

# YOUTUBE VS. THE MUSIC INDUSTRY: ARE ONLINE SERVICE PROVIDERS DOING ENOUGH TO PREVENT PIRACY?

Karl Borgsmiller

## I. INTRODUCTION

In 2015, for the first time in music history, digital streaming revenue overtook traditional album sales.<sup>1</sup> The ever-growing expansion of music-streaming services and products creates many issues regarding copyright infringement and the illegal use of an individual's work used for profit. There is a growing argument that while service providers, such as YouTube, implement technology and spend resources to identify and take down these unauthorized users, the current law doesn't compel them to actively seek out and eliminate infringing material. This inaction results in losses for users uploading original content due to less revenue from streaming and advertisement because their content is replicated by a user who has no legal claim to the material.

An online petition, drafted by huge names in the industry such as Taylor Swift and Paul McCartney, circulated on several different news outlets disapproving of the way YouTube handles copyright infringement on its site.<sup>2</sup> The petition claims YouTube doesn't pay enough to musicians and music labels, and the media giant stomps on musician's right to upload original content without having others steal and benefit from their hard work. Irving Azoff, a prominent producer in the industry, also penned an op-ed criticizing online-service providers and claimed YouTube refuses to regulate copyrighted material on its site because it is easier and more profitable to YouTube.<sup>3</sup> Today, a significant number of those in the music industry have a growing animosity toward online service providers such as YouTube, as they believe their original material is not safe from copyright infringement. More importantly, they are losing profits because they are being exploited not only from those copyright their material but the service providers that are supposed to be protecting them. Whether the artists are just starting out or

---

<sup>1</sup> *IFPI Global Music Report 2016*, IFPI (Apr. 12, 2016), <https://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016>.

<sup>2</sup> Matthew Ingram, *YouTube Pays Billions, But the Music Industry Says It's Not Enough*, FORTUNE (July 13, 2016), <http://fortune.com/2016/07/13/youtube-music-billions/>.

<sup>3</sup> Irving Azoff, *Dear YouTube: An Open Letter from Irving Azoff*, RECODE (May 9, 2016), <https://www.recode.net/2016/5/9/11609494/irving-azoff-youtube-artists-streaming-music>.

have years of experience in the industry, people are speaking out against the current system and want change.

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA) to create a set of rules and procedures online service providers must meet in order to prevent liability from extending to them. 17 U.S.C. § 512(c), dubbed the “safe-harbor provision,” sets out what actions an online service provider must take in order to be free from liability. Cases such as *UMG Recordings, Inc. v. Veoh Networks, Inc.* and *Viacom International, Inc. v. YouTube, Inc.* interpreted the definitions of “actual knowledge” and “apparent knowledge” as used in the statute to determine liability. A common criticism of these interpretations is the DMCA allows online service providers to use “willful blindness” in order to justify their ignorance in failing to identify an unauthorized user infringing on copyrighted material. But, is this really true?

This Note argues the DMCA does not need to be reformed; instead, legitimate forms of streaming through new innovation and technology should be used to better protect copyright owners against infringement. Part II discusses the court’s interpretations of the DMCA safe harbor provisions in landmark cases since the statute’s inception. Part III explores YouTube’s Content-ID system and how exactly it has helped prevent copyright infringement and increase revenue for authorized users. Part IV is a rebuttal of the music industry’s and various organization’s criticisms of Content-ID and the DMCA. Part V is a proposal arguing the DMCA should not be reformed through legislative or judicial action, and instead new technology and innovation will advance streaming making it better for everyone, while also preventing online piracy.

## II. THE PROVISIONS OF §512(C) OF THE DMCA AND JUDICIAL INTERPRETATION

Section 512(c) of the DMCA establishes limited liability for online copyright infringement for service providers.<sup>4</sup> The subsection has three separate parts, the first of which is the general rules for liability exemption.<sup>5</sup> The Act states a service provider will not be liable for copyright infringement if it does not have “actual knowledge” that the material is infringing.<sup>6</sup> In the absence of actual knowledge, if the service provider is not aware of facts or circumstances from which infringing activity is apparent, or after obtaining such knowledge or awareness the service provider acts expeditiously to remove or disable access to the material, it will not be liable.<sup>7</sup> Additionally,

---

<sup>4</sup> 17 U.S.C. § 512 (West 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

the service provider will not be held liable for infringing material if it does not receive a financial benefit directly attributable to the infringing activity, so long as the provider has the right and ability to control such activity.<sup>8</sup>

The second part of Section 512(c) states the service provider must have a designated agent to receive notifications of claimed infringement.<sup>9</sup> The service provider must provide basic information about the designated agent, including their name, address, phone number and email address, and this information must be on its website in a location accessible to the public.<sup>10</sup>

The third part of Section 512(c) details the elements of a notification of alleged infringement.<sup>11</sup> A notification of infringement must “substantially” include the following: a written communication to the service provider’s designated agent that includes the signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed, identification of the copyrighted work claimed to have been infringed and the material that is claimed to be infringing, contact information to permit the service provider to contact the complaining party, a statement that the complaining party has a good faith belief that the use of material in the manner complained of is not authorized by the copyright owner, and a statement that the information in the notification is accurate.<sup>12</sup>

In summary, a service provider will not be liable for transmitting or storing infringing material where the service provider has no actual knowledge or reason to suspect that the material is infringing, does not financially benefit from the infringing activity, and acts expeditiously to remove or disable access to such material upon discovering or being notified that the same is infringing.<sup>13</sup> The service provider must have a designated agent in position to receive notifications of copyrighted material, and the complaining party alleging the infringement must provide a detailed notification to that agent.<sup>14</sup>

By the early 2000’s, major disputes regarding the DMCA safe harbor provisions reached the courts. There have been several landmark cases in federal district courts and the courts of appeals. Based on their rulings, one could say the courts have sided with the online service providers.<sup>15</sup>

---

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

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> J.T. Westermeier, *Recent “Safe Harbor” Rulings in the United States*, FINNEGAN (2011), <https://www.finnegan.com/en/insights/recent-safe-harbor-rulings-in-the-united-states.html?news=3f14a59e-81f8-4aa2-afee-0fc80a4efdd7>.

<sup>14</sup> 17 U.S.C. § 512 (West 2010).

<sup>15</sup> *See generally* *Viacom Int’l v. YouTube*, 676 F.3d 19 (2d Cir. 2012); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Ca. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Ca. 2009); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

Essentially, the courts have held while service providers have a duty to prevent infringing material from appearing on their sites, the burden is not completely on them. A duty also falls on owners of copyrighted material to identify infringement and to notify the service providers so the infringing material can be removed.

#### A. Perfect 10, Inc. v. CCBill LLC

Perfect 10 is the publisher of an adult entertainment magazine and the owner of the website perfect10.com.<sup>16</sup> Consumers pay a membership fee to gain access to the content on the website.<sup>17</sup> Perfect 10 holds registered U.S. copyrights for thousands of images of models for display in its website and magazine as well as several related registered trademark and service marks.<sup>18</sup>

Cavecreek Wholesale Internet Exchange (CWIE) provides webhosting and related Internet connectivity services to the owners of various websites.<sup>19</sup> CWIE charges consumers to provide “ping, power, and pipe” services to their clients, ensuring the server has power and connects the client’s service or website to the Internet via a data center connection.<sup>20</sup> CCBill works in conjunction with CWIE and allows consumers to use credit cards or checks to pay for subscriptions or memberships to e-commerce venues.<sup>21</sup> Perfect 10 alleged CCBill and CWIE were infringing on their copyrights and sent notifications to Thomas Fisher, the Executive Vice-President and designated agent of both CCBill and CWIE, to remove the infringing material.<sup>22</sup>

The court held Perfect 10’s notification of infringement was not “substantial” because the notice only complied with some of the requirements of Section 512(c)(3)(A).<sup>23</sup> Specifically, Perfect 10’s notice failed to identify the infringing material, as it did not include a statement that the complaining party is authorized to act on behalf of the owner of the original material, and did not include a statement that Perfect 10 has a good-faith belief that the material is infringing.<sup>24</sup> The court identified the burden falls “squarely on the owners of the copyright” and declined to shift that burden to the service provider.<sup>25</sup>

Perfect 10 further argued CCBill failed the “red flag” test under Section 512(c)(1)(A)(ii) which states a service provider loses immunity if it fails to

---

<sup>16</sup> Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1108 (9th Cir. 2007).

