *supra* note 21, at 1587–88.

203. *Id.* at 1588 n.181.

204. *Id.* at 1588–89; *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

205. *Shelter Capital*, 667 F.3d at 1030 (quoting S. Rep. No. 105-190 at 8 (1998)) (quotation marks omitted) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (extended 5).

206. *Id.* (quoting S. Rep. No. 105-190 at 8 (1998)).

207. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) (quoting S. Rep. No. 105-109 at 19 (1998)) (quotation marks omitted).

208. *See generally Shelter Capital*, 667 F.3d *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013).

209. *Id.* at 1044 (quoting Lee, 32 Colum. J.L. & Arts at 236–37).

210. *Shelter Capital*, 667 F.3d at 1043 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001)) (citing *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002)) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013)

(Page 19 of the superseding decision extends this the Napster quote however it also agrees with the YouTube court test of “right and ability to control” as meaning to “exert[] substantial influence on the activities of users.” This includes “purposeful conduct” as in *Grokster* and high levels of control over activities of users like in *Cybernet*.)

common law requires to show a “right and ability to control.”<sup>211</sup> However, the two courts failed to agree about what “something more” means. The Ninth Circuit found, and continued to find in its rehearing, that a right and ability to control also required specific knowledge.<sup>212</sup> The Second Circuit did not recognize specific knowledge as a requirement and was extremely vague about what would be required.<sup>213</sup>

Tracing this back to the secondary infringement analysis above, specific knowledge was mentioned in connection with the volition requirement of secondary liability.<sup>214</sup> The Second Circuit held that automatic and indiscriminate services will not be held liable for secondary infringement because specific knowledge is necessary for the volition required for infringement.<sup>215</sup> The Second Circuit’s refusal to extend a specific knowledge requirement for the vicarious liability codified in the DMCA arguably removed volition as a threshold requirement for liability. It is unclear whether this overturns a volition requirement in the Second Circuit, or whether volition is tested by a different standard, if tested at all, when considering the DMCA conditions. It seems that the Second Circuit extended a broader *Grokster* rationale to DMCA interpretation than how the *Grokster* Court intended its findings to be applied to common law secondary infringement.<sup>216</sup>

The result of the new Second Circuit approach will be to tie the hands of OSP development. Litigants will use the hunt for smoking gun e-mails to drive up the cost of discovery. Now, any colorable evidence found can be used to get past a 12(b)(6) motion to dismiss, which will hike up the price of settlement as well. Thus, the cost of litigation will be too high for developing OSPs. OSP platforms invented in a garage could become a thing of the past, while only well-heeled OSPs will be able to shoulder the risk of copyright liability associated with developing new OSP platforms. Large content owners may use the threat of litigation to shape internet communications facilitated by OSPs at a high cost to end users and small content owners.

Furthermore, the Second Circuit opinion in *YouTube* will probably override the Ninth Circuit. If one circuit raises the requirements for a valid 12(b)(6) motion under these circumstances, it may have the effect of becoming the new national rule because OSPs are especially susceptible to plaintiff forum shopping.<sup>217</sup> In turn, this effect will undermine the FCC’s goal of protecting

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211. *YouTube*, 676 F.3d at 27–28 (citing *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002)) (as the only case so far that has found an OSP to have the right and ability to control).

212. *Shelter Capital*, 667 F.3d at 1043 *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 19 of the superseding decision extends this finding.).

213. *YouTube*, 676 F.3d at 20–31.

214. See *supra* note 55 and accompanying text.

215. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008); *Sony*, 464 U.S. at 490–92.

216. See *supra* note 81 and accompanying text.

217. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (OSP’s purposely avail themselves anywhere end users access their commercial or sufficiently interactive services online.). *But see* *Howard v. Missouri Bone & Joint Ctr., Inc.*, 373 Ill. App. 3d 738, 743, 869 N.E.2d 207, 212 (2007) (Courts have not agreed on the *Zippo*’s sliding scale test,

internet openness and freedom, and will eventually justify arguments such as Verizon's current complaint that the FCC net neutrality rules are solving problems that do not exist.<sup>218</sup>

The Second Circuit *YouTube* decision should be reversed via adoption of three rationales. First, as the Ninth Circuit reasoned, the benefits of compliance with the safe harbor will be undone if something less than specific knowledge can get a plaintiff past a 12(b)(6) motion.<sup>219</sup> Second, Judge Kozinski's approach in *Perfect 10 v. Visa* should be adopted so that the nature of OSP direct profits from end user infringing activities is considered more central to imposing liability than merely facilitating dissemination.<sup>220</sup> In so doing, "direct financial benefit" in §512 should be defined to exclude profits derived from general network benefits.<sup>221</sup> Third, the requirement of a direct infringer and the traditional contours of copyright should be considered during the interpretation of the DMCA vicarious liability provision.<sup>222</sup> In addition, *Sony's* use of the staple article of commerce doctrine and recognition of content owners that do not disapprove of dissemination should be applied to hold a majority of YouTube end users as fair users.<sup>223</sup> Finally, as an underpinning for these rationales, §512(m) should be interpreted to limit any condition of safe harbor protection that encourages OSPs to undermine FCC regulations. FCC net neutrality regulations should be used to inform the scope of an OSP's "right and ability" in the DMCA vicarious liability provision as well.

