

FILTERING SYSTEMS OR FAIR USE? A COMPARATIVE  
ANALYSIS OF PROPOSED REGULATIONS FOR USER-  
GENERATED CONTENT\*

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INTRODUCTION

Technological developments over the past decade have allowed average consumers to create and distribute their own works of art to the masses. Through the proliferation of websites such as MySpace<sup>1</sup> and YouTube,<sup>2</sup> a user can, with the click of a few buttons, upload a painting he made, a song he recorded himself playing, or even a video he filmed, to a virtual audience of millions. Although the availability of instant promotion and distribution helps sustain a creative community with relatively little expense to

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<sup>1</sup> MySpace Home Page, <http://www.myspace.com> (last visited Dec. 21, 2008).

<sup>2</sup> YouTube Home Page, <http://www.youtube.com> (last visited Dec. 21, 2008).

the artist,<sup>3</sup> it also, at the same time, creates many opportunities to violate the law.

For example, imagine a mother creates a digital video of her young child dancing to music playing in the house. Excited about the prospect of her adorable home movie, she uploads it to YouTube to share with her friends and family across the country. Though this activity seems harmless in nature, Mom's actions may potentially be unlawful. Stephanie Lenz found this out firsthand, when she received an email from YouTube informing her that the video she had uploaded had been removed from the website for violating copyright, and that "future copyright infringements on her part could force [YouTube] to cancel her account."<sup>4</sup> The video in question was recorded by Ms. Lenz on her digital camera and consisted of twenty-nine seconds of her eighteen-month-old son, Holden, dancing in the kitchen to "Let's Go Crazy," a Prince song, playing in the background.<sup>5</sup> Universal, currently the music industry's largest record label and parent company of Warner Bros. Records, owner of the copyright for "Let's Go Crazy," alleged that Ms. Lenz's use of the song without its permission violated its copyright, and, citing the notice and takedown provisions of the Digital Millennium Copyright Act,<sup>6</sup> demanded that YouTube remove the "Let's Go Crazy' Baby Video" from the site.<sup>7</sup> The clip remained offline for six weeks, during which time Lenz filed a counter-complaint with YouTube, which eventually restored the video back online.<sup>8</sup>

Regardless of whether the creators of such content realize they are actively infringing upon another's work, many of these videos are uploaded to user-generated content hosting sites like YouTube every day. As technology becomes more advanced and the Internet creates more platforms to host user-generated content like the "Let's Go Crazy' Baby Video," the issue of how to regulate such content or activity is raised. In late 2007, many organizations and large corporations attempted to develop solutions in response to this problem of rampant copyright infringement on the Internet. On October 18, 2007, CBS, Microsoft and several other Internet and media companies announced their Principles for User Generated Content Services ("UGC Principles") with the

<sup>3</sup> See YouTube Fact Sheet, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Dec. 21, 2008) ("YouTube is building a community that is highly motivated to watch and share videos. The YouTube service is free and will be supported by advertising.")

<sup>4</sup> Jim Avila, Chris Franciscani & Mary Harris, *The Home Video Prince Doesn't Want You To See*, ABC NEWS, Oct. 26, 2007, <http://abcnews.go.com/TheLaw/Story?id=3777651&page=1>.

<sup>5</sup> *Id.*; Prince and the Revolution, *Let's Go Crazy*, on PURPLE RAIN (Warner Bros. Records 1984).

<sup>6</sup> See generally Digital Millennium Copyright Act, 17 U.S.C. § 512 (2000), discussed *infra*, Part I.A.

<sup>7</sup> See Avila, Franciscani & Harris, *supra* note 4.

<sup>8</sup> *Id.*

intended objectives of eliminating infringing content, encouraging original works, and simultaneously respecting the fair use doctrine and the rights of original copyright owners.

One signature notably absent from the UGC Principles pact was that of Google, which purchased YouTube in October 2006.<sup>10</sup> Shortly before the UGC Principles were announced, Google and YouTube announced their own anti-piracy protection plan.<sup>11</sup> Dubbed "YouTube Video Identification," the technology attempts to "help copyright holders identify their works on YouTube [by developing] one-of-a-kind technology that can recognize videos based on a variety of factors. [Though still a work in progress], YouTube Video Identification will be available to all kinds of copyright holders all over the world, whether they want their content to appear on YouTube or not."<sup>12</sup>

On October 31, 2007, the Electronic Frontier Foundation ("EFF") and a coalition of public interest groups proposed The Fair Use Principles for User-Generated Content ("Fair Use Principles") to address the issue of copyright infringing user-generated content.<sup>13</sup> In contrast with the UGC Principles and YouTube Video Identification, which attempt to set up structures to prevent further copyright infringement, the Fair Use Principles set forth "detailed steps that content owners and video hosting services can take to make good on [the promise to accommodate fair use of user-generated content]."<sup>14</sup> Essentially, the EFF hoped that its Fair Use Principles would strike a balance between the illegal use of copyrighted content and having a fair use defense to use such content under United States copyright law.

Part I of this Recent Development will discuss the current law applicable to user-generated content and the recent high-profile case, *Viacom v. YouTube*, which helped raise public awareness of the need to create a set of uniform standards and practices to govern user-generated content. Part II will examine and compare two recently proposed sets of such standards and practices: the Principles for User Generated Content Services and the YouTube Video

<sup>9</sup> See User Generated Content Principles, <http://www.ugcprinciples.com> (last visited Dec. 21, 2008).

<sup>10</sup> On October 9, 2006, Google, Inc. acquired YouTube for \$1.65 billion. Press Release, Google, Inc., Google To Acquire YouTube for \$1.65 Billion in Stock (Oct. 9, 2006), [http://www.google.com/press/pressrel/google\\_youtube.html](http://www.google.com/press/pressrel/google_youtube.html). However, YouTube still "operate[s] independently" and "retain[s] its distinct brand identity." *Id.*

<sup>11</sup> See Posting of David King to The Official Google Blog, *Latest Content ID Tool for YouTube*, <http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html> (Oct. 15, 2007, 14:01 EST).

<sup>12</sup> *Id.*; see also YouTube Video Identification Beta, [http://www.youtube.com/t/video\\_id\\_about](http://www.youtube.com/t/video_id_about) (last visited Dec. 21, 2008).

<sup>13</sup> Press Release, Electronic Frontier Foundation, Fair Use Advocates Issue Principles for Protecting Online Videos (Oct. 31, 2007), <http://www.eff.org/press/archives/2007/10/31>.

<sup>14</sup> *Id.*

Identification tool. Part III will analyze the standards and practices in light of the fair use provisions of section 107 of the United States Copyright Act, drawing on recent cases that aim to highlight the legal flaws inherent in the current system. Additionally, Part III will examine in detail the EFF's proposed "Fair Use Principles for User Generated Content," a model set of principles aimed at balancing the interests of copyright owners, service providers, and content creators. By speculating about the merits and potential pitfalls of each of the three proposed models, Part IV will examine how to proceed with the battle over user-generated content in the future.