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1112.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1113.

take action on infringing material that is “apparent.”<sup>26</sup> Perfect 10 alleged providing services to other websites using the material, posting a disclaimer to another website, and password-hacking websites hosted by CWIE are all examples of apparent infringement and CCBill is liable.<sup>27</sup> The court disagreed.<sup>28</sup> The court reasoned for a website to qualify as a “red flag” of infringement, it would need to be apparent that the website instructed or enabled users to infringe another’s copyright.<sup>29</sup> This was not the case here because CCBill did not have knowledge the material was infringing; therefore, it could not have instructed or enabled users on other websites to infringe on Perfect 10’s copyright.<sup>30</sup>

Finally, the court interpreted Section 512(c)(1)(B) of the Act and held a “direct financial benefit” to the service provider must constitute a “draw for subscribers, not just an added benefit.”<sup>31</sup> The court held the allegation that CWIE “hosts websites for a fee” is not sufficient evidence of a “draw,” and this does not qualify as a direct financial benefit.<sup>32</sup> Essentially, the court said Perfect 10 did not produce evidence up to the standard of the safe-harbor provision, and the burden rests on the complaining party’s shoulders.

In *Perfect 10*, the court set a high bar for what can create liability for online service providers. The notice of infringing material must comply with all requirements under the statute, not just some of them. The court also said to pass the red flag test under the Section 512(c) it must be apparent that the service provider instructed another website to infringe on copyrighted material. It is not enough for the service provider to have apparent knowledge that the website exists. Finally, the court determined a financial benefit must be a draw for subscribers and providing free websites does not qualify.

#### B. Io Group, Inc. v. Veoh Networks, Inc.

Io Group (Io) is a multimedia company that produces, markets, and distributes adult entertainment products, including audiovisual works, and holds and owns registered copyrights for its films.<sup>33</sup> Veoh Networks (Veoh) owns a website that enables users to share video content, and, at the time of the lawsuit, Veoh had hundreds of thousands of videos on its website. Io

---

<sup>26</sup> *Id.* at 1114.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.* at 1117.

<sup>32</sup> *Id.* at 1117-18.

<sup>33</sup> *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1136 (N.D. Ca. 2008).

alleged copyright infringement against Veoh when ten of its videos were uploaded to veoh.com.<sup>34</sup>

Io argued Veoh knowingly uploaded the videos to its website because the company reviews and edits user-submitted content before it is allowed to be posted on its site; therefore, Veoh knew it was uploading infringing material.<sup>35</sup> The court disagreed with this assertion because the system in place automatically processes user-submitted content and recasts it in a format that is readily accessible to its users. Veoh does not actively participate or supervise the uploading of files.<sup>36</sup>

Io provided no notice to Veoh that there was infringing material on its site, so there was no actual knowledge on behalf of Veoh, but Io still contended Veoh had apparent knowledge under the “red flag” test in §512(c)(1)(A)(ii).<sup>37</sup> The court required evidence that Veoh “turned a blind eye” toward infringement to constitute apparent knowledge.<sup>38</sup> Io alleged Veoh should have known about the infringed material because the videos were “professionally created,” and one video even contained Io’s trademark.<sup>39</sup> The court disagreed and held although one of the videos contained Io’s trademark, none of the videos upload contained Io’s copyright notices.<sup>40</sup> Moreover, no evidence presented showed Veoh was aware of the origin of the videos, and the fact that they were “professionally created” means nothing considering the video equipment technology that was available to the general public at the time.<sup>41</sup>

Io further argued Veoh should have known about the Child Protection and Obscenity Enforcement Act of 1988, which requires producers of sexually explicit material to label where records are located, and the fact that this wasn’t anywhere in the video suggested it came from an illegitimate source.<sup>42</sup> The court similarly brushed this allegation off saying Io is attempting to shift the burden from itself to the service provider, something the court refused to do in *Perfect 10 v. CCBill*.<sup>43</sup>

Io then contended Veoh had the right and ability to control its system and failed to prevent users from submitting the infringing material.<sup>44</sup> It is “not whether Veoh has the right and ability to control it[s] *system*, but rather,

---

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1138-39.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1148.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1149.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1150.

whether it has the right and ability to control the *infringing activity*.<sup>45</sup> This is the important conclusion that court makes in this case. Veoh does not control what users upload to its site; it can only remove the material when it is notified of infringement after the fact.<sup>46</sup> Io argued Veoh needs to change its upload procedures and vet every video that is uploaded to its site individually, but the court recognized the enormous burden that puts on Veoh, as they would have to vet hundreds of thousands of videos to find potentially infringing material.<sup>47</sup> Veoh would have to expend massive amounts of time and resources to comply with this, yet there is no guarantee that they can catch every possible infringing incident.<sup>48</sup> The court concluded Veoh “has a strong DMCA policy, takes active steps to limit incidents of infringement on its website and works diligently to keep unauthorized works off its website,” and ruled Veoh is entitled to the protections under the safe-harbor provision.<sup>49</sup>

In this case, the court addressed the automatic processes that many online service providers use. Veoh’s system automatically processes the video and recasts it in the format used on its website, and this does not equate to “knowingly” posting infringing material because the provider does not manually do it. Additionally, the court once again declined to rule that Veoh had apparent knowledge. Here, the court required the provider know the origin of the video in order to constitute apparent knowledge. It was not enough that the videos contained a trademark or were “professionally created.”

The main point to get from this case is in order to extend liability to the online service provider, the online service provider must have the right and ability to control the infringing activity and not its own system. Veoh is just a host for others to post their material; it cannot regulate every video that is uploaded to their site because the burden would be too great. In *Perfect 10* and *Io* the court has relied upon the burden placed upon the complaining party, and we will see this continue in the next couple cases.

### C. UMG Recordings, Inc. v. Veoh Networks, Inc.

In this action, UMG Recordings, Inc. (UMG), which controls the copyrights to a “vast library” of sound recordings and musical compositions, brought suit against Veoh for alleged infringing music videos that were on its website.<sup>50</sup> UMG argued Veoh had actual knowledge of the infringing

---

<sup>45</sup> *Id.* at 1151 (emphasis in original).

<sup>46</sup> *Id.* at 1153.

<sup>47</sup> *Id.* at 1153-54.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1155.