### *Effective Notice*

§512 (c) & (d) safe harbors require that upon notification of claimed infringement that the OSP expeditiously removes or disable access to the infringing material.<sup>224</sup> §512(d) further requires "information reasonably sufficient to permit the service provider to locate that reference or link."<sup>225</sup> The alternative for OSPs to removing links to alleged infringing material in order to comply with the §512 safe harbor is to implement "simple measures" to avoid the contributory liability that the safe harbor protects OSPs from.<sup>226</sup> As we saw

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but many have adopted it).

218. Brief of Appellant at 51 *Verizon v. FCC*, No. 11-1355 (D.C. Cir.).

219. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1043 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (Page 17-18 of the superseding decision extends this finding. DMCA "right and ability to control" is not coextensive with the common law, but it included This includes "purposeful conduct" as in *Grokster* and high levels of control over activities of users like in *Cybernet.*).

220. *See supra* note 41 and accompanying text.

221. *See supra* note 49 and accompanying text.

222. *See supra* note 63 and accompanying text.

223. *See supra* note 74 and accompanying text.

224. The Digital Millennium Copyright Act 17 U.S.C. §§ 512(c)(1)(C) & 512(d)(3) (2000).

225. The Digital Millennium Copyright Act 17 U.S.C. § 512(d)(3) (2000).

226. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (deciding that Google did not implement "simple measures" to stop access to infringing material over their network and that if they fall out of §512(d) safe harbor they could be liable contributorily for

above, the Second Circuit opinion will incentivize OSP failure to comply with the safe harbor provision because the cost of implementing simple measures may not be as high as complying with the safe harbor's requirements.<sup>227</sup> Supposing that an OSP has decided to comply with § 512, once an OSP receives a notice of infringing activity. § 512(g) outlines the process for taking down the infringing material pursuant to (c)(1)(C) of the Copyright Act.<sup>228</sup> There is no "liability for taking down generally."<sup>229</sup> However, the OSP must promptly notify the subscriber that it has removed or disabled access to the material. Then, upon counter-notification from the user, the OSP must notify the user that the removed material will be put back up, or the OSP will cease disabling access within 10 business days.<sup>230</sup> The material must be replaced or access must be enabled within 10 to 14 business days following the receipt of the counter-notice.<sup>231</sup>

However, if the OSP receives notice that the person claiming infringement has filed an action seeking a court order to restrain the subscriber, then the OSP must refrain from enabling access or replacing the alleged infringing material.<sup>232</sup> § 512(g)(3) requires a counter-notification to include the alleged infringer's physical or electronic signature, identification of the material that has been removed, the location from which it was removed, a statement under penalty of perjury that the subscriber has a good faith belief that the material was removed by mistake or misrepresentation. The counter-notice must also include the alleged infringer's name, address, telephone number and a statement that the alleged infringer consents to the jurisdiction of the Federal District Court.<sup>233</sup> § 512(h) gives copyright owners the ability to subpoena the personal information of alleged infringers that have revealed themselves by submitting a counter-notice.<sup>234</sup>

In general, the content industry can ensure that content is taken down without a ruling about fair use or idea/expression merger bars on the limited rights granted to them through the Copyright Act.<sup>235</sup> The legal action supported by § 512(g) & (h) implicates pressing questions about the breadth of our First Amendment rights online.<sup>236</sup> Forbes has noted that there is a commonly known corporate wisdom in using the DMCA to force take downs of embarrassing disclosures about businesses and politicians,<sup>237</sup> and the FCC has taken a strong stance against these sorts of takedowns, repeatedly renewing its dedication to

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copyright infringement.).

227. See *supra* note 170 and accompanying text.

228. *Perfect 10*, 508 F.3d, at 1172 (9th Cir. 2007) (§512(g) does not mention safe harbor §512(d), so presumably once a link is alleged to lead to infringing material an OSP must expeditiously remove it or fall out of the safe harbor).

229. *Id.*

230. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(2)(B) (2000).

231. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(2)(C) (2000).

232. *Id.*

233. The Digital Millennium Copyright Act 17 U.S.C. § 512(g)(3) (2000).

234. The Digital Millennium Copyright Act 17 U.S.C. § 512(h) (2000).

235. *Id.*

236. *Id.*

237. Daniel Lyons, *Fighting Back*, FORBES, Nov. 14, 2005, <http://www.forbes.com/forbes/2005/1114/128sidebar.html>.

preserving an open internet.<sup>238</sup> However, abuse of the notice and takedown requirements also threatens the value of OSPs adhering to the safe harbor requirements. Furthermore, the recent Second Circuit holding will justify using invalid notices as evidence to get past a 12(b)(6) motion based on red flag knowledge.

#### *Abuse of the Notice Requirement*

The DMCA does have §512(f) as an “express remedy for misuse of the DMCA’s safe harbor provisions,”<sup>239</sup> which gives a remedy to any party that misrepresents a claim of copyright ownership.<sup>240</sup> An example is the *Diebold* case.<sup>241</sup> Diebold was found to have violated §512(f) for using the DMCA as a “sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”<sup>242</sup> The case went on to note that the DMCA was made to protect service providers and not copyright holders and ultimately found that Diebold “knowingly materially misrepresented” under §512(f).<sup>243</sup> This provision provides damages and costs to be paid by the violating party.