### I. DMCA SECTION 512 AND THE POTENTIAL FOR COPYRIGHT INFRINGEMENT ACTIONS ARISING FROM USER-GENERATED CONTENT

#### A. History

The Digital Millennium Copyright Act ("DMCA") was enacted in 1998 to "implement[] two 1996 World Intellectual Property Organization (WIPO) treaties . . . [and to] address[] a number of other significant copyright-related issues."<sup>15</sup> Title II of the DMCA, codified at section 512 of the United States Copyright Act, came into effect for the purpose of "providing certainty for copyright owners and Internet service providers with respect to copyright infringement liability online."<sup>16</sup> Under Title II, Congress intended not to "embark upon a wholesale clarification of [the doctrines of service provider liability]," but rather "to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of online service providers."<sup>17</sup> The safe harbor protections, as defined in 17 U.S.C. §§ 512(a)-(d), insulate from liability providers of the following: (1) transitory digital network communications;<sup>18</sup> (2) system caching;<sup>19</sup> (3) information residing on systems or networks at the direction of users;<sup>20</sup> and (4) information location tools.<sup>21</sup>

Once an online service provider ("OSP") has proven it falls under one of the above four categories, sections 512(c)(1) and 512(i) outline additional criteria for OSPs to qualify for the DMCA's safe harbor status.<sup>22</sup> These additional criteria, at least for

<sup>15</sup> The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary, <http://www.copyright.gov/legislation/dmca.pdf> (last visited Dec. 21, 2008).

<sup>16</sup> S. REP. NO. 105-190, at 2 (1998).

<sup>17</sup> *Id.*

<sup>18</sup> Digital Millennium Copyright Act, 17 U.S.C. § 512(a) (2000).

<sup>19</sup> *Id.* at § 512(b).

<sup>20</sup> *Id.* at § 512(c).

<sup>21</sup> *Id.* at § 512(d).

<sup>22</sup> *Id.* at § 512(c)(1) ("A service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage

caching and hosting OSPs,<sup>23</sup> require an OSP to have no "actual" or "apparent" knowledge that infringing material appears on its site, or, if aware of any infringing activity, to "act expeditiously to remove[] or disable access to[] the material."<sup>24</sup> Furthermore, an OSP cannot directly benefit from the infringing activity.<sup>25</sup>

In addition, the limited liability provided by the statute will only apply if the OSP "has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers," and does not interfere with "standard technical measures."<sup>26</sup> Section 512(h) governs the procedure by which copyright owners can request that a district court clerk issue a subpoena to the OSP, forcing the OSP to disclose the identity of the infringing user.<sup>27</sup>

A majority of the litigation arising from user-generated content falls under the domain of 17 U.S.C. § 512(c). YouTube, the subject of several high profile legal battles,<sup>28</sup> is probably the most noteworthy example of a company who raises questions as to the proper interpretations of DMCA Section 512. Created in February 2005, YouTube bills itself as "the leader in online video entertainment, and the premiere Internet destination for watching and sharing original videos worldwide."<sup>29</sup> YouTube "enables people to easily upload and share video clips on [its own site], or elsewhere online through websites, mobile devices, blogs, and email."<sup>30</sup> Due to the site's increasing growth and popularity, there are no precise statistics of exactly how many users are registered or how many

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at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider: (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.").

<sup>23</sup> Section 512(c)(1)'s "safe harbor" status does not apply to § 512(a), which addresses transmissions like Comcast and AT&T.

<sup>24</sup> 17 U.S.C. § 512(c) (2000).

<sup>25</sup> *Id.*; see *IO Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS 65915, at \*31-32 (N.D. Cal. Aug. 27, 2008).

<sup>26</sup> 17 U.S.C. § 512(i)(2)(A)-(C).

<sup>27</sup> See 17 U.S.C. § 512(h).

<sup>28</sup> See, e.g., *Viacom Int'l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (S.D.N.Y. Mar. 13, 2007); *Tur v. YouTube, Inc.*, 2007 U.S. Dist. LEXIS 50254 (C.D. Cal. June 20, 2007).

<sup>29</sup> Google Press Center: Product Descriptions, <http://www.google.com/intl/en/press/descriptions.html#youtube> (last visited Dec. 21, 2008).

<sup>30</sup> *Id.*

videos are available on the site. However, as of December 21, 2008, YouTube is the fourth most-visited website in the United States,<sup>31</sup> with “[p]eople . . . watching hundreds of millions of videos a day on YouTube and uploading hundreds of thousands of videos daily. In fact, every minute, ten hours of video is uploaded to YouTube.”<sup>32</sup> In addition to YouTube, there are many other user-generated content hosting sites that qualify under section 512(c) as hosts of “information residing on systems or networks at the direction of users,” including Myspace, Dailymotion, Facebook, VideoEgg and Vimeo.<sup>33</sup>

Because YouTube falls under the jurisdiction of section 512(c), it would have to comply with the many requirements advanced in the section in order to receive safe harbor status. First, YouTube must meet the standards outlined in section 512(c)(1), as discussed *infra* in this section. Additionally, YouTube would have to designate an agent to “receive notifications of claimed infringement”<sup>34</sup> by registering the agent’s contact information with the United States Copyright office and putting such information in a “location accessible to the public.”<sup>35</sup> Failure to provide such notification both to the public and to the copyright office could result in an OSP losing its safe harbor status under the DMCA.<sup>36</sup>

Assuming the requirements of sections 512(c)(1) and (2) are met, section 512(c)(3) governs the required procedure required to take place after an OSP receives a “notification of claimed infringement.”<sup>37</sup> The “Let’s Go Crazy’ Baby Video” discussed in the introduction is helpful in illustrating this process. First, upon encountering an allegedly infringing use of “Let’s Go Crazy,” Universal Records (the copyright owner) would locate the agent YouTube has designated to receive copyright infringement claims and send the agent a “written communication.”<sup>38</sup> As outlined by sub-

<sup>31</sup> Alexa.com, United States - Alexa Top 100 Sites, [http://www.alexa.com/site/ds/top\\_sites?cc=US&ts\\_mode=country&lang=none](http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none) (last visited Dec. 21, 2008).

<sup>32</sup> YouTube Fact Sheet, *supra* note 3.

<sup>33</sup> Posting of Ryan Bilborrow-Koo to Digital Video Guru Blog, <http://www.dvguru.com/2006/04/07/ten-video-sharing-services-compared> (Apr. 7, 2006, 17:45 EST); see MySpace Home Page, *supra* note 1; Dailymotion United States, <http://www.dailymotion.com/us> (last visited Dec. 21, 2008); Facebook, <http://www.facebook.com> (last visited Dec. 21, 2008); VideoEgg, <http://www.videoegg.com> (last visited Dec. 21, 2008); Vimeo, <http://www.vimeo.com> (last visited Dec. 21, 2008).