<sup>50</sup> UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1100 (C.D. Cal. 2009).

material because it was hosting “music,” a category subject to copyright protection, Veoh “tagged” more than 240,000 videos with the label “music video”, Veoh paid search engines to have a link to its website appear in search results when using certain terms that included UMG-controlled music videos, and the notice of infringement given to Veoh identified artists who made the materials.<sup>51</sup> The court held none of UMG’s arguments showed Veoh had actual knowledge.<sup>52</sup>

First, “music” as a general category is too broad to impute actual knowledge to the service provider.<sup>53</sup> Second, tagging a video as a “music video” and appearing in search results is an automatic process that is not only linked to the alleged infringing material but also to legitimate videos posted by other authorized users.<sup>54</sup> This ties back to the reasoning above, that is, merely hosting videos with music cannot be a basis for actual knowledge.<sup>55</sup> Finally, simply identifying an artist’s name is not enough based on the specificity required under the Act.<sup>56</sup> The complaining party must identify specific material that is being infringed, and the name of the artist is not enough to allow the service provider to locate and remove infringing material.<sup>57</sup>

Next, UMG argued Veoh was aware of facts or circumstances from which infringing activity was apparent under §512(c)(1)(A)(ii).<sup>58</sup> UMG said “general awareness” of infringing material being present on Veoh’s website within the company is enough to establish apparent knowledge; thus the court should hold Veoh liable.<sup>59</sup> UMG cited no case to support this point<sup>60</sup> and seemed to be stretching an already weak argument. The court did not buy it.<sup>61</sup> The “red flag” standard under this subsection is already very high,<sup>62</sup> and, if general knowledge were to adhere to this standard, the DMCA safe harbor provision would not serve its purpose of balancing the interests of providers, owners, and users.<sup>63</sup> UMG also argued Veoh avoided gaining actual knowledge of infringement by waiting to implement its Audible Magic fingerprinting system, a filtering system used to identify infringement on its site.<sup>64</sup> The court held Veoh does not have a duty to implement filtering

---

<sup>51</sup> *Id.* at 1108-10.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1108-09.

<sup>54</sup> *Id.* at 1109.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1110.

<sup>57</sup> *Id.* at 1109-10.

<sup>58</sup> *Id.* at 1110-11.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

<sup>63</sup> *UMG Recordings*, 665 F. Supp. 2d at 1111.

<sup>64</sup> *Id.*

technology, and Veoh took steps to filter its content using “hash” filtering before implementing the Audible Magic fingerprinting system.<sup>65</sup>

Finally, UMG argued Veoh had the “right and ability” to control to infringing material, and should be precluded from protection under the safe-harbor provision.<sup>66</sup> The court entered an extensive analysis of the elements of right and ability to control, concluding that Veoh’s implementation of filtering software, with or without Veoh’s ability to control users access, is not enough to show they don’t deserve protection.<sup>67</sup> “If courts were to find that the availability of superior filtering systems or the ability to search for potentially infringing files establishes—without more—that a service provider has ‘the right and ability to control’ infringement, that would effectively require service providers to adopt specific filtering technology and perform regular searches.”<sup>68</sup> Simply having the ability to remove users’ content is not enough; there needs to be additional actions that could’ve been taken by Veoh to control the infringing material.<sup>69</sup> The DMCA should encourage service providers to engage in some copyright protection measures but not punish them when those measures are not the proper standard according to the complaining party and not consistent with the purpose of the statute.<sup>70</sup>

The court in *UMG* did not agree that Veoh had actual or apparent knowledge. It seems that in each of these cases the complaining party is attempting to establish knowledge through evidence of “general awareness,” something the court is not willing to allow. They need something further, something concrete in order to create liability for the service provider. So far, this has not been proven.

The court also addresses a service provider’s “right and ability” to control infringing material using some type of filtering software. The court realizes if it ruled the filtering system does allow the service provider to control infringing material, it will set a standard that all online service providers must have superior filtering technology, or they are not entitled to protection under the safe harbor provisions. This would create extensive liability for service providers that can’t afford, or don’t have the technology, to implement such a software, and would essentially run them out of business. The court acknowledges while Veoh’s filtering software does provide additional copyright protection measures, this is not required by all service providers.

---

<sup>65</sup> *Id.* at 1111-12.

<sup>66</sup> *Id.* at 1113.

<sup>67</sup> *Id.* at 1113-15.

<sup>68</sup> *Id.* at 1113.

<sup>69</sup> *Id.* at 1113-14.

<sup>70</sup> *Id.*

## D. Viacom International, Inc. v. YouTube, Inc.

Viacom is a U.S. media conglomerate that holds copyrights for audiovisual works.<sup>71</sup> Viacom filed suit against YouTube, a Google-owned video sharing company that lets its users upload videos to its website free of charge.<sup>72</sup> YouTube currently has over 24 hours of content uploaded each minute, and one billion hours of content are watched on YouTube every day.<sup>73</sup> Viacom alleged YouTube was liable for approximately 79,000 audiovisual “clips” located on their website that infringed on copyright material.<sup>74</sup>

Viacom first argued YouTube had actual knowledge of the infringing material.<sup>75</sup> The court of appeals affirmed the district court’s ruling that YouTube did not have actual knowledge of the infringing material.<sup>76</sup> The court differentiated between the actual knowledge requirement and the “red flag” provision to require two different standards: an objective standard and a subjective standard.<sup>77</sup> Both standards are legitimate under the statute, and one does not render the other superfluous.<sup>78</sup> 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>79</sup>

Viacom first cited evidence that YouTube employees conducted website surveys and estimated that 75-80% of all YouTube streams contained copyrighted material, more than 60% of YouTube’s content was “premium” copyrighted content, and that only 10% of the premium content was authorized.<sup>80</sup> Therefore, YouTube was “conscious” that a significant amount of the material on its website was infringing on copyrights.<sup>81</sup> However, the court found this alone did not prove actual knowledge.<sup>82</sup> Viacom then cited emails between YouTube founders, Jawed Karim, Steve Chen, and Chad Hurley, that discussed a CNN clip in which they recognize potential infringing material, but decide to leave the clip on YouTube for now.<sup>83</sup> The

---

<sup>71</sup> Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 28 (2d Cir. 2012).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 30-31.

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

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

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 31.

<sup>80</sup> *Id.* at 33.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 33-34.

court found this raised a material issue of fact, enough for Viacom to survive summary judgment.<sup>84</sup>

Viacom next argued YouTube showed willful blindness, or a “deliberate effort to avoid guilty knowledge,” to specific infringing activity.<sup>85</sup> The court held the DMCA does not speak to willful blindness, but Section 512(m) provides the safe harbor protection “shall not be conditioned on ‘a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i).’”<sup>86</sup> In other words, willful blindness cannot be defined as an affirmative duty to monitor.<sup>87</sup> Section 512(m) “limits—but does not abrogate—the doctrine,” so the willful blindness doctrine may apply to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.<sup>88</sup> This issue was a question of fact to be addressed on remand.<sup>89</sup>

The court then addressed the issue of “right and ability” to control infringing activity.<sup>90</sup> The court rejected both parties’ construction and instead formed their own.<sup>91</sup> The court held the “right and ability to control” infringing activity “requires something more than the ability to remove or block access to materials posted on a service provider’s website.”<sup>92</sup> Although this “something more” is difficult to define, the court looked at *Perfect 10, Inc. v. Cybernet Ventures, Inc.* and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster* for guidance.<sup>93</sup> In those two cases, the service providers exerted “substantial influence on the activities of users without necessarily—or even frequently—acquiring knowledge of specific infringing activity.”<sup>94</sup> However, the court did not address if YouTube exerted this same substantial influence and instead remanded the issue to the district court to determine if Viacom produced sufficient evidence to show this.<sup>95</sup>

Finally, the court analyzed the “by reason of” storage issue under Section 512(c)(1) of the DMCA.<sup>96</sup> The safe harbor provisions “extend[] to software functions performed ‘for the purpose of facilitating access to user-stored material.’”<sup>97</sup> The court affirmed the lower court’s ruling that three of

---

<sup>84</sup> *Id.* at 34.