Substantially complying notices have been interpreted to only be effective regarding material online up to the time when the notice was sent and cannot be used to impose an ongoing obligation for an OSP to monitor its service.<sup>244</sup> Notices that do not fully comply with §512(c)’s specifications for notices are deemed defective and do not require OSPs to take down material.<sup>245</sup> However, if the Second Circuit’s recent opinion allows defective notices to be used as evidence of “red flag knowledge,” §512(m) and §512(c)(1)(C) could become superfluous.<sup>246</sup> A blanket statement that a plaintiff’s works are within 22,000 pages of documents, without specific identification of infringing pages, did not provide sufficient notice to OSPs under the DMCA.<sup>247</sup> That being said, it is still unclear how many pages in which notice can be hidden and still constitute sufficient notice and/or constitute sufficient evidence that an OSP had “red flag knowledge.” Because the law is unclear on this, OSPs may be burdened with reviewing lengthy documents from content owners who may be

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238. See *supra* note 98 and accompanying text.

239. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1205 (N.D. Cal. 2004).

240. The Digital Millennium Copyright Act 17 U.S.C. § 512(f) (2000).

241. *Diebold*, 337 F. Supp. 2d at 1205.

242. *Id.* at 1204–05.

243. *Id.* (“Knowing material misrepresentation” was defined by the *Diebold* Court: “Knowingly means that a party actually knew, should have known if acted with reasonable care or diligence, or would have no substantial doubt had it been acting in good faith that it was making misrepresentation. False Material means that the misrepresentation affected the ISP’s response to a DMCA letter.”).

244. Ballon, *supra* note 93, at 656 n.966 (citing *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003)).

245. *Id.*

246. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1033–34 (9th Cir. 2011) *opinion withdrawn and superseded on reh’g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (extended 13).

247. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112 (9th Cir. 2007).

trying to remove safe harbor protection in order to launch favorable copyright suits. Additionally, OSPs may have to take costly defensive measures to conceal or avoid e-mail communications involving these matters.<sup>248</sup> At some point, the simple measures required to avoid common law contributory liability will be seen as less costly than the costs involved in staying within the safe harbor.

#### PART IV: FCC NET NEUTRALITY RULES

The FCC announced open internet principles in 2005 because it had found clear deviations from internet openness.<sup>249</sup> Chairman Genachowski was concerned with “real risks to the Internet’s continued freedom and openness. Broadband providers have natural business incentives to leverage their positions as gatekeepers of the Internet.”<sup>250</sup> He also remarked that “openness is a quality – a generative power – that must be preserved and protected,” and defined internet openness as “the ability to speak, innovate, and engage in commerce *without having to ask anyone’s permission*,” accrediting this as the reason for the Internet’s “unparalleled success.”<sup>251</sup> Unfortunately, if interpretations of copyright law are adopted that increase the gate keeping obligations of OSPs<sup>252</sup> and maximize copyright protection,<sup>253</sup> the inevitable result will be destruction of any vision for the internet that includes not having to ask for anyone’s permission to participate.

In a recent defense of its net neutrality rules, the FCC noted three incentives ISPs have in blocking or disrupting the activities of OSPs (what the FCC calls “edge providers” like Netflix or Skype).<sup>254</sup> First, ISPs that provide telephone or video services have an interest in blocking or disrupting online video and voice providers like Netflix or Skype. Second, ISPs have an incentive to block end user access to OSPs unless the OSP pays additional costs for end user access. The FCC also noted that ISPs could similarly charge end users tiered prices for access to popular websites, including access to potentially unwanted, extra services. Finally, ISPs have an incentive to charge for prioritized access to OSPs giving the highest internet speeds and quality to the highest paying OSPs. The effects would be highly disruptive to online

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248. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m).

249. *FCC Remarks on Internet Freedom*, *supra* note 6.

250. *Id.* (giving a generally negative view to gatekeeping that should be carried over to copyright law). *See also*, *Kneecapping the Future: Comcast’s Unjustified Internet Caps and the Plan to Kill Video Competition*, FREE PRESS, June 25, 2012, [http://www.savetheinternet.com/sites/default/files/resources/Comcast%20New%20Caps%20Factsheet\\_FINAL.pdf](http://www.savetheinternet.com/sites/default/files/resources/Comcast%20New%20Caps%20Factsheet_FINAL.pdf) (reporting that Comcast has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T’s Facetime Blocking*, FREE PRESS, Sept. 30, 2012, <http://www.savetheinternet.com/resource/100084/facts-about-atts-facetime-blocking>.

251. *FCC Remarks on Internet Freedom*, *supra* note 6.

252. *See generally* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

253. *See* *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012) (YouTube didn’t bid for a permission from the football league and left clips of their football games up on the site.).

254. Brief of Respondent-Appellee at xi, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.).

innovation, and “the next Google or Facebook may never begin.”<sup>255</sup> Because ISPs can purchase content and enter into exclusive licensing agreements with content owners, these ends may as well be achieved through copyright law. Thus, copyright law should be interpreted with broad limits on OSP copyright liability.