<sup>34</sup> 17 U.S.C. § 512(c)(2) (1998). Under the Act, contact information includes the name, address, phone number, and e-mail address of the agent, as well as any other information that the Register of Copyright deems appropriate. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (holding that a provider that changed its contact email address for copyright infringement claims without updating its contact information on either its website or with the Copyright Office failed to meet the requirements necessary to avail itself of safe harbor protections).

<sup>37</sup> 17 U.S.C. § 512(c)(3) (1998).

<sup>38</sup> *Id.* at § (c)(3)(A).

sections (i)-(vi), the written communication would need to contain the identification of the copyrighted work (in our example, "Let's Go Crazy" as performed by Prince) and the material allegedly infringing that work (e.g., Stephanie Lenz's video), the location of the work (e.g., the YouTube URL where Lenz posted the video), and information affirming that Universal is acting in good faith on behalf of a copyright it owns.<sup>39</sup> In order to maintain its safe harbor status, once YouTube receives this notification from Universal, YouTube is required to "respond expeditiously to remove, or disable access to, the material that is claimed to be infringing."<sup>40</sup> Should YouTube fail to comply with this request, Universal can also look to DMCA section 512(h) for protection, which governs the process by which Universal can request a subpoena to YouTube to identify the alleged infringer.<sup>41</sup>

### B. Viacom v. YouTube

Though on its face, DMCA section 512 appears to be a well-intentioned effort by Congress to balance the interests of copyright owners, user-generated content creators, and OSPs, many critics, including influential media and entertainment corporations, argue that the Act's fatal flaw lies in its emphasis on the copyright owner having to police his content for infringement.<sup>42</sup> A prominent, recent claim that best addresses this criticism is the current case of *Viacom International, Inc. v. YouTube, Inc.*

On March 13, 2007, Viacom, a multi-billion dollar global media enterprise, filed a copyright infringement suit against YouTube, one of the fastest growing Internet companies.<sup>43</sup> Alleging that YouTube has "appropriate[ed] the value of creative content on a massive scale for YouTube's benefit without payment or license," Viacom has identified over 150,000 unauthorized clips of its copyrighted material on YouTube that had been viewed a total of over 1.5 billion times.<sup>44</sup> Additionally, Viacom argues that "YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site" because by having such content available, YouTube directly profits, "while leaving

<sup>39</sup> *Id.* at § (c)(3)(A)(i)-(vi).

<sup>40</sup> *Id.* at § (c)(1)(C).

<sup>41</sup> 17 U.S.C. § 512(h) (1998).

<sup>42</sup> Complaint, *supra* note 28, at 3-4; *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 709 (2007) ("The DMCA notification procedures place the burden of policing copyright infringement-identifying the potentially infringing material and adequately documenting infringement-squarely on the owners of the copyright.").

<sup>43</sup> In November 2008, YouTube had a market share of around 45%. Tom Steinert-Threlkeld, *ZDNet Undercover: The YouTube File*, ZDNET, Nov. 2008, available at <http://whitepapers.zdnet.com/abstract.aspx?docid=393305>. Its next biggest competitor's share was roughly one-tenth of this. *Id.*

<sup>44</sup> Complaint, *supra* note 28, at 3-4.

copyright owners insufficient means to prevent it."<sup>45</sup>

Though the case is currently pending in the U.S. District Court for the Southern District of New York,<sup>46</sup> its filing brought to the forefront many of the issues surrounding copyright ownership and user-generated content. One primary issue the case raises is based on section 512(c)(1)(A)(iii) of the DMCA, which states that once an OSP has obtained "such knowledge or awareness [that infringing content is available on its site, the OSP must] act[] expeditiously to remove, or disable access to, the material."<sup>47</sup> How much "knowledge" must an OSP receive about the allegedly infringing content before it is required to "act expeditiously"?

For example, assume Viacom sends YouTube proper notice under section 512(c) that episode 382 of the popular television show *The Colbert Report* is available on YouTube and requests that it be removed. Viacom would likely argue that providing the name of the television show (*The Colbert Report*) and the specific episode number (382) is enough "knowledge" to meet this requirement, and that YouTube should therefore be responsible for removing all content that incorporates *The Colbert Report* episode 382 from every user who uploaded it. In contrast, YouTube would likely argue that such information is too broad, and instead maintain that if Viacom wants the episode removed, Viacom should be responsible for notifying YouTube of each instance of copyright infringement pertaining to that specific episode. This example highlights the current debate over whether notice by the copyright owner covers every instance of the infringing content or only one specific instance of that content as uploaded by one specific user. As alleged in Viacom's complaint, it is simply not possible for "copyright owners to monitor YouTube on a daily or hourly basis to detect infringing videos and send notices to YouTube demanding that it 'take down' the infringing works."<sup>48</sup> According to Phillippe P. Dauman, current President and CEO of Viacom, "[e]very day we have to scour the entirety of what's available on YouTube [to] look for our stuff . . . It is very difficult for us and places an enormous burden on us."<sup>49</sup> As for the creators of the content, many of them are not even aware of the infringement until it is brought to their attention. It is quite possible that when Stephanie Lenz up-

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<sup>45</sup> *Id.*

<sup>46</sup> As of December 21, 2008, the case has yet to reach a final decision. However, Judge Louis Stanton has ruled on several procedural issues, including whether certain materials can be introduced into evidence. See Opinion and Order no. 96915, *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. July 2, 2008) (No 07 Civ. 2103) (holding that Google must turn over to Viacom its records of which users watched which videos on YouTube).

<sup>47</sup> 17 U.S.C. § 512(c)(1)(A)(iii) (1998).

<sup>48</sup> Complaint, *supra* note 28, para. 6.

<sup>49</sup> *Id.*



loaded her home video to YouTube, the thought that she was committing an illegal act of copyright violation never crossed her mind.

When DMCA section 512 was written, dynamic websites that enabled users to create and submit their own content on a massive, worldwide scale did not yet exist. As such, the law did not expressly provide for websites like YouTube. The aforementioned issues, as highlighted by *Viacom v. YouTube* and Stephanie Lenz's home video controversy, raise some critical questions about section 512. In order to find an effective solution, does the law itself need to change? Or must we look to the courts to interpret the law? Ironically, Viacom and YouTube, two companies embroiled in section 512-related lawsuits, were some of the first to come forward and offer up solutions, discussed at length in the following section of this Recent Development.