<sup>85</sup> *Id.* at 35.

<sup>86</sup> *Id.*

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

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 36.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 38.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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

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

<sup>97</sup> *Id.* at 39.

YouTube's software functions: "the conversion (or 'transcoding') of videos into a standard display format, the playback of videos on 'watch' pages, and the 'related videos' function" all fell within the statute's definition of "by reason of" user storage.<sup>98</sup> They remanded a fourth software function, third-party syndication of videos upload to YouTube, as a question of fact.<sup>99</sup>

"Transcoding involves '[m]aking copies of a video in a different encoding scheme' in order to render the video 'viewable over the Internet to most users.'"<sup>100</sup> "The playback process involves 'deliver[ing] copies of YouTube videos to a user's browser cache' in response to a user request."<sup>101</sup> Both transcoding and playback were addressed in *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, and the court agreed with the holding in that case, specifically excluding this software from the statute would "eviscerate the protection afforded to service providers."<sup>102</sup> The "related videos" function "identifies and displays 'thumbnails' of clips that are 'related' to the video selected by the user."<sup>103</sup> The court held this function is also protected under the statute because the algorithm behind the software "'is closely related to, and follows from, the storage itself,' and is 'narrowly directed toward providing access to material stored at the direction of users.'"<sup>104</sup>

Although the court was clear on the transcoding, playback, and related video issues, the court was doubtful on the third-party syndication function.<sup>105</sup> YouTube transcoded approximately 2,000 videos into a format compatible with mobile devices and licensed the videos to Verizon Wireless.<sup>106</sup> Viacom argued "business transactions do not occur at the 'direction of a user' within the meaning of §512(c)(1) when they involve the manual selection of copyrighted material for licensing to a third party."<sup>107</sup> The court thought this argument had "some force," and remanded it for fact-finding.<sup>108</sup>

It seems what the courts are looking for is concrete evidence that the service provider knew, and although the case was remanded, it seems very likely that an email acknowledging copyright infringement is happening on YouTube, and then doing nothing about it, amounts to actual knowledge. This case also addresses the "willful blindness" portion of the DMCA and

---

<sup>98</sup> *Id.* at 38-39.

<sup>99</sup> *Id.* at 39.

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

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 40.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

holds that this can be another avenue for the complaining party to prove knowledge when traditional avenues or actual or apparent knowledge fail.

The consensus from the opinion is the court recognizes that many of the YouTube's processes are automatic, and that allows them to claim safe harbor from liability. However, the last feature, third-party syndication, gave the Court trouble. It held because YouTube manually selected videos and licensed them to Verizon Wireless it was questionable whether the action fit within the framework of the statute. The automated processes of online service providers can be extremely beneficial in keeping them from liability under the safe harbor provision.

The cases discussed give an overview of how the courts view the safe harbor provisions of the DMCA and the actions taken by online service providers to protect them from liability. Based on the results of the cases, courts have set a high standard for creating liability for a service provider, and the complaining party must present clear, convincing evidence to show a violation of the safe harbor provisions. The purpose and spirit of the DMCA is clear to the courts, and protection against online service providers is a rebuttable presumption that requires a lot to overturn. Online service providers must be protected, and the judicial system has recognized the importance of their duty to provide this shield from liability.

### III. YOUTUBE'S CONTENT ID

Released in 2007,<sup>109</sup> YouTube's Content ID is a proprietary system of copyright and content management tools meant to give copyright holders control of their content on YouTube.<sup>110</sup> Content ID identifies user-uploaded videos that contain infringing material by scanning the videos against a database of files that have been submitted to YouTube by copyright owners.<sup>111</sup> This database of audio and visual reference content spans more than 600 years.<sup>112</sup> Originally, Content ID was an audio-only detection system with the ability to recognize songs in their entirety.<sup>113</sup> Through YouTube's continued investments in Content ID, this system has expanded to be able to detect video and even melodies.<sup>114</sup> When a match is made by Content ID, the copyright owners are given the option to monetize, track, or block the content.<sup>115</sup> Essentially, authorized users have the option to either remove the

---

<sup>109</sup> GOOGLE, *How Google Fights Piracy* (2016), 24.

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

<sup>111</sup> *Id.* at 25.

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

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

infringing material, keep it up and view tracking statistics, or keep it on YouTube and receive revenue through Google advertising.<sup>116</sup>

The music industry, in working with YouTube, chooses to monetize over 95% of sound recording claims, meaning that Content ID automatically identifies the work and applies the copyright owner's preferred action without the need for intervention by the copyright owner in all but 5% of cases.<sup>117</sup> Content ID has over 50 million active reference files, something YouTube claims is "unparalleled in the industry."<sup>118</sup> Fifty percent of the revenue the music industry receives from YouTube is from monetizing fan uploads.<sup>119</sup> Content ID offers copyright owners an automated way of identifying infringing material, instead of forcing them to manually "sift" through videos in order to protect their material.<sup>120</sup>

YouTube has "an average of over 1 billion users per month," almost one-third of all people on the Internet, making it the number one streaming service in the world.<sup>121</sup> It has launched in more than ninety-one countries and is accessible in eighty different languages (ninety-five percent of the Internet population).<sup>122</sup> Since its inception, YouTube has invested more than \$60 million in Content ID in an effort to fight against online piracy.<sup>123</sup> Through the YouTube Partner Program, which allows millions of content creators from over eighty countries to earn revenue from their YouTube videos, YouTube has paid out over \$3 billion to the music industry and another \$2 billion to its partners.<sup>124</sup> These partners consist of network broadcasters, movie studios, songwriters, and record labels.<sup>125</sup> In a 2014 report released by YouTube, the revenue to partners was only \$1 billion, suggesting that this has grown by \$1 billion from 2014 to 2016.<sup>126</sup> Moreover, the number of YouTube channels earning revenue of more than \$100,000 per year is up fifty percent year-over-year.<sup>127</sup>

The vast majority of the content on YouTube is not infringing material, but nonetheless, YouTube takes an initiative in educating its users about copyright infringement and creating "strong incentives" to discourage this.<sup>128</sup>

---

<sup>116</sup> Ingram, *supra* note 2.

<sup>117</sup> *How Google Fights Piracy*, *supra* note 110.

<sup>118</sup> *Id.*

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

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

<sup>121</sup> Michael Kostaras, *YouTube's Safe Harbor: The Push for Reform*, HYPEBOT (Jan. 1, 2017), <http://www.hypebot.com/hypebot/2017/01/youtubes-safe-harbor.html>; *YouTube for Press*, YOUTUBE (2018), <https://www.youtube.com/yt/about/press/>.

<sup>122</sup> *YouTube for Press*, *supra* note 121.

<sup>123</sup> *How Google Fights Piracy*, *supra* note 109.

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

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

<sup>126</sup> Ingram, *supra* note 2.

<sup>127</sup> *How Google Fights Piracy*, *supra* note 109.