The FCC has kept a watchful eye on business developments online to support its findings. From 1995 until 2010, small businesses and startups brought in more than 22 million new American jobs, and the internet had a central role in facilitating this.<sup>256</sup> In 2005, there were 600 billion web pages and 50 million blogs.<sup>257</sup> Clearly, as Genachowski noted, “[t]he internet has been an unprecedented platform for speech and democratic engagement, and a place where the American spirit of innovation has flourished. We’ve seen new media tools like Twitter and YouTube used by democratic movements around the world.”<sup>258</sup> Interpretations of copyright law that maximize online gate keeping will limit the effect of OSPs disseminating American culture and influence globally. American OSPs’ foreign operations have been on the frontlines as a symbol of free speech and public criticism.

In fact, a number of movements against an open internet have been showing up around the world. China, a communist republic, blocks its citizens from accessing social networking sites like Twitter and YouTube by burdening ISPs and OSPs with vicarious liability.<sup>259</sup> The Pakistani Supreme Court has ordered criminal cases against telecommunications officials and Internet intermediaries for failing to block Danish newspaper cartoons that depicted the prophet Muhammad.<sup>260</sup> A Belgian court ruled that Google had violated European Union (EU) copyright laws by not blocking links to articles originally published in Belgian newspapers without getting permission.<sup>261</sup> Germany has imposed strict liability on ISPs for hosting copyright infringement.<sup>262</sup> The EU has pushed initiatives to get ISPs to block objectionable content from the internet.<sup>263</sup> Australia, France, Sweden, and Germany have all induced ISPs and OSPs to block speech deemed as “hate speech” in their countries from being transmitted over the internet, and at least one major search engine has responded by blocking sites globally that constitute “hate speech” as defined by the Swiss, German and French governments.<sup>264</sup> In response, two new pieces of legislation have recently been

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255. *Id.* at 13.

256. *FCC Remarks on Internet Freedom*, *supra* note 6.

257. Kreimer, *supra* note 14, at 17.

258. *FCC Remarks on Internet Freedom*, *supra* note 6.

259. Kreimer, *supra* note 15, at 18 (China has lead the way in targeting ISP’s, routers and search engines as a means of controlling access to Internet content.); Joshua Schroeder, *A Glass Half Full: An Alternative View on China’s IP Future*, SWIDER MEDIEROS HAVER BLOG, July 16, 2012, <http://www.smhllaw.com/articles/wp-content/uploads/2012/07/A-Glass-Half-Full-An-Alternative-View-of-Chinas-IP-Future-NUMBER-THREE2.pdf> (noting that MAPIC, a Chinese law, has been employed for some time now to enlist ISPs to gate keep).

260. Kreimer, *supra* note 15, at 19.

261. Cunard, *supra* note 24, at 753.

262. Kreimer, *supra* note 15, at 20.

263. *Id.* at 21.

264. *Id.* at 19–21.

unveiled that could facilitate the protection of internet freedom. They are called the “Electronic Communication Privacy Act 2.0” and the “Global Free Internet Act.”<sup>265</sup> If enacted, they may be used along with the FCC’s net neutrality regulations to limit secondary infringement suits against OSPs via §512(m) of the DMCA.

A cost of using OSPs to block copyright infringing material is the risk of error and misuse.<sup>266</sup> Risk-averse OSPs will drop risky speech to a greater degree than was intended by regulation.<sup>267</sup> For instance, in *Democracy and Technology v. Pappert*, the Court found that OSPs blocked around 1.2 million “innocent” websites in response to a demand from law enforcement that they disable 400.<sup>268</sup> Another example is when Diebold invoked the DMCA to block embarrassing disclosures of the flaws in its voting machines.<sup>269</sup> People easily use the DMCA to force OSPs to take down critical or embarrassing content from websites.<sup>270</sup> Nevertheless, the law continues its journey away from the *Sony* decision and the sentiment that copyright law should not “censor freely broadcasting companies at the behest of others who sought compensation.”<sup>271</sup> Freely blogging and freely streaming companies should not be treated any differently simply because they conduct their activities over the internet.

The FCC’s net neutrality regulation does not protect unlawful content and communications.<sup>272</sup> Thus, it is a good general rule that in cases of direct infringement, FCC regulation gives way to copyright law. However, this is not true regarding cases of secondary infringement by OSPs. The DMCA safe harbor contains a provision in §512(m) that anything barring the entry of an OSP to the safe harbor should be disregarded if it forces the OSP to do something illegal.<sup>273</sup> In the case of secondary infringement by an OSP, there is no reason to presume copyright law’s preeminence over FCC regulation. To date, courts have not made any clear decision on the interpretation of §512(m)(2), and using telecommunications law in conjunction with it remains an unexplored limitation on cases of secondary copyright liability by OSPs. Furthermore, it should be a viable interpretation, as courts have relied on telecommunications findings to reach conclusions about the DMCA in the past. For instance, when considering whether §1201 DMCA violated the First Amendment, the Second Circuit applied the standard from a

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265. ECPA 2.0 Act of 2012, H.R. 6529, 112th Cong. § 2(d) (2012), 2012 CONG US HR 6529 (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr6529ih/pdf/BILLS-112hr6529ih.pdf>); Global Free Internet Act of 2012, H.R. 6530 112th Cong. § 2(d) (2012), 2012 CONG US HR 6530 (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr6530ih/pdf/BILLS-112hr6530ih.pdf>).