## II. COMPARATIVE ANALYSIS OF THE UGC PRINCIPLES AND THE YOUTUBE VIDEO IDENTIFICATION SYSTEM

### A. *User-Generated Content Principles*

On October 18, 2007, several prominent media and Internet companies<sup>50</sup> announced "their joint support for a set of collaborative principles that enable the continued growth and development of user-generated content online and respect the intellectual property of content owners."<sup>51</sup> The Principles for User Generated Content Services ("UGC Principles"), as they are called, aim to serve as guidelines to help ease the growing tension between the creators of user-generated content ("UGC"), whose creations may infringe upon others' copyrights, and the Internet sites where users can display their work.<sup>52</sup> In plain English, the UGC Principles hope to deter situations like Stephanie Lenz's by preventing user-generated content that infringes upon someone else's copyright from being published on a site like YouTube, thus preempting infringement claims.

As alleged in the *Viacom* complaint, when users upload infringing content onto Internet sites that do not police for infringement, the effects upon the original copyright holder are detrimental.<sup>53</sup> Such conduct "depriv[es] writers, composers and

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<sup>50</sup> The full list of organizations involved with the UGC Principles includes CBS, Dailymotion, Disney, Fox Entertainment Group, Microsoft, Myspace, NBC-Universal, Veoh, and Viacom. Press Release, Principles for User Generated Content Services, Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights (Jan. 14, 2008), [http://ugcprinciples.com/press\\_release.html](http://ugcprinciples.com/press_release.html).

<sup>51</sup> *Id.*

<sup>52</sup> *See id.*

<sup>53</sup> *See generally* Complaint, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (S.D.N.Y. Mar. 13, 2007).

performers of the rewards they are owed for effort and innovation" and "reduce[s] the incentives of America's creative industries."<sup>54</sup> However, the companies that have adopted the UGC Principles hope to strike a balance between the two extremes by "collectively find[ing] a path that fosters creativity while respecting the rights of copyright owners."<sup>55</sup>

The companies that have signed onto the UGC Principles ("UGC Services") share four common objectives: "(1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, the (3) accommodation of fair use of copyrighted content on UGC Services and (4) the protection of legitimate interests of user privacy."<sup>56</sup> Through these objectives, the UGC Services' ultimate goal is to implement filtering software that blocks users from uploading copyrighted material without permission.<sup>57</sup> Termed "Identification Technology," UGC Services had planned to have this "highly effective"<sup>58</sup> technology readily available on their respective websites "by the end of 2007."<sup>59</sup> As of early December 2008, however, the filtering technologies are still a work in progress on many of the participating companies' sites.<sup>60</sup>

When a user wants to upload a video to the site, the UGC Principles establish a course for how the filtering techniques will either accept or reject the video.<sup>61</sup> The first step of the process is to have a copyright owner provide three vital pieces of information: the "reference data for content required to establish a match with user-uploaded content, . . . instructions regarding how matches should be treated, and . . . representations made in good faith that it possesses the appropriate rights regarding the content" ("Reference Material").<sup>62</sup> If a user uploads a video that matches the Reference Material of the copyright holder, the UGC Service can use the Identification Technology to block the video, preemptively stopping any infringing content from becoming

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<sup>54</sup> *Id.*

<sup>55</sup> Press Release, Principles for User Generated Content Services, *supra* note 50.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ("UGC Services should fully implement commercially reasonable Identification Technology that is highly effective, in relation to other technologies commercially available at the time of implementation, in achieving the goal of eliminating infringing content.")

<sup>59</sup> User Generated Content, <http://ugcprinciples.com/> (last visited Dec. 21, 2008).

<sup>60</sup> See MySpace FAQ, "What's Your Policy On Copyright Infringement?," available at <http://tinyurl.com/66yok2> (last visited Dec. 21, 2008); Veoh Copyright Policy, <http://www.veoh.com/static/corporate/copyright.html> (last visited Dec. 21, 2008).

<sup>61</sup> See generally User Generated Content Principles, § 3, <http://www.ugcprinciples.com> (last visited Dec. 21, 2008).

<sup>62</sup> *Id.* ("If a Copyright Owner does not include in the Reference Material instructions regarding how matches should be treated, the UGC Service should block content that matches the reference data.")

available on the site. Should the copyright holder specify that he does not want his content blocked, he can specify alternatives to be implemented, including allowing the content to be uploaded or licensed out, "in which case the UGC Service may follow those instructions or block the content, in its discretion."<sup>63</sup>

With such extensive filtering techniques in place, one can assume that users may try to post infringing content despite such limitations, knowing that the content may or may not be blocked by the site. The UGC Principles attempt to address this scenario by requiring that UGC Services inform users that "they may not upload infringing content and that, by uploading content, they affirm that such uploading complies with the UGC Service's terms of use," which forbid infringing uploads.<sup>64</sup> However, this requirement is not markedly different from the pre-UGC Principles Terms of Service agreements that users must agree to before becoming members of websites like MySpace.<sup>65</sup> Like the UGC Principles, the Terms of Service require the user to assert that the content he uploads is indeed his own (or is allowed under a fair use defense) and does not violate any applicable law.<sup>66</sup>

Should a copyright owner find infringing work on a UGC Service's site, he can avail himself of the protections of section 512(c).<sup>67</sup> After receiving a notice of infringement and deciding to remove the content, the UGC Service should "do so expeditiously, . . . [and] take reasonable steps to notify the person who uploaded the content," and, should the original uploader provide a counter-notification, inform the copyright owner of such a notification, and "replace the content if authorized by applicable law or agreement with the Copyright Owner."<sup>68</sup> The UGC Principles also require "reasonable efforts" to implement a "repeat infringer termination policy," which would effectively ban a person who continually tries to upload infringing material to the site.<sup>69</sup>

The crux of the UGC Principles lies in the provision that essentially creates immunity from lawsuits brought by the Copyright Owner against the UGC Service should any infringing content slip through the cracks of the filtering technology. Section 14 states:

<sup>63</sup> *Id.* at § 3(c).

<sup>64</sup> Press Release, Principles for User Generated Content Services, *supra* note 50.

<sup>65</sup> See MySpace Terms & Conditions, § 6.3, (Feb. 28, 2008), <http://www.myspace.com/index.cfm?fuseaction=misc.terms> ("You represent and warrant that: (i) you own the Content posted by you on or through the MySpace Services or otherwise have the right to grant the license set forth in this section . . . , and (ii) the posting of your Content on or through the MySpace Services does not violate the . . . copyrights . . . of any person . . .").

<sup>66</sup> *Id.*

<sup>67</sup> Press Release, Principles for User Generated Content Services, *supra* note 50 at § 6.

<sup>68</sup> *Id.* at §§ 8-9.

<sup>69</sup> User Generated Content Principles § 11, <http://www.ugcprinciples.com> (last visited Dec. 21, 2008) (suggesting that one method that may be useful to prevent repeat infringers is "blocking re-use of verified email addresses").