<sup>128</sup> *Id.*

There are several policies in place to discourage copyright infringement and to terminate repeat offenders: (1) when a valid copyright notice is submitted to a user, a “strike” is applied to their account; (2) as a user accrues more strikes, features such as live streaming and uploading videos longer than fifteen minutes are disabled; (3) if users with strikes complete a “Copyright School” program, which teaches them about current copyright regulations, they can have a strike removed from their account; and (4) if a user receives three strikes their account is suspended and all content they uploaded is removed.<sup>129</sup>

If a user uploads a video that receives a Content ID claim, the user can dispute the claim.<sup>130</sup> However, fewer than one percent of these claims are actually disputed, and of the one percent, copyright owners agree with twenty-five percent of the disputes issued by users.<sup>131</sup> Ninety-eight percent of copyright issues on YouTube are resolved with Content ID.<sup>132</sup> The remaining two percent are manually resolved by copyright holders through takedown requests established under the DMCA.<sup>133</sup> The YouTube Copyright Center, “an easy-to-use webform,” simplifies the process for copyright owners and their representatives to submit takedown notices.<sup>134</sup> YouTube also offers a Content Verification Program for copyright owners who “have a regular need to submit high volumes of copyright removal notices and have demonstrated high accuracy in their prior submissions.”<sup>135</sup>

Throughout this process, YouTube attempts to be as transparent as possible by notifying users when they take action on their account.<sup>136</sup> If a user believes that the notification filed against them is false, they can file a “counter notification” to show why the copyright owner was wrong.<sup>137</sup> If a copyright owner abuses their power in filing notifications, they can have their access to Content ID’s copyright management tools disabled.<sup>138</sup> Altogether, this provides copyright owners with an efficient, streamlined process to identify infringing material and remove it while also giving the alleged unauthorized user a chance to make their case.

---

<sup>129</sup> *Id.*  
<sup>130</sup> *Id.*  
<sup>131</sup> *Id.*  
<sup>132</sup> *Id.*  
<sup>133</sup> *Id.*  
<sup>134</sup> *Id.*  
<sup>135</sup> *Id.*  
<sup>136</sup> *Id.*  
<sup>137</sup> *Id.*  
<sup>138</sup> *Id.*

#### IV. REBUTTING THE CRITICISMS OF THE DMCA AND CONTENT ID

Artists, music labels, and various organizations have come out against the DMCA and YouTube's Content ID arguing that the legislation is "outdated" and needs reform in order to better regulate modern technology and adapt to how people listen to music today. These accusations go even further to claim the DMCA safe harbor provision allows large companies like YouTube to take advantage of music creators by reducing their profits. While the DMCA and Content ID are not perfect, present data shows not only have they increased the profits and platform for musicians and music labels, YouTube has set the standard for what an online service provider should do to prevent copyright infringement and protect creative work.

##### A. The "Value Gap"

One common criticism of the DMCA is that it creates a "value gap" between actual profit and estimated potential profit from user-generated content sites, meaning less money for artists and music labels, and more for service providers like YouTube.<sup>139</sup> In other words, YouTube "streaming depresses the rates that subscription-based music streaming services, such as Spotify, are willing to pay for streaming licenses."<sup>140</sup> However, data seems to disprove this. In an initiative by Google, the company commissioned a study to determine the "cannibalization" of other streaming services and potential profits.<sup>141</sup> The study found if YouTube was not available to the public, eighty-five percent of time spent on the site would move to lower value channels, creating a significant increase in piracy.<sup>142</sup> If YouTube did not have music on its site, time spent listening to pirated content would increase by twenty-nine percent.<sup>143</sup> This suggests that instead of reducing profits for the music industry, YouTube is a large reason why it isn't losing *more* money.<sup>144</sup> The study also found when songs were blocked on YouTube,

---

<sup>139</sup> Jeremy Malcolm, *Recording Industry Claims Imaginary Value Gap as a Bigger Threat Than Piracy*, ELECTRONIC FRONTIER FOUND. (May 17, 2017), <https://www EFF.org/deeplinks/2017/05/recording-industry-claims-imaginary-value-gap-bigger-threat-piracy>; Sara Boboltz, *Taylor Swift Wants YouTube to Treat Artists More Fairly, Too*, HUFFINGTON POST (June 20, 2016, 6:08 PM), [https://www.huffingtonpost.com/entry/what-taylor-swift-paul-mccartney-and-others-have-against-youtube\\_us\\_576830b1e4b0853f8bf1a268](https://www.huffingtonpost.com/entry/what-taylor-swift-paul-mccartney-and-others-have-against-youtube_us_576830b1e4b0853f8bf1a268).

<sup>140</sup> Malcolm, *supra* note 139.

<sup>141</sup> *Value of YouTube to the Music Industry – Paper 1 – Cannibalisation*, RBB ECON. (May 2017), <http://www.rbbecon.com/downloads/2017/05/Value-of-YouTube-to-the-music-industry-Paper-I-Cannibalization.pdf> (This study was conducted using data of music listeners in United Kingdom, France, Germany, and Italy).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

there was no significant impact on streaming volumes.<sup>145</sup> The “value gap” is further disproved when considering the \$3 billion paid to musicians through the monetization option of Content ID.<sup>146</sup>

YouTube also further generates money for the music industry with their new service, YouTube Premium.<sup>147</sup> YouTube Premium is a paid, monthly subscription service that allows subscribers to stream music and music videos without being subjected to unwanted advertisements.<sup>148</sup> In addition to ad-free viewing, YouTube Premium subscribers can also view videos offline by saving them to their device, listen to music with the screen off, have access to new “members-only” original shows and movies from popular YouTubers, and enjoy a free monthly subscription to Google Play Music.<sup>149</sup> YouTube has stated “our creator community will make as much or more money on YouTube than they would have without it. And on a per-user basis, a paying YouTube Premium member will generate more money for creators than a typical ad-viewing, free user.”<sup>150</sup> YouTube Premium also doesn’t cost creators a thing – their videos can still be viewed with or without a membership.<sup>151</sup> Without YouTube and YouTube Premium, artists and labels would be losing out on two separate revenue streams, and billions of dollars would be left on the table. The assertion that YouTube is creating a “value gap” is not based on the evidence. In fact, YouTube is the only reason why artists have more money in their pocket instead of less.

#### B. “Notice-and-Stay-Down” Proposals

In response to the criticisms of the DMCA and software like Content ID, there are some organizations who are lobbying the government to force service providers to use programs to ensure copyright protection by requiring them to be stricter about the content they take down.<sup>152</sup> These proposals have been dubbed “notice-and-stay-down” laws.<sup>153</sup> In a Notice and Request for Public Comment by the U.S. Copyright Office, the government is attempting to gather information to potentially put forth an amendment to the DMCA in

---

<sup>145</sup> *Id.*

<sup>146</sup> *How Google Fights Piracy*, *supra* note 109.

<sup>147</sup> Sarah Mitroff & Taylor Martin, *Everything You Need to Know About YouTube Red*, CNET (Oct. 27, 2017, 2:00 PM), <https://www.cnet.com/how-to/youtube-red-details/>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *YouTube Red is Here: Seven Things to Know About Our New Subscription Service*, YOUTUBE CREATOR BLOG (Oct. 28, 2015), <https://youtube-creators.googleblog.com/2015/10/youtube-red-is-here-seven-things-to.html>.

<sup>151</sup> *Id.*

<sup>152</sup> Elliot Harmon, “*Notice-and-Stay-Down*” Is Really “*Filter-Everything*”, ELECTRONIC FRONTIER FOUND. (Jan. 21, 2016), <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>.