266. Kreimer, *supra* note 15, at 27, 29 (noting that Fair Uses may be blocked to avoid copyright infringement).

267. *Id.* at 29. See generally *Ctr. For Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).

268. *Ctr. For Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 655 (E.D. Pa. 2004).

269. Kreimer, *supra* note 15, at 32 (ISPs complied even though the claim was improper).

270. Lyons, *supra* note 198.

271. Kreimer, *supra* note 15, at 56 n.130.

272. Preserving the Open Internet, 47 C.F.R. § 8.5 (noting that ISPs may not block users from accessing “lawful” websites.).

273. The Digital Millennium Copyright Act, 17 U.S.C. § 512(m).

telecommunications law case, *Red Lion*: “Differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>274</sup> The Second Circuit also noted that “[w]hen the Framers of the First Amendment prohibited Congress from making any law ‘abridging the freedom of speech,’ they were not thinking about computers, computer programs, or the internet. But nor were they thinking about radio, television or movies.”<sup>275</sup> The Second Circuit seemed to conclude that Congress could not go wrong by instituting the prophylactic criminalization of hackers.<sup>276</sup> It also noted that the First Amendment is wrought with “doctrinal ambiguities and inconsistencies result[ing] from the absence of any detailed judicial analysis of [its] true rationale,”<sup>277</sup> and concluded that it might be “fundamentally unintelligible.”<sup>278</sup> In short, the telecommunications law standard in *Red Lion* allowed the Court to punt to Congress and the Supreme Court to better define the free speech standard that should be applied to the DMCA.

Unlike in *Reimerdes*, courts cannot punt away problems with free speech without promulgating significant contradictions in the law that are likely to undermine the goals of the FCC regarding internet openness. OSPs like Google and Facebook are spending a tremendous amount of money to get a definition of the copyright liability they face for facilitating speech over the internet. Legal advice often includes implementation of a takedown system that complies with the requirements of §512. Unfortunately, following these requirements can result in a conflict with communications regulation. Taking down copyrighted content could trigger a fine by the FCC if it finds that it is censorship of “lawful” free speech,<sup>279</sup> but in many instances, leaving “unlawful” copyright infringing content online will cause the OSP to fall out of the §512 safe harbor.<sup>280</sup> Determining which content is “lawful” is a complicated legal question that is normally debated vigorously in court before it is decided

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274. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453 (2d Cir. 2001) (In this case the restricted speech is code that was “designed to facilitate unlawful access to copyrighted works, which the Court used to inform the scope of 1<sup>st</sup> amendment protection of these works. They also found that the functionality of computer code reduced the scope of first amendment protection afforded to DeCCS.) (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969)).

275. *Corley*, 273 F.3d, at 434 (“The Congress shall make no law . . . abridging the freedom of speech.”) (quoting U.S. CONST. amend. I).

276. *Id.* at 444 (“Congress could not ‘diminish’ constitutional rights of free speech even if they wished to . . .”). *See also* *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (The District Court issuing an injunctive order appeared to agree that Copyright law naturally should get a free pass when it came to the first amendment noting that “Copyright law restricts speech: it restricts you from writing, painting, publically performing, or otherwise communicating what you please.”) (quoting Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998)) (internal quotation marks removed).

277. *Reimerdes*, 82 F. Supp. 2d, at 225 (quoting Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 54 (1984)).

278. *Id.* (quoting John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 419 (1983)).

279. *See infra* notes 251 and accompanying text.

280. *See supra* note 22 and accompanying text.

by judges and juries.<sup>281</sup> Asking OSPs to answer this question outside of court is unfair and inappropriate.

Chairman Genachowski has noted that in many key respects, content creators, internet providers, and American consumers have aligned interests.<sup>282</sup> Essentially, the more people use the internet to upload and access content, still more people will create new and innovative ways to upload and access content on the internet. Genachowski supports a net neutrality framework because “consumers and innovators have the right to a level playing field. No central authority, public or private, should have power to pick which ideas or companies win or lose over the internet, that’s the role of the market and the marketplace of ideas.”<sup>283</sup> Net neutrality is the prohibition of unreasonable discrimination in transmitting lawful internet traffic.<sup>284</sup>

Opponents of net neutrality have argued it is “a solution in search for a problem.”<sup>285</sup> Currently Verizon is using this concept to challenge the rules in Federal Court as arbitrary and capricious.<sup>286</sup> But this is an outdated argument,<sup>287</sup> as the FCC has frequently caught service providers crimping free speech and engaging in anticompetitive behavior, including: blocking VoIP services over their networks, censoring private e-mails, blocking a webcast when singer Eddie Vedder criticized George Bush, and blocking text messages from an abortion rights group to its subscribers because it claimed the right to block “controversial or unsavory” text messages.<sup>288</sup> Network operators should not be able to control what people do online, just like telephone companies should not control how people communicate over the phone.<sup>289</sup> In addition, Cox cable provider has admitted to blocking file sharing applications.<sup>290</sup> RCN, a regional internet and cable provider, settled when it was accused of blocking OSPs.<sup>291</sup> AT&T admitted to restricting its mobile customers’ ability to use competing calling applications such as Skype from

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281. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

282. *FCC Remarks on Internet Freedom*, *supra* note 6. *See also* Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1831–32 (2009) (noting the symbiotic relationship between technology and content production. Also discussing the anti-copyright sentiment that happens when copyright holders shut down the services of tech industries.).