If a UGC Service adheres to all of these Principles in good faith, the Copyright Owner should not assert a claim of copyright infringement against such UGC Service with respect to infringing user-uploaded content that might remain on the UGC Service despite such adherence to these Principles.<sup>70</sup>

Coupled with the safe harbor provisions of the DMCA, section 14 of the UGC Principles, if implemented, could help bolster a defense to the multitude of lawsuits in which Microsoft, Disney, Viacom, and other signatories to the pact are presently engaged. Should these major media and Internet companies follow the rules that they worked together to create, they could potentially save a vast amount of time and money.

### B. *YouTube Video Identification*

One major company notably absent from the signatories of the UGC Principles was Google.<sup>71</sup> The exact reason for Google's absence is unknown, but despite that it has been involved in an ongoing legal battle with Viacom, one of the signatories to the UGC Principles, YouTube maintains that it has been working on its own "content identification tools."<sup>72</sup> Coincidentally (or maybe not), the unveiling of this new identification technology occurred just days before the UGC Principles went public.<sup>73</sup>

On October 15, 2007, three days before the UGC Principles announcement, Google-owned YouTube revealed its "YouTube Video Identification" technology to a public audience via a post on The Official Google Blog website.<sup>74</sup> The technology is touted as "the next step in a long list of content policies and tools that we have provided copyright owners so that they can more easily identify their content and manage how it is made available on YouTube."<sup>75</sup> Perhaps implying a subtle jab at Viacom, the announcement states that Video Identification goes above and beyond YouTube's legal responsibilities and "will help copyright holders identify their works on YouTube, and choose what they want done with their videos: whether to block, promote, or even – if a copyright holder chooses to license their content to appear on the site – monetize their videos."<sup>76</sup> After some idealistic language about

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<sup>70</sup> *Id.* at § 14.

<sup>71</sup> Posting of Frank Smith to Contentinople, *Internet, Media Companies Announce UGC Principles*, (Oct. 18, 2007, 18:15 EST), [http://www.contentinople.com/author.asp?section\\_id=431&doc\\_id=136714](http://www.contentinople.com/author.asp?section_id=431&doc_id=136714).

<sup>72</sup> See King, *supra* note 11.

<sup>73</sup> Smith, *supra* note 71.

<sup>74</sup> King, *supra* note 11.

<sup>75</sup> *Id.* Other "policies and tools" provided for copyright owners include a "strict repeat-infringer policy" that terminates the accounts of users who repeatedly infringe copyright after receiving DMCA notices, a ten-minute length requirement for all videos posted to YouTube, and "copyright tips for users in plain English." *Id.*

<sup>76</sup> *Id.*

balancing creativity, promoting fair use, and providing a faultless user experience while simultaneously helping rights owners protect their content from infringers, David King, product manager of YouTube, asks the audience to “[s]tay tuned . . . and for more information, check out our Video Identification page,” providing a hyperlink to the site.<sup>77</sup>

Upon a visit to the Video Identification page,<sup>78</sup> one would expect (or at least hope for) a detailed explanation of how this magical copyright-protection technology will protect owners from ruthless infringers. However, the page only contains principles-based language, emphasizing “choice” for the copyright owner and a “great user experience” for those who want to use the site to “express themselves.”<sup>79</sup> In addition, YouTube adds several veiled disclaimers, maintaining that “[n]o matter how accurate the tools get, it is important to remember that no technology can tell legal from infringing material without the cooperation of the content owners themselves,” and asks interested participants for their patience as the program continues to be developed.<sup>80</sup>

Development of the Video Identification technology can be viewed as both helpful and harmful in YouTube’s ongoing battle with Viacom. Going public with the technology *now*, as opposed to in the past, may bolster Viacom’s argument that YouTube previously was not doing all it could to prevent and fight piracy and instead was leaving the infringing content available on its site in order to make a profit.<sup>81</sup> As a counterargument, one school of thought maintains that the DMCA does not require sites like YouTube to even create a video identification system in the first place, and that YouTube, by doing so, is going above and beyond what it needs to do to prevent infringement under the current law.<sup>82</sup> Yet, should a copyright-infringing video fall through the cracks, Viacom would be able to use this oversight as evidence of the ineffectiveness of YouTube’s system and argue that YouTube should take responsibility.<sup>83</sup> Since the case has yet to be decided, and both Viacom and YouTube’s systems are not one hundred percent finalized<sup>84</sup>, only time will tell how the battle will play out.

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<sup>77</sup> *Id.*

<sup>78</sup> YouTube Video Identification Beta, [http://www.youtube.com/t/video\\_id\\_about](http://www.youtube.com/t/video_id_about) (last visited Dec. 21, 2008).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Juan Carlos Perez, *Google Testing YouTube Antipiracy System*, PC WORLD, Oct. 16, 2007, <http://www.pcworld.com/article/id,138493-c,google/article.html>.

<sup>82</sup> *Id.*; see *IO Group, Inc. v. Veoh Networks, Inc.*, 2008 U.S. Dist. LEXIS 65915 (N.D. Cal. Aug. 27, 2008) (ruling that Veoh was not liable for copyright violations on its site because it was in compliance with the safe harbor provisions of the DMCA).

<sup>83</sup> Perez, *supra* note 81.

<sup>84</sup> NBC Chief Counsel Rick Cotton has gone on record stating that “YouTube’s filters are ‘improving month by month’ and now catch some 75-80 percent of all illegal uploads.” Posting of Janko Roettgers to NewTeeVee, *YouTube Filters 75-80 Percent Accurate: NBCU*

Despite the vague terms and inherent notion of competition between the two companies fueled by the pending lawsuit, YouTube's Video Identification technology and the UGC Principles (of which Viacom is a part), appear quite similar. Most obvious is the notion that, given the vast amount of both infringing and non-infringing material currently available on the Internet, developing a successful filtering technology will take a significant amount of time and require a substantial amount of work. Both the UGC Principles and the Video Identification system are frontloaded, requiring the copyright owner himself to supply each platform with the works that he owns and wants to be filtered. Basically, "movie and TV studios will have to provide decades of copyright material if they don't want it to appear on YouTube[,] or [they will have to] spend even more time scanning the site for violations."<sup>85</sup>

After the material is provided, both the UGC Principles and the Video Identification technology will upload the material and create a "digital fingerprint" database.<sup>86</sup> When someone other than the copyright owner tries to upload a video that matches a file from the database, the system would recognize it and "remove it within a minute or so."<sup>87</sup> Though this database may prove in the future to be an essential step in the deterrence of uploading infringing content, building the database from the ground up will require a substantial amount of work from the copyright owners themselves.<sup>88</sup> Without proven results of the database's effectiveness, some may be wary to put forth such time and effort.