<sup>153</sup> *Id.*

order to make content filtering a “legal obligation.”<sup>154</sup> Essentially, what these groups want is to make platforms such as YouTube “filter and block any future uploads of the same allegedly infringing content.”<sup>155</sup> This would effectively require all service providers to develop their own filtering software, such as Content ID, in order to be protected under the safe harbor provisions of the DMCA.<sup>156</sup>

The strongest argument against these types of over-protective laws is they go against the spirit and purpose of the DMCA. Throughout opinions where judges have addressed the safe harbor provision, there is the common theme, that the larger burden is on the challenger to prove copyright infringement and safe harbor is extended to service providers who meet the standards of the DMCA.<sup>157</sup> If these proposals were signed into law, there would effectively be no safe harbor for these companies, and instead of focusing on creating services for the public, their time and resources would be spent filtering through content and battling constant litigation. This is the very thing the DMCA is supposed to prevent.<sup>158</sup>

If “notice-and-stay-down” proposals went into effect only large companies like YouTube would be able to continue to function, while smaller companies would be unable to grow, or would go out of business.<sup>159</sup> Requiring service providers to be responsible for every infringement that occurs on its site would subject them to huge litigation costs that only companies like YouTube would be able to withstand. Smaller companies with less revenue would be unable to grow their company due to the increased costs policing copyright infringement or would go out of business altogether by failing to make a profit. This burden would even prevent new service providers from starting because they wouldn’t have enough resources to focus on providing consumers services due to high administrative costs.

### C. YouTube Doesn’t Work with Policymakers

YouTube has paired with governments and industry leaders to provide the best product possible and maximize its impact in protecting copyrights

---

<sup>154</sup> FEDERAL REGISTER, SECTION 512 STUDY: NOTICE AND REQUEST FOR PUBLIC COMMENT; Harmon, *supra* note 152.

<sup>155</sup> Harmon, *supra* note 152.

<sup>156</sup> *Id.*

<sup>157</sup> See generally *Viacom Int’l v. YouTube*, 676 F.3d 19 (2d Cir. 2012); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Ca. 2008); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Ca. 2009); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

<sup>158</sup> See generally *Viacom Int’l*, 676 F.3d at 19; *Io Group, Inc.*, 586 F. Supp. 2d at 1132; *UMG Recordings, Inc.*, 665 F. Supp. 2d at 1099; *Perfect 10, Inc.*, 488 F.3d at 1102; Harmon, *supra* note 152.

<sup>159</sup> Harmon, *supra* note 152.

and preventing piracy. YouTube actively works with policymakers to craft law and regulations that benefit copyright owners and users.

“In October 2015, Google filed a ‘public comment’ with the U.S. Intellectual Property Enforcement Coordinator (IPEC) on the development of the Joint Strategic Plan on Intellectual Property Enforcement, the agency’s plan for fighting piracy while also continuing to grow the creative economy.”<sup>160</sup> In March 2015, Google supported the “follow the money” process introduced by the French Minister of Culture and signed a charter “committed to the establishment of clear and transparent principles to prevent advertising services from engaging with ‘rogue sites.’”<sup>161</sup> In April 2015, Google was a member of the U.S. Department of Commerce’s Internet Policy Task Force to improve the effectiveness of the DMCA’s notice-and-takedown system.<sup>162</sup> In March 2016, Google worked with the Australian Digital Alliance (ADA) to introduce a copyright forum with participants which included industry leaders, policymakers, and international experts.<sup>163</sup>

In October 2015, Google was involved with the Cable and Satellite Broadcasting Association of Asia (CASBAA), “Asia’s association for the multi-channel audio-visual content creation and distribution industry,” workshop to help fight against online piracy in the region.<sup>164</sup> In April 2015 and 2016, Google “participated in WIPO workshops for experts and IPOs from Association of Southeast Asian Nations (ASEAN) member-states focusing on the value of copyright and how it spurs innovation.”<sup>165</sup> In February 2015, Google, alongside Digital Trading Standards Group (DTSG), a “cross-industry” group based in the United Kingdom, created self-regulatory practices to ensure that online advertisers do not appear on copyright infringing websites.<sup>166</sup> These, and many others, are examples of Google working to ensure it is taking steps in sync with the international copyright community, and the measures implemented are for the benefit of the music industry and the internet community.

#### D. YouTube Doesn’t Pay Its Fair Share

As stated earlier, YouTube has paid out over \$3 billion to the music industry.<sup>167</sup> However, the music industry does not see this as being enough. Taylor Swift, along with numerous other accomplished musicians such as U2

---

<sup>160</sup> *How Google Fights Piracy*, *supra* note 109.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

and Paul McCartney, as well as music labels like Universal, Sony, and Warner, have all come out against YouTube saying it “systematically undervalues music.”<sup>168</sup> They argue the DMCA safe harbor provisions should be rewritten because it allows service providers like YouTube to hide behind the DMCA and keep all the profits for themselves.<sup>169</sup>

Underlying their argument is the notion that YouTube should be paying as much as streaming companies such as Spotify.<sup>170</sup> However, the sources of revenue each service generates and how they pay the music industry is very different. YouTube “relies on advertising revenue while streaming services pay a specified licensing fee per song.”<sup>171</sup> Another factor is YouTube’s advertising revenue has fallen even though the number of streams it serves has risen significantly.<sup>172</sup> These two statistics suggest the amount paid out to copyright owners has fallen because “[YouTube] pays a proportion of revenue rather than a set amount.”<sup>173</sup> In 2015, YouTube’s payments rose by fifteen percent to \$740 million while the number of music streams rose by more than 170%,<sup>174</sup> resulting in the amount YouTube pays per video dropping by half, from \$0.002 to \$0.001.<sup>175</sup>

Let’s compare YouTube with Spotify, a company Taylor Swift and others say pays a “fair share.” Spotify has almost 90 million subscribers and around \$2 billion in annual revenues, making it the “most successful streaming service in the world.”<sup>176</sup> But, despite this success, the company does not make a profit due to the royalties it pays out to the music industry.<sup>177</sup> How is this possible? From 2014 to 2015, Spotify’s revenue grew by eighty percent, and its amount of users went up almost fifty percent, from 60 million to 89 million.<sup>178</sup> With such explosive growth, Spotify quickly came out ahead of all of its competitors, including Apple Music.<sup>179</sup> However, during this same time period, Spotify’s losses went from \$184 million to \$206 million.<sup>180</sup> The “single biggest expense are the payments [Spotify] has to make to record labels and music publishers,” which rose by eighty-five

---

<sup>168</sup> Ingram, *supra* note 2; Peter Kafka, *The Music Industry Signs Up Taylor Swift and U2 in its Fight Against YouTube*, RECODE (June 20, 2016, 5:45 AM), <https://www.recode.net/2016/6/20/11974514/taylor-swift-youtube-dmca-music-letter>.

<sup>169</sup> Ingram, *supra* note 2.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Matthew Ingram, *Spotify’s Financial Results Reinforce Just How Broken the Music Business Is*, FORTUNE (May 24, 2016), <http://fortune.com/2016/05/24/spotify-financials>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

percent in 2015 to around \$1.8 billion.<sup>181</sup> The company was even forced to raise \$1 billion in convertible debt financing in 2016 in order to keep the company afloat because “equity investors weren’t prepared to put in more money at the valuation the company wanted.”<sup>182</sup> This is not a unique problem to Spotify, as other streaming services such as Deezer, Rdio, and Pandora have also struggled.<sup>183</sup> “[E]very dollar that Spotify brings in the door in revenues, about 85 cents goes right back out the door again in the form of payments to the music industry.”<sup>184</sup> Still, the music industry complains this is not enough.

According to a 2016 IFPI Global Music Report, global music revenues increased by 3.2%, up to \$15 billion.<sup>185</sup> Digital sales accounted for forty-five percent of this while physical sales account for only thirty-nine percent.<sup>186</sup> However, according to the RIAA, the revenue per-stream fell to \$0.00506 in 2015, from \$0.00666 in 2014.<sup>187</sup> Still, the royalties paid to music labels increased by seven percent, to almost \$203 million.<sup>188</sup> The bottom line is that musicians and record labels are still getting paid millions of dollars, but they see this as insignificant because YouTube and Google pull in billions of dollars each year.