283. *FCC Remarks on Internet Freedom*, *supra* note 6.

284. *Id.* *See also* Preserving the Open Internet 47 C.F.R. § 8 (2011) (ISPs are not allowed to block OSP services that compete with their telephony services nor are they supposed to unreasonably discriminate against their services).

285. Benjamin, *supra* note 25, at 161 n.59.

286. *See generally* Brief of Appellant at 51 Verizon v. FCC, No. 11-1355 (D.C. Cir.).

287. Benjamin, *supra* note 25, at 166 (“Comcast’s recent practices. . .believe the notion that network neutrality is still ‘searching for a problem.’”) (quoting Formal Complaint of Free Press and Public Knowledge against Comcast Corp for Secretly Degrading Peer to Peer Applications, 23 FCCR 13028, (2008) (No 07-52) (Internal quotation marks omitted) and at 167 (Comcast has been accused of “cutting off and slowing speeds” to BitTorrent file transfers.).

288. *Id.* at 158.

289. *Id.* at 160 n.45 (citing Vint Cerf, a well-known expert in the tech field).

290. Brief of Respondent-Appellee at 15, Verizon v. FCC, No. 11-1355 (D.C. Cir.).

291. *Id.*

their cell phones.<sup>292</sup> Skype has had problems gaining internet access in order to provide its services.<sup>293</sup> ISPs have even been charged with blocking online credit card processing that competed with their affiliated services.<sup>294</sup> The right to take these actions is generally preserved in most ISP terms of service, including “sweeping rights to block, degrade, or favor traffic.”<sup>295</sup>

Free Press and Public Knowledge brought an action against Comcast for blocking and degrading BitTorrent access over its network, and the FCC held against Comcast for violating their net neutrality policies.<sup>296</sup> In its complaint, the Free Press and Public Knowledge cited that “over 20,000 Americans complained about Comcast’s blatant and deceptive blocking of peer-to-peer communications.”<sup>297</sup> It also noted that content providers such as Vuze, Inc., CBS, Twentieth Century Fox, and Sports Illustrated all had utilized Torrents to legally distribute their content to users.<sup>298</sup> It characterized Torrents as a new way to cheaply and quickly disseminate communications by harnessing multiple internet connections.<sup>299</sup> Google and Vuze, Inc. have solicited the FCC for more clarity about what types of network management protocols are acceptable, especially as they are looking to comply while also avoiding secondary copyright liability.<sup>300</sup>

Post *Napster & Grokster*, sympathizers with file sharing technology like BitTorrent, Publius, FreeNet, LOCKSS, and Exeem have re-characterized them as “overlay networks” and have cast their use as a “collective hard drive for all of humanity.”<sup>301</sup> They especially point to LOCKSS, which used a peer-to-peer system designed for libraries to determine whether a digital copy of a document remains authoritative and to replace damaged copies.<sup>302</sup> Some other academic file sharing services that are living under the shadow of a rising risk of secondary copyright liability include LionShare, eduCommons, Edutella and The Internet Archive Project.<sup>303</sup> As Comcast subsidiary NBC creates copyrighted content and its other subsidiary Xfinity distributes it online, directly competing with OSPs like Netflix and Hulu, we must ask ourselves when copyright misuse will become a relevant defense again.<sup>304</sup> As Josh Silver, the Executive Director of Free Press, opined, “[T]he fight is far from over. A

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292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. Benjamin, *supra* note 248, at 169 (3-2 vote.).

297. *Id.* at 168 n.131.

298. *Id.* at 167 (citing *Formal Complaint* at 13030).

299. *Id.*

300. *Id.* at 172.

301. Zittrain, *supra* note 30, at 295.

302. *Id.* at 292 n.209.

303. *See* Wang, *supra* note 32, at 1–2.

304. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006) (“In sum, the existing case teaches that the misuse defense applies when a copyright holder leverages its copyright to restrain creative activity. In the instant case, StreamCast advances a litany of vague allegations of anticompetitive conduct on the part of Plaintiffs. None of the alleged misconduct has sufficient nexus with the public policy embodied in the grant of copyright to implicate the misuse defense.”).

duopoly market—where phone and cable companies control nearly 99% of high speed internet connections—will not discipline itself.”<sup>305</sup>

#### CONCLUSION

Until internet and computer technology arrived, the content industry retained near complete control over the creation and dissemination of creative works.<sup>306</sup> Content businesses were able to become and remain “gatekeepers” to creative content mostly because of limited public access to new technology.<sup>307</sup> Literary, video, music recording, and publishing equipment was too rare and expensive for the general public to afford, which allowed content businesses to set prices high and limit access to creative works. This also limited competition in the content industry by keeping the supply of professional grade creative works into the stream of commerce relatively low. Under this regime, prices remained high for consumers, competition low in the content industry, and many artists were not fairly compensated for their creative efforts.<sup>308</sup>

For the first time in history, state of the art tools of creation and dissemination have been cheaply placed into the hands of the general public. Through computers and the internet, successful new business models are being pioneered by artists themselves. Not only do these artists frustrate the traditional content industry, they compete with it, driving traditional profit margins down. Many new artists are adapting nicely to this new world whether or not they are signed with the content industry. Many have elected to release their creative works under creative commons licenses so that they may be shared freely over the internet, including over peer-to-peer file sharing networks. In the meantime, major players in the content industry have been rallying support for even stronger copyright protection that might destroy emerging business models and limit the effects of the technological revolution.<sup>309</sup>

Using OSPs as gatekeepers stunts the growth of new business models for copyrighted works. Those who support OSP gate keeping have said “you can’t compete with free,”<sup>310</sup> and claim that the whole content industry could go down in flames due to online copyright infringement. However, enterprising artists have proved that free internet dissemination can be used to make a

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305. Benjamin, *supra* note 257, at 170.