Another similarity between the UGC Principles and the Video Identification technology is that although both repeatedly emphasize the desire to balance the enforcement of the original copyright holder's rights with the fair use of the copyrighted content by others, neither platform explicitly defines "fair use." Shortly after the Video Identification System and the UGC Principles were unveiled, the EFF came forward with its set of "Fair Use Principles

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*Exec.*, <http://newteevee.com/2008/11/06/youtube-filters-75-80-percent-accurate-nbcu-exec> (Nov. 6, 2007, 15:15 PST).

<sup>85</sup> Michael Liedtke, *YouTube Unveils Anti-Piracy Protection*, ASSOCIATED PRESS, Oct. 15, 2007, available at <http://www.law.com/jsp/article.jsp?id=1192525404635>.

<sup>86</sup> *For YouTube, a System to Halt Copyright-Infringing Videos*, N.Y. TIMES, July 28, 2007, <http://www.nytimes.com/2007/07/28/business/28google.html>.

<sup>87</sup> *Id.*

<sup>88</sup> Both the YouTube Video Identification and UGC Principles have enlisted the help of third party companies to build such databases and screen for infringement. Several supporters of the UGC Principles use content management service Audible Magic. See Press Release, Audible Magic, MySpace Implements Video Filtering System to Block Unauthorized Use of Copyrighted Content (Feb. 12, 2007), <http://www.audiblemagic.com/news/press-releases/pr-2007-02-12.asp>. YouTube also uses Audible Magic for its audio-filtering technology, but also says it is using "home-grown technology that watches patterns in images[] to spot matches of copyrighted video as well." Steinert-Threlkeld, *supra* note 43.

for User Generated Video Content.”<sup>89</sup> Before evaluating whether the EFF’s theories are feasible, it is helpful to have an overview of the fair use doctrine and its recent court appearances as a defense to copyright infringement.

### III. WHERE DOES “FAIR USE” FIT IN?

Fair use is a doctrine of United States copyright law that permits unauthorized uses of copyrighted materials in certain situations, including commentary, criticism, news reporting, and parody.<sup>90</sup> Evolving from case law<sup>91</sup> before eventually being implemented via statute, the doctrine purports to “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>92</sup>

When evaluating a “fair use” claim under the Copyright Act, courts must consider four factors: “(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work; and (4) the potential market harm of copying the copyrighted work.”<sup>93</sup>

#### A. *The Fair Use Doctrine in Action*

The fair use doctrine has often been invoked as a defense to copyright infringement. One recent example involves Michelle Malkin, creator of “a conservative Internet broadcast network” called Hot Air.<sup>94</sup> During an episode of “Vent with Michelle Malkin,” a daily video podcast that appears on the network, Malkin criticized Akon, a hip-hop artist on Universal Music Group (“UMG”), for being a “misogynist” with “vulgar and degrading” antics.<sup>95</sup> Malkin supported her video commentary by showing clips of Akon’s music videos and recent concert footage of the hip hop star dancing provocatively with a teenage girl in a Trinidadian nightclub.<sup>96</sup>

<sup>89</sup> Press Release, Electronic Frontier Foundation, Fair Use Advocates Issue Principles for Protecting Online Videos (Oct. 31, 2007), <http://www.eff.org/press/archives/2007/10/31>.

<sup>90</sup> 17 U.S.C. § 107 (2000).

<sup>91</sup> See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1435 (6th Cir. 1992) (“Fair use is the only exception to a copyright holder’s exclusive rights in his work.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (explaining that a copyright owner does not possess exclusive rights to usage and that any individual can reproduce a copyrighted work for a “fair use”).

<sup>92</sup> *Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

<sup>93</sup> 17 U.S.C. § 107 (2000).

<sup>94</sup> Press Release, Electronic Frontier Foundation, Malkin Fights Back Against Copyright Law Misuse by Universal Music Group (May 9, 2007), <http://www.eff.org/press/releases/2007/05#005245>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

A few days later, after Malkin publicized the video on a nationally syndicated radio show, UMG submitted a DMCA-mandated takedown notice to YouTube, the host of Malkin's video podcast. This notice forces YouTube to either take down the video or face threat of a lawsuit, and also requires YouTube to inform the original uploader of the content (in this case, Malkin) of its removal.<sup>97</sup> Instead of allowing the take-down to happen, as it does all too often,<sup>98</sup> Malkin went to the EFF for support.<sup>99</sup> Together, they filed a counter-notification with YouTube, claiming that Malkin was "legally entitled to distribute her video" under the fair use doctrine of the Copyright Act.<sup>100</sup> As stated in the provisions of the DMCA, after receiving Malkin's counter-notice, YouTube could have reposted the video ten days later and still qualified for the statute's safe harbor protections.<sup>101</sup> Shortly thereafter, YouTube restored the video to its website.<sup>102</sup>

According to EFF Senior Staff Attorney Kurt Opsahl, "UMG's misuse of federal law made the video unavailable on YouTube for a full week, denying the Hot Air podcast access to YouTube's extensive audience during a time when the controversy about Akon's behavior was all over the news."<sup>103</sup> Though eventually Malkin prevailed (Universal agreed to retreat),<sup>104</sup> the controversy raises the larger issue of how a giant corporation such as UMG can use the DMCA to intimidate those who rightfully can exploit such copyright under the very same law.

#### B. *Potential Problems of Fair Use Videos Under the UGC Principles and YouTube Video Identification Technology*

Though the above example proves that, if used correctly, the DMCA can effectively balance the competing interests of a copyright owner and of a creator, the actual videos themselves would likely hit a wall when run through the automated systems proposed by the UGC Principles and the Video Identification technology.<sup>105</sup>

As discussed *supra* in Part II, both the UGC Principles and the

<sup>97</sup> *Id.*

<sup>98</sup> See generally FAQ about Chilling Effects Clearinghouse, <http://www.chillingeffects.org/faq.cgi> (last visited Dec. 21, 2008).

<sup>99</sup> Press Release, Electronic Frontier Foundation (May 9, 2007), *supra* note 89.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; see Digital Millennium Copyright Act, 17 U.S.C. § 512 (2000).

<sup>102</sup> The video can currently be viewed at <http://www.youtube.com/watch?v=N1KJHFWlhQ> (last visited Dec. 21, 2008).

<sup>103</sup> Press Release, Electronic Frontier Foundation (May 9, 2007), *supra* note 89.

<sup>104</sup> Press Release, Electronic Frontier Foundation, Universal Music Group Backs Off Claims to Michelle Malkin Video (May 14, 2007), <http://www.eff.org/deeplinks/2007/05/universal-music-group-backs-claims-michelle-malkin-video>.

<sup>105</sup> See Liedtke, *supra* note 85; User Generated Content Principles, *supra* note 9.