Although YouTube puts huge amounts of resources in Content ID, which creates a whole new revenue source for the music industry while also reducing online piracy, the music industry still wants a bigger piece of the pie. Artists and labels also seem to forget that due to YouTube’s massive growth year after year, this means more money for them in the long run. Is it fair for YouTube to pay eighty-five percent of its revenue to the music industry like Spotify? No, it isn’t, especially considering Spotify has incurred huge losses.<sup>189</sup> Artists seem to believe that because it is their content being viewed, they should be the ones making the majority of the profits. However, they forget the fact that these companies were started by people whose ideas made it possible for music to be streamed all over the globe.

Through the innovation and creativity of music streaming industry leaders, artist’s content is reaching audiences in a way like never before. Digital sales of music have grown exponentially,<sup>190</sup> and traditional forms of

---

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *IFPI Global Music Report 2016, supra note 1.*

<sup>186</sup> *Id.*

<sup>187</sup> Ed Christman, *U.S. Recording Industry Sees Slight Uptick in Revenue Last Year, Streaming Dominates Digital*, BILLBOARD (Mar. 22, 2016, 2:35 PM), <http://www.billboard.com/biz/articles/news/record-labels/7271732/us-recording-industry-sees-slight-uptick-in-revenue-last>.

<sup>188</sup> *Id.*

<sup>189</sup> Ingram, *supra note 175*.

<sup>190</sup> *IFPI Global Music Report 2016, supra note 1.*

selling music, such as physical copies, are becoming obsolete as streaming takes over the market. In fact, Best Buy is no longer selling CDs in their stores, and Target has threatened to do the same.<sup>191</sup> Traditionally, artists would have to pay a middle man who takes a cut of the profits to distribute their music.<sup>192</sup> Now they can sign a deal with YouTube or Spotify, and their music easily reaches a bigger audience for a cheaper price. More money should be going to the streaming platform because it is their product which created a revolution within the music industry and has given back more profits to musicians than ever before.

## V. PROPOSAL

Reforming the DMCA will not decrease piracy or create more revenue for artist but instead will harm artist's long-term profit margins and contradict the purpose of the statute by holding more online service providers liable for copyright infringement which will stifle the market and make artists less money. Instead, we should focus our policy making efforts on encouraging legitimate forms of streaming, specifically targeting online pirates using the "follow the money" approach and promoting new technology and innovation from industry leaders. Using these strategies, global leaders and industry pioneers can work together to decrease online piracy in a cost-effective manner.

### A. More Legitimate Forms of Streaming

The greater availability of legitimate forms of streaming has resulted in a global decrease to online piracy.<sup>193</sup> "When it comes to fighting the infringement of content creators' intellectual property, the wide availability of convenient, legitimate forms of content consumption is one of the most effective weapons."<sup>194</sup> The industry has already shown initiative with this by licensing numerous music services including YouTube, Spotify, Pandora, iTunes, YouTube Red, and Google Play Music.<sup>195</sup>

---

<sup>191</sup> Ed Christman, *Best Buy to Pull CDs, Target Threatens to Pay Labels for CDs Only When Customer Buy Them*, BILLBOARD (Feb. 5, 2018, 6:50 PM), <https://www.billboard.com/articles/business/8097929/best-buy-to-pull-cds-target-threatens-to-pay-labels-for-cds-only-when>.

<sup>192</sup> Heather McDonald, *Music Distribution Defined*, BALANCE (Aug. 1, 2017), <https://www.thebalance.com/music-distribution-defined-2460499>.

<sup>193</sup> *How Google Fights Piracy*, *supra* note 109, at 13.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

Since the rise of Spotify, the piracy rate in Sweden has dropped by twenty-five percent.<sup>196</sup> Similarly, the Netherlands and Italy have seen a decrease, with projections that Italy could see seven million more consumers using legal music alternatives and 47 million fewer files being downloaded within the next few years.<sup>197</sup> When Spotify launched in Australia in 2012, the country saw the number of illegal music files downloaded plummet by more than twenty percent just one year later.<sup>198</sup>

New music streaming services have caused the vast majority of the music-listening population to turn away from illegal file sharing and instead use legal sites. As availability of these services increases, the illegal music market will shrink, resulting in less infringing activity. Less infringing activity will result in more revenue for the industry as more users will subscribe to streaming sites and artist's content be streamed more. Action should be taken to protect and encourage these legitimate forms of streaming, rather than rewriting the DMCA to slam them with more regulations.

#### B. "Follow the Money"

Another way to hit back at infringing sites is known as the "follow the money" approach.<sup>199</sup> This tactic involves identifying and cutting off sources of revenue of infringing sites by going after "ad networks, banks, payment houses, and affiliate programs."<sup>200</sup> The idea is essentially to identify how an infringing site makes money and target that revenue source. The Police Intellectual Property Crime Unit, based in the United Kingdom, estimated that ninety-five percent of infringing sites could be shut down using this method.<sup>201</sup>

"This approach has proven to be effective: for example, in March of 2016, three of the most popular file-sharing sites in Europe shut down citing problems monetizing their service through advertising."<sup>202</sup> Google, together with other industry leaders, has engaged in the "follow the money" approach by "ejecting infringing sites from Google's advertising services, but also by

---

<sup>196</sup> Will Page, *Adventures in the Netherlands: Spotify, Piracy and the New Dutch Experience*, MUSIC BUS. WORLDWIDE 2 (2013), <https://www.musicbusinessworldwide.com/files/2014/12/Will-Page-2013-Adventures-in-the-Netherlands-Final.pdf>.

<sup>197</sup> *Id.* at 2-3.

<sup>198</sup> Lars Brandle, *Streaming Services Make Inroads into Piracy Down Under, Spotify's Will Page Tells Bigsound*, BILLBOARD (Sept. 10, 2014, 4:31 AM), <https://www.billboard.com/biz/articles/news/6244180/streaming-services-make-inroads-into-piracy-down-under-spotifys-will-page>.

<sup>199</sup> *How Google Fights Piracy*, *supra* note 109, at 14-15.

<sup>200</sup> Paul Kedrosky, *Follow the Money, Not the Domains*, N.Y. TIMES (Jan. 18, 2012, 7:07 PM), <https://www.nytimes.com/roomfordebate/2012/01/18/whats-the-best-way-to-protect-against-online-piracy/follow-the-money-not-the-domains>.

<sup>201</sup> *How Google Fights Piracy*, *supra* note 109, at 14.

<sup>202</sup> *Id.*

working to establish industry-wide best practices for shutting down advertising to infringing sites.”<sup>203</sup>

This practice has been extended internationally with Google working with regulators in the United Kingdom, France, Italy, and Southeast Asia to “create self-regulatory principles that help ensure ads do not appear on alleged copyright-infringing websites.”<sup>204</sup> Due to greater availability of legitimate forms of content and efforts by industry leaders and law enforcement utilizing this strategy, “the proportion of unauthorized music consumed online is expected to fall from thirty-five percent in 2012 to less than ten percent by 2018.”<sup>205</sup>

### C. Innovation v. Legislation

A 2015 study analyzed data in six different countries to determine whether innovation through new services or anti-piracy legislative enforcement is more effective at reducing online piracy.<sup>206</sup> In Sweden, the increased success of Spotify caused a major decline of infringing sites, including The Pirate Bay, one of the most notorious illegal file sharing websites in the world.<sup>207</sup>

In 2011, New Zealand passed an anti-piracy legislative act called the Copyright (Infringing File Sharing) Amendments Act, also known as “Skynet.”<sup>208</sup> After the enactment, there was a “short-lived” drop in illegal downloads, but after two months infringing activity returned to normal levels with forty-one percent of users accessing infringing services in February 2012.<sup>209</sup> However, the country saw a decline in the software piracy rate when Spotify, Pandora, Google Play, Rdio, I Heart Radio, and Deezer all entered the market.<sup>210</sup>

In 2013, the United Kingdom spent over €45 million (\$55.6 million) enforcing the Copyright, Designs and Patents Act (CDPA), legislation used to fine and/or imprison website owners infringing copyright.<sup>211</sup> Despite the massive costs and complex legislative scheme, thirty percent of the UK

---

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 56.