306. Mark G. Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, 896 PLI/PAT 133, 138 (2007).

307. *Id.*

308. *Id.* at 141. See also Mike Masnick, *The Future of Music Business Models (And Those Who Are Already There)*, TECH DIRT, Jan. 25, 2010, <http://www.techdirt.com/articles/20091119/1634117011/future-music-business-models-those-who-are-already-there.shtml> (noting that the old music industry was a “lottery” where only a small percentage of artists make any money at all).

309. See *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (Not only did the Court side with roller pianos and against copyright holders. They decided that perforated rollers were not “copies” as intended in the copyright act because they were part of a machine and worked as part of a mechanism. This indicates that the “copies” copyright law is to allow copyright holders control over can be more creatively interpreted than is the current trend today.).

310. Masnick, *supra* note 270. See also *infra* note 278 and accompanying text.

living.<sup>311</sup> A common strategic trend in the music industry is for artists to capture the value of a copyrighted work in live performance ticket sales, merchandise, and special edition versions of their works.<sup>312</sup> Literary authors have distributed copies online for free to attract public attention to their works.<sup>313</sup> Google images have been held to be a fair use in the Ninth Circuit partly because disseminating thumbnails of images makes it more likely that the author will monetize his images.<sup>314</sup> Across the board, online content is being used as a loss leader for other products sold at a price. OSP gate keeping will limit the content owner's ability to utilize their work as a loss leader and will artificially increase the cost of breaking into the content industries. If required to act as gatekeepers, OSPs may also block other new business models being pioneered by working class artists. For example, some musicians sell "memberships" online that connect fans to online feeds of new content as it is produced.<sup>315</sup>

Most artists today get discovered online.<sup>316</sup> Artists like Christina Perri, Colbie Caillat, Dane Cook, OAR, and many others have since been signed and are represented by content industry professionals while OSPs are being sued for providing this service.<sup>317</sup> Since the rise of the internet, there is more creative content being produced, invested in, and disseminated than there ever was in the past.<sup>318</sup> In fact, the purpose set out in the Constitution of "progress" through

311. Masnick, *supra* note 270. See also Jeff Goins, *Why I Did the Unthinkable and Gave My eBook Away for Free*, GOINS WRITER BLOG (June, 30, 9:29 AM), goinswriter.com/unthinkable-giveaway (Goins gave his book away online for free for two days as a promotion and his blog included links to claim free copies. This blog posting includes a number of comments, one claiming that giving copyrighted works away for free online is a "tiny advertising cost." Goins gave 3 of his own reasons why he did this: "Because I care more about spreading an idea than making money. Because anonymity is a writer's greatest enemy. Because giving away a book is a great strategy to sell one." citing a fellow writer Sarah Mae who "gave away 2000 copies and sold 20,000.").

312. Masnick, *supra* note 270 (hypocritically, artists signed to the content industry are using similar strategies while demanding higher protection of copyright).

313. Jeff Goins, *Why I Did the Unthinkable and Gave My eBook Away for Free*, GOINS WRITER BLOG (June, 30, 9:29 AM), goinswriter.com/unthinkable-giveaway.

314. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

315. Masnick, *supra* note 270.

316. May 24, 2012 Posting on Joshua Schroeder's Facebook Profile, FACEBOOK, www.facebook.com/joshua.schroeder2 (Facebook users express their understanding that Justin Bieber, Esmee Denters, Bo Burnham, Greyson Chance, Christina Perri, Sophia Grace, Rosie, Colbie Caillat, Dane Cook, OAR (discovered on a PTP filesharing website), Ted Williams (the "Golden Voice"), Kimbra, The Pretty Reckless, Sara Bareilles, Karmin, Dondria, Jackie Evancho (skipping the on stage initial audition on America's Got Talent submitting hers through YouTube and was vote #1 through online vote), and OK Go were discovered or got their start online through OSPs like Facebook, MySpace and YouTube.); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 349 ("The alienation of copies is perhaps the most rational way to gain exposure for one's ideas. This is a non-economic, and perhaps higher, form of the idea of recognition: respect, honor, and admiration. Even for starving artists recognition of this sort may be far more valuable than economic rewards.").

317. See generally *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) *opinion withdrawn and superseded on reh'g*, 09-55902, 2013 WL 1092793 (9th Cir. Mar. 14, 2013) (The superseding decision extends many of the findings of the prior decision.).