Video Identification technology plan to utilize an elaborate “electronic fingerprint” to automatically match uploaded content with a database of content previously supplied by the copyright owner. Using Michelle Malkin’s video podcast as a hypothetical example, assuming both monitoring systems were successfully implemented, the following scenario would likely occur: (1) Malkin uploads her video to Myspace, which employs the UGC Principles monitoring system, and YouTube, which uses the Video Identification technology; and (2) As the video contains a sizable chunk of an Akon music video, the “electronic fingerprint” technology of both systems would detect a match between a portion of Malkin’s video and the Universal-supplied Akon copyrights stored within the databases.<sup>106</sup> Malkin’s video would either be rejected from being successfully uploaded (UGC Principles) or uploaded and removed shortly thereafter (Video Identification).

Historically, Congress has noted that “since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”<sup>107</sup> The fatal flaw in this reasoning lies in the fact that a computer program essentially holds all of the power in determining whether a video is acceptable, whereas the determination of fair use is one that is best left up to the courts. The four criteria laid out in 17 U.S.C. § 107 provide a solid platform for courts to decide whether a use is fair or infringing, but ultimately, the criteria are merely a balancing test, requiring not code and complex programming, but rather human logic and reason to reach a solution.

### C. EFF’s Fair Use Principles for User-Generated Content

To balance the controversy between man and machine, the EFF proffered a set of “Fair Use Principles for User Generated Video Content” (“EFF Principles”) shortly after the UGC Principles and Video Identification technologies were unveiled.<sup>108</sup> The EFF Principles aim to help “content owners and service providers”

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<sup>106</sup> YouTube and the companies following the UGC Principles have enlisted Audible Magic for help with content identification. Audible Magic - Content Identification Services Customers, <http://www.audiblemagic.com/clients-partners/contentsvcs.asp> (last visited Dec. 21, 2008). Among its many features, “Audible Magic provides content identification services that identify copyrighted music on user videos uploaded to YouTube,” and “recognition and management services to VideoEgg [a UGC Principles signatory] for audio within its video files.” *Id.*

<sup>107</sup> H.R. 1476, 94th Cong. (1976).

<sup>108</sup> Fair Use Principles for User Generated Video Content, <http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen> (last visited Dec. 21, 2008) [hereinafter EFF Fair Use Principles]. These Principles were endorsed by: the Electronic Frontier Foundation; the Center for Social Media, School of Communications, American University; the Program on Information Justice and Intellectual Property, Washington College of Law, American University; Public Knowledge; the Berkman Center for Internet and Society at Harvard Law School; and the ACLU of Northern California. *Id.*

with their "mutual intention to protect and preserve fair use in the UGC context, even as they move forward with efforts to address copyright concerns."<sup>109</sup> To do so, the EFF proposed six principles "meant to provide concrete steps that [content owners and service providers] can and should take to minimize the unnecessary, collateral damage to fair use as they move forward with those efforts."<sup>110</sup> This Section will first examine the principles and then discuss their shortcomings.

The first principle on the agenda is "A Wide Berth for Transformative, Creative Uses."<sup>111</sup> According to the EFF, the fair use doctrine provides many exceptions to a copyright owner's exclusive right.<sup>112</sup> However, because "the precise contours of the fair use doctrine can be difficult for non-lawyers to discern, creators, service providers and copyright owners alike will benefit from a more easily understood and objectively ascertainable standard."<sup>113</sup> In the absence of a uniform standard, the EFF recommends that content owners avoid issuing takedown notices altogether (whether under the DMCA or informally) for any use of their content that "constitute[s] fair uses *or* that are noncommercial, creative, and transformative in nature."<sup>114</sup> As an example, the EFF cites to Viacom's website, which now includes a disclaimer that "regardless of the law of fair use, we have not generally challenged users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy or transformative use of a limited excerpt for non commercial purposes."<sup>115</sup>

The second principle put forth by the EFF is that "Filters Must Incorporate Protections for Fair Use."<sup>116</sup> As mentioned *supra* in Part III.B, there could be unfair ramifications if filtering technologies were left to their own devices to determine whether user-generated content contained infringing material. The EFF attempts to circumvent this problem by offering up three solutions.<sup>117</sup> Solution A, entitled "Three Strikes Before Blocking," argues against a filtering system that automatically removes or blocks content unless the content has been removed under an undisputed DMCA takedown notice or the content has the following three strikes against it:

- (1) the video track matches the video track of a copyrighted

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> EFF Fair Use Principles, *supra* note 108.

<sup>115</sup> *Id.*; see Viacom, Fair Use and Availability of Viacom Content on Authorized Websites, <http://www.viacom.com/news/Pages/aboutfairuse.aspx> (last visited Dec. 21, 2008).

<sup>116</sup> EFF Fair Use Principles, *supra* note 108.

<sup>117</sup> *Id.*

work submitted by a content owner;

(2) the audio track matches the audio track of that *same* copyrighted work; and

(3) nearly the entirety (e.g., 90% or more) of the challenged content is comprised of a single copyrighted work (i.e., a “ratio test”).

If filtering technologies are not reliably able to establish these “three strikes,” further human review by the content owner should be required before content is taken down or blocked.<sup>118</sup>

Solution B, “Humans Trump Machines,” advocates for the use of human review. Should the filtering system detect a match, the uploader of the content should be notified immediately and given the opportunity to dispute the conclusions.<sup>119</sup> The burden would then shift to the service provider to notify the “relevant content owner” and may impose a brief “quarantine” period of no more than three business days to allow the content owner a chance to review the material and, if applicable, issue a DMCA takedown notice after a human review of the contested content.<sup>120</sup>

Lastly, Solution C addresses “minimization.”<sup>121</sup> This concept aims to protect users who upload one blocked video from the blanket removal of all of the other videos they have posted.<sup>122</sup> For example, assume that Stephanie Lenz is an avid YouTube user, posting many original home movies to the site. The concept of minimization would protect Ms. Lenz from having her YouTube account cancelled simply because she posted one video, the “Let’s Go Crazy’ Baby Video,” that resulted in a copyright dispute. Bolstering the provision in YouTube’s Terms of Use, minimization only allows termination of an account if the user proves to be a repeat infringer.<sup>123</sup>

The third principle, “DMCA Notices Required for Removals” commends the efforts of Title II of the DMCA, described in Part I, for protecting creators like Michelle Malkin, whose works were “improperly targeted for removal.”<sup>124</sup> The EFF suggests that before an OSP acts on a takedown notice from the original copyright owner, the OSP itself should ensure that the copyright owner is

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> EFF Fair Use Principles, *supra* note 108. (“In applying automatic filtering procedures, service providers should take steps to minimize the impact on other expressive activities related to the blocked content”).