<sup>205</sup> *How Google Fights Piracy*, *supra* note 109; *see also Online Content Study: Changes in the Distribution, Discovery and Consumption of Lawful and Unauthorized Online Content*, IDATE CONSULTING (2015), [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0031/69196/online-content-study-010316.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0031/69196/online-content-study-010316.pdf) (“Over the next three years online copyright infringement is predicted to fall for all content types apart from e-books.”).

<sup>206</sup> Michael Ho, Joyce Hung & Michael Masnick, *The Carrot or the Stick?*, COPIA (Oct. 2015), <https://copia.is/library/the-carrot-or-the-stick>.

<sup>207</sup> *Id.* at 3.

<sup>208</sup> *Id.* at 21.

<sup>209</sup> *Id.* at 22.

<sup>210</sup> *Id.* at 23.

<sup>211</sup> *Id.* at 13.

population continue to engage in some type of copyright infringement.<sup>212</sup> Legislative efforts in the UK “expand every year,” but even an industry insider admitted the anti-piracy enforcement is “not really going to divert or stop even medium-level or hardcore pirates. Maybe it will quash the nervous teenager, but that’s about it.”<sup>213</sup> Alternatively, online subscription video services in the UK have thrived without the need for anti-piracy enforcement.<sup>214</sup> In fact, the UK has created a “healthy market” due to the large number of legal music and video services.<sup>215</sup> New innovation and new services have thrived in the UK where invasive laws don’t exist and the same can happen in the US.

In South Korea, the latest amendment to the Copyright Act of Korea instituted a three-strike policy to disable user access to accounts that engage in infringing activity.<sup>216</sup> Despite this legislative initiative, and an additional 22 billion won (around \$20 million) spent per year on internet piracy enforcement,<sup>217</sup> online piracy is still a significant threat. As shown in other countries, there is little evidence to show that South Korea’s anti-piracy law did anything to decrease piracy rates.<sup>218</sup> The market “hit its bottom” in 2005, four years before the passage of the three-strike law, and there was almost no change in revenue in 2009 when the law passed.<sup>219</sup> Sweeping legislation and increases in spending to police online piracy have not been proven to work.

Japan’s old copyright law, the Copyright Law of 1899, was replaced in 1971 and several revisions have occurred since.<sup>220</sup> The most recent amendment happened in 2012, in which Japan instituted a strict policy that resulted in fines and jail time for those caught infringing copyright.<sup>221</sup> During the first year after the new amendment there was a two percent decrease (from twenty-one percent to nineteen percent) in the piracy rate, but since then the number has remained fairly the same.<sup>222</sup> Even after the amendment was passed in 2012, there was not a significant effect on online piracy.<sup>223</sup> In fact, in the period immediately following strict anti-piracy regulations there was no increase in the amount of revenue the music industry saw.<sup>224</sup>

---

<sup>212</sup> *Id.* at 14.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 15.

<sup>217</sup> *Id.* at 16.

<sup>218</sup> *Id.* at 17.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 18.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 20.

<sup>224</sup> *Id.*

However, the embrace of legal and authorized services in Japan did see a jump in revenue.<sup>225</sup>

In 2010, France implemented Haute Autorité pour la Diffusion des Euvres et la Protection des Droits sur Internet (HADOPI), which created a new government agency to combat digital piracy.<sup>226</sup> Similar to the three-strikes policy in South Korea, HADOPI created a “gradual response” policy to issue up to three warnings to those infringing copyright, after which they could suspend the user’s Internet access for up to a year.<sup>227</sup> France spent over €12 million annually and employed sixty government agents to enforce the law before the French culture minister, Aurelie Filippetti ended the program stating it “fail[ed] to foster legal content and reduce illegal downloading.”<sup>228</sup> HADOPI did not deter online piracy; however, since legal music services like Deezer and iTunes have become available in France, the piracy rate has decreased.<sup>229</sup>

Overall, the data reveals that an anti-piracy/pro-artist legislative effort has not proven to have a favorable result for the industry. In fact, the opposite has been shown throughout countries across the world. Legislative action often results in a short-term decrease in piracy rates only to have the rate bounce back once the population discovers another method of bypassing law. Legislative action, including “notice-and-stay down” proposals, have been shown not to work, but expansion of legal music services has proven to be an effective, long-term, solution to a problem that has evaded law enforcement and legislative bodies for decades.

#### D. More Regulation Means Less Innovation

Modern approaches to fighting online piracy must encourage legitimate forms of streaming, track, and find the source of revenue of infringing sites. This can be effectively accomplished by using the “follow the money” approach and promoting new technology and innovation instead of regulation of the industry. Tech leaders have identified this strategy as being more successful than previous endeavors and have worked with governments and various organizations all over the world to implement this. Huge advancements have been made using this strategy and we should not succumb to the false premise that legislating more will solve this complex problem.

Reforming the DMCA to require a greater burden on online service providers will cause companies to spend less resources on legitimate forms

---

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 6.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 7.

of streaming, which is proven to decrease online piracy, and instead spend time and money manually searching for infringing material. For a company like YouTube, which has endless hours of content of their site with more being uploaded every second, this task is an impossible one. The amount of additional staff and technology required to do a major sweep of all existing videos and every new video being uploaded would be especially taxing on a company's productivity and resources. Smaller companies would not be able to continue to operate with such a stringent standard.

Software like Content ID has done more for identifying and eliminating infringing material than any one person or company could do by itself. If we change the DMCA to place the burden on service providers there will be a decrease in features that benefit everyone because there will be less money to invest in new technology. Don't forget, YouTube is not required to create Content ID per the DMCA, but they did not do it for nothing. YouTube saw an opportunity to automate and streamline the notice and takedown process while making money for themselves and the music industry at the same time. A brilliant idea like this would not have come as a result of strict regulations on service providers.

It's hard to see how artists and record labels can complain when YouTube effectively created a new stream of revenue for them, putting money in their pocket that they never would have seen without YouTube. There is less incentive for the next massive online service provider to come into fruition if the DMCA creates more of a burden on them by increasing their costs. This also hurts users. YouTube has brought people together in a way that no one saw possible, and to take away the opportunity for new companies to come up with new inventions and technology is to rob the world of creativity and excellence in streaming.

## VI. CONCLUSION

The courts have addressed the safe harbor provisions within the DMCA and have correctly concluded that the burden of identifying infringing material lies with the challenger, and not the online service provider. The DMCA should not be reformed, and the standards for online service providers established by the safe harbor provisions should remain the same. Instead of judicial or legislative interference in this area, new technology and innovation such as YouTube's Content ID should be utilized, as this has been shown to be the most effective way of combatting online piracy across the globe. There will always be some form of online piracy, but implementing the measures laid out in this Note is an effective method for long term prevention that will benefit everyone involved in the music industry.