318. Masnick, *supra* note 270 (citing a Harvard Study); *Sony Corp. of Am. v. Universal*

creation and dissemination of creative works is being achieved at ever increasing levels.<sup>319</sup>

Plenty of artists and some content industry businesses are embracing internet dissemination via creative commons licensing including peer-to-peer file sharing.<sup>320</sup> It may be that free internet distribution of music results in “better, stronger and more efficient business models.”<sup>321</sup> Nevertheless, major players in the content industry have been able to secure increasingly robust copyright protection that they will use to shape the way the internet functions to their benefit and at a cost to the public interest, middle class copyright owners, and the general future state of the internet.<sup>322</sup>

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City Studios, Inc., 464 U.S. 417, 442 (1984).

319. ARTISTS AND ART MATERIALS USA 2009, [http://www.namta.org/files/public/Mrkt\\_Stdy\\_ExecSum.pdf](http://www.namta.org/files/public/Mrkt_Stdy_ExecSum.pdf) (last visited July 30, 2012) (noting that as of 2009 there were 4.4 million visual artists in the United States, 122,000 art degree seeking college students); KEY BUSINESS SKILLS: STRATEGIC ANALYSIS, <http://www.artistmentorsonline.com/?tag=how-many-artists-are-there> (noting that in the United States there are more than twice as many visual artists as there are engineers and six times as many artists as there are medical doctors that produce anywhere from around 36 to 75 creative works a year each).

320. Masnick, *supra* note 270 (1 - Trent Reznor from Nine Inch Nails released tracks under creative commons licenses, encouraged fans to bring cameras to concerts and encouraged the posting of videos and images they capture online. He releases his content for free on his website and also gives options to purchase including a 2 disc CD set for \$10, a Deluxe Edition for \$75 which included a DVD, Blu-ray and photo book, an Ultra-Deluxe Limited Edition package for \$300 each with only 2,500 available. The Ultra-Deluxe Limited Edition sold out bringing in \$750,000. These efforts also increase the demand for live performance tickets. 2 - Josh Freese, made considerable money with a similar marketing strategy. 3 - Jill Sobule was dropped by 2 labels after having 1 hit song and raised all the money she needed for her next project by selling advance copies of her work before it had been created. 4 - Corey Smith used to be a high school teacher, but now he uses the internet to connect him to fans who he gives his music away for free to. From the ticket sales he brings in from live shows he has grossed nearly 4 million dollars in 2008. Corey also tried pulling free music off of his website and found that his iTunes sales dropped when he did that. 5 - Jonathon Coulton was a computer programmer but in 2006 he decided to write, record and release a new song every week of the year under a creative commons license. Because people could share his music freely he became a cult sensation. Due to the ability to crowd source his following on the internet he was able to “parachute” in to play shows in venues that would make him money. With the money his music business makes Jonathon doesn’t have to be a computer programmer anymore. 6 - Motoboy, a Swedish singer/songwriter purposely put his album out onto Peer-to-Peer websites including Pirate’s Bay which turned him into a star in Sweden. He also did a “YouTube concert” for his fans. 7 - Amanda Palmer, a singer from a punk cabaret duo called the Dresden Dolls, released a solo album on Roadrunner records, a subsidiary of Warner Music, but they weren’t interested in promoting the album. She used Twitter to set up “flash gigs” and makes money selling merchandise online, sometimes via an “online auction.” 8 - Terry McBride runs Nettwerk, a Canadian based label that embraces these “new” music industry business models. They allowed fans to mix one of their hip-hop artist’s songs themselves. The album made it to the top 50. 9 - Matthew Ebel - performed on Second Life. Fans could pay \$5, \$10 or \$15 for benefits including access to new songs every couple of weeks as well as having recorded shows sent to them. Ebel makes a good living doing this. 10 - Mold Over is an electronic band in San Francisco that made a CD case with a working circuit board with buttons noises and lights including a jack to plug it into your computer. The CD’s sold for \$50 apiece and sold very well because he gave his fans a reason to buy physical CDs instead of downloading them online for free.).

321. *Id.*

322. *Id.* (“Stop worrying and learn to embrace the business models that are already helping

The next era of internet regulation should find its cornerstone in the public interest, and should maximize openness and freedom for OSPs and end users. For a bright regulatory future, the DMCA must be interpreted in a way that does not undermine the FCC net neutrality rules made to limit the effects on OSPs and end users from gate keeping regimes. Anything less will result in contradictions that make the application of internet law dysfunctional and unnecessarily contradictory. Reversing the Second Circuit's most recent holding in *YouTube* is an auspicious way of getting these changes underway. The Ninth Circuit statutory interpretation in the *Shelter Capital* case, Judge Kozinski's rationale in *Perfect 10 v. Amazon* emphasizing the second prong of vicarious liability, and *Sony*-inspired fair use findings for direct infringers all should be employed to limit the conditions of the DMCA safe harbors.

If FCC regulation can be aligned with copyright law to safeguard continued openness and freedom online, the public will reap untold rewards when it is needed most. New ways of communicating and making money should be celebrated. Logging onto a dot com website should mean that you have entered the freest and most open form of internet possible. This reality is within reach and lawmakers should seize it for the sake of continued freedom and openness of the internet, for our nation, and for the world.

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musicians make plenty of money and use file-sharing to [your] advantage, even in the absence of licensing or copyright enforcement.”)