<sup>123</sup> *Id.*; see also YouTube Terms of Use, <http://www.youtube.com/t/terms> (“YouTube will terminate a User’s access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.”) (last visited Dec. 21, 2008). However, the Agreement fails to define “repeat infringer.” See YouTube Terms of Use, <http://www.youtube.com/t/terms> (last visited Dec. 21, 2008).

<sup>124</sup> *Id.*

compliant with DMCA principles and not just making a baseless accusation.<sup>125</sup> This injects a layer of responsibility on behalf of the OSP, whereas under the previous DMCA process, the OSP merely acted as an intermediary, providing contact information for the copyright owner to pass along the takedown notice to the user who posted the potentially infringing content.<sup>126</sup>

EFF's fourth and fifth principles provide guidelines for the process of notifying the alleged infringer that a DMCA takedown notice has been issued and for a system of informally adjudicating a claim. Whereas under the DMCA, the OSP was only required to provide contact information in response to a request or subpoena by the copyright owner, the fourth principle suggests that the OSP should notify the user first-hand of the challenge to the content he has uploaded. According to the EFF, such notification should include "(1) an entire copy of the takedown notice, (2) information concerning the user's right to issue a DMCA counter-notice and the provider's procedures for receiving such notices, and (3) information about how to contact the content owner directly in order to request a reconsideration of the takedown notice."<sup>127</sup>

Additionally, the EFF advocates for each OSP to create a "dolphin hotline" to act as an escape mechanism for when the electronic system makes a mistake, analogous to when a dolphin is caught in a tuna net.<sup>128</sup> This mechanism would allow users who feel their content was wrongly denied to invoke an informal method to request reconsideration of the content owner's decision, such as a specific website or email address designated solely for such requests.<sup>129</sup> A response to the claim should ideally be issued within three business days, and the claim should be retracted if one can show the notice was issued erroneously.<sup>130</sup> If enacted properly, these methods may prove extremely helpful in reducing the amount of litigation related to potentially infringing user-generated content. Lastly, the sixth principle urges service providers to follow the formal process outlined in the DMCA and provide its users with a "streamlined mechanism to reinstate content . . . when a takedown notice has been retracted by the content owner."<sup>131</sup>

Overall, the EFF Fair Use Principles provide an alternative set

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* EFF suggests that this information be sent not only to the user via private communication, but also should be publicly posted on the page where the allegedly infringing content appeared. *Id.*

<sup>128</sup> EFF Fair Use Principles, *supra* note 108.

<sup>129</sup> *Id.* The EFF cites Viacom as an example. *Id.* Viacom has set up an email address at [counternotices@viacom.com](mailto:counternotices@viacom.com) for users who want to challenge Viacom's takedown notices.

*Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

of guidelines for regulating user-generated content and practical guidelines for balancing the interests of copyright owners, OSPs, and creators of user-generated content. If implemented and utilized correctly, a combination of the DMCA, UGC Principles/Video Identification technology, and the EFF's Fair Use Principles would allow, or at least act as a launching pad, for a stable system of user-generated content where creators, copyright owners, and OSPs can exist in harmony.

#### IV. WHERE DO WE GO FROM HERE?

The UGC Principles, YouTube technology, and EFF Principles all address the current issue of how to properly regulate user-generated content online. Thinking beyond the current DMCA guidelines, each proposal attempts to balance the interests of the copyright owner, OSP, and content creator in a way that expands protection for all three. Despite their good intentions, all three sets of principles have not been welcomed with open arms by everyone. Rather, they have been met with valid criticisms. As discussed above, examples of such criticisms include the amount of work involved in creating "electronic fingerprints" of all copyrighted content that owners want regulated,<sup>132</sup> as well as the principles' repeated mentions of the concept of "fair use" without an explicit definition as to what fair use actually means.<sup>133</sup>

A valid issue raised by the EFF Principles is exactly how much copyright-infringing content a user's creation need infringe upon before the video can rightfully be removed. The "ratio test" advocated by the EFF suggests that user-generated content should only be taken down if it comprises "nearly the entirety (e.g., 90% or more) of the challenged content."<sup>134</sup> In contrast, the UGC Principles and YouTube technology only require that the content follow the principles of fair use as defined by section 107 of the Copyright Act, without giving reference to a specific percentage. Under section 107, one of the factors used to determine fair use is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>135</sup> Though the Copyright Act uses this factor as one of four in a balancing test to determine fair use, one could assume that incorporating 90% of someone else's copyright into a user's own content would seldom provide that user with a fair use defense. As the EFF's standard is too broad and the UGC Principles and YouTube technology's standard is too vague, we must look either to the courts to reinterpret the law or for the

<sup>132</sup> See *For YouTube, a System to Halt Copyright-Infringing Videos*, *supra* note 86.

<sup>133</sup> See *EFF Fair Use Principles*, *supra* note 108.

<sup>134</sup> *Id.*

<sup>135</sup> 17 U.S.C. § 107(3).

law to create a clear-cut set of guidelines for how to proceed.

Additionally, critics can point to the potential lack of uniformity across OSPs. What if each service provider has a different monitoring system? What if some service providers elect not to follow any user-generated content-related principles whatsoever, but instead choose to shield themselves behind the protections of the DMCA? The result would likely be that videos allowed on one service may be blocked by another, perhaps creating a "race to the bottom" phenomenon. Often encountered in governmental and regulatory issues, this phenomenon "implies that states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation . . . so as to make itself more attractive to outside financial investors or unattractive to unwanted outsiders."<sup>136</sup> Applying this situation to the user-generated content context, each service provider would try to outdo the others by being the most liberal in its content restrictions, thus attracting the most users.

#### CONCLUSION

Publicized by the rampant success of YouTube, a small Internet startup that transformed almost overnight into an online phenomenon, the war over how to properly regulate user-generated content has been set into motion. The Digital Millennium Copyright Act helped serve as a potential buffer for OSPs against liability for hosting copyright infringing user-generated content, but the recent billion-dollar *Viacom v. YouTube* lawsuit serves to highlight the inherent limitations of the law standing by itself. Microsoft, et al.'s Principles for User Generated Content and YouTube's Video Identification technology attempt to bolster the DMCA by shouldering some of the burdens copyright owners face in protecting their content. By stepping up to the plate and offering to act as the first line of defense between an infringing user and a copyright owner, the OSPs are creating a mechanism to facilitate the enforcement of copyright law. Despite the inherent flaws in each system and the competing interests of the copyright owners and the EFF's Fair Use Principles, the standards and practices set forth by the companies who have thrown their hats into the user-generated content ring provide a stable platform for the law to develop and to adapt to the technology it tries so hard to regulate.

Brette G. Meyers\*

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<sup>136</sup> SANFORD F. SCHRAM, *AFTER WELFARE: THE CULTURE OF POSTINDUSTRIAL SOCIAL POLICY* 91 (NYU Press 2000).

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