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Note

Tempting the Sword of Damocles: Reimagining the Copyright/DMCA Framework in a UGC World

*Jordan Sundell**

I. INTRODUCTION

In the last twenty years the landscape of information distribution and commentary has undergone a kaleidoscope of changes. Take, for example, Rip Van Winkle. If, rather than sleeping through the American Revolution, he had instead fallen into his slumber on the precipice of the 1990s only to wake in the present, he would scarcely recognize the current information terrain. Prime among those revolutions is the Internet.

Ushering in an era of information, the Internet provides ready access to almost any topic or proclivity a person could desire or imagine. If not, wait a few weeks and someone will upload an article, book, or video that rectifies the oversight.¹ Moreover, the Internet, combined with technological tools, enables people to interact with and alter the information they encounter in ways previously unimagined. For example, a person can pen a political piece featuring an embedded video from a television news program on his or her blog,² or take Queen's "Another One Bites the Dust," merge it with Daft Punk's "Da Funk," and voilà, "Another One Bites Da Funk."³ Or someone

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1. See, e.g., Brian Stelter, *Some Media Companies Choose to Profit from Pirated YouTube Clips*, N.Y. TIMES, Aug. 16, 2008, at C1 (noting that every minute, thirteen hours of video is uploaded to YouTube alone).

2. See, e.g., David Kurtz, *GOP Eating Its Own*, TALKING POINTS MEMO (Jan. 10, 2008, 7:04 PM), <http://talkingpointsmemo.com/archives/063381.php>.

3. *List of Mashup Songs*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_mashup_songs (last visited Jan. 23, 2010, 11:58 PM).

can take clips from Beyoncé Knowles's song "Single Ladies," splice them together with the theme to the Andy Griffith Show, and create a parody featured on SI.com's Hot Clicks.⁴

Herein resides the problem. User-generated content (UGC) and the technology enabling its existence gives users many new and often meaningful ways to communicate, but all too frequently that communication unlawfully uses copyrighted material.⁵ At what point should the line be drawn between copyright holders' financial interests, and everyone else's creative interests? And given the ease, anonymity, and pervasiveness of UGC, what should copyright enforcement look like in the UGC arena?

Thus far, the existing legal framework has failed to provide adequate solutions for the rise of UGC. For example, current U.S. copyright law allows large media companies to wield an imposing sword over the heads of those who, usually for no reason other than impressing their friends and acquaintances, create Internet content that may include unauthorized portions of copyrighted works.⁶ Such UGC is created at such a break-neck pace that copyright holders use every weapon in their arsenal to keep *all* said content off the Internet—whether or not the content *really is* a violation of the holder's rights.

This Note proposes a series of simple alterations to the Digital Millennium Copyright Act (DMCA) and copyright law that would foster the "Progress of the Arts," while respecting the spirit of copyright holders' rights according to the Copyright Act. Part I of this Note describes what UGC is, why it matters,

4. See *Single Ladies (In Mayberry)*, YOUTUBE (Dec. 16, 2008), <http://www.youtube.com/watch?v=GE-l4gfCM8>.

5. While there is a consensus that UGC uses copyrighted material, there is far less agreement on the extent of UGC's actual usage of copyrighted material. For example, one study suggested that less than six percent of all views on YouTube comprised copyrighted material. BRI HOLT, HEIDI R. LYNN & MICHAEL SOWERS, ANALYSIS OF COPYRIGHTED VIDEOS ON YOUTUBE.COM 2 (2007). A different study concluded that twelve percent of YouTube videos infringed copyrights. Michael Wesch, *YouTube Statistics*, DIGITAL ETHNOGRAPHY @ KSU, (Aug. 13 2008, 2:02 PM), <http://ksudigg.wetpaint.com/page/YouTube+Statistics>.

6. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 931-32 (2009) (noting that key players such as Google, actual users, and public interest groups were absent from the talks over the DMCA and that as a result the principles in the DMCA "were not intended to strike a balance between fair use and ownership, but rather to solidify ownership.").

and the interplay between copyright law, the DMCA, and UGC. Part II of this Note looks into the inequities of the current approach and suggests a series of simple solutions. Finally, Part III concludes that to remedy the DMCA's favoritism towards major content providers, legislatures or the courts should modify the current UGC legal framework with clear rules that: (1) expressly limit (or eliminate) liability for non-economic UGC,⁷ (2) impose increased policing and financial responsibilities on sites specializing in copyright-infringing UGC content, and (3) reduce frivolous and non-particularized claims of infringement.

II. BACKGROUND

A. WHAT IS UGC?

In general, UGC is creative content⁸ produced and published, usually by individuals who possess limited technical expertise,⁹ out of a desire to share, connect with others, or simply to express oneself.¹⁰ Examples of UGC include weblogs¹¹ (i.e., "blogs"), wikis,¹² social networks,¹³ RSS feeds,¹⁴ the user com-

7. Non-economic UGC in this Note means UGC produced without any intent to profit, and which does not cause more than de minimis financial damage to infringed copyright holders.

8. Content encompasses a broad range of creative works including written, audio, visual, or a mixture thereof. Org. Econ. Co-operation & Dev., *Participative Web: User Created Content* 8 (Working Party on the Information Economy, Report No. DSTI/ICCP/IE(2006)7/FINAL), available at <http://www.oecd.org/dataoecd/57/14/38393115.pdf> [hereinafter OCEd].

9. *Id.* *But see id.* at 9 (suggesting that the media and other sophisticated Internet users increasingly buy or create UGC and UGC platforms for financial reasons).

10. *Id.*

11. *Blog*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/869092/blog> (last modified Sept. 28, 2010, 12:39 PM) (defining a blog as an "online journal where an individual, group, or corporation presents a record of activities, thoughts, or beliefs").

12. *Wiki*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1192819/wiki> (last modified Sept. 28, 2010, 12:44 PM) (defining a wiki as a "site that can be modified or contributed to by users" such as Wikipedia).

13. *Social network*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1335211/social-network> (last modified Sept. 28, 2010, 12:47 PM) (defining a social network as "an online community of individuals who exchange messages, share information, and, in some cases, cooperate on joint activities"). Prominent examples include Facebook, MySpace, Twitter, and LinkedIn.

14. *RSS*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1508925/RSS> (last modified Sept.

ments section at the end of news pieces, evaluations from product reviews, and, most notably, distribution sites like YouTube and Metacafe.

In addition to the above generalizations about the nature of UGC, UGC also possesses a handful of commonly agreed upon characteristics. First, it must be accessible via the Internet¹⁵ on either public websites or more restricted sites, like fee sites or private message boards. So, for example, email and instant messaging would not fit this rubric since they are not public media.¹⁶ Nor would a poem or song someone writes, but never shows to anyone, be UGC since it is neither public nor in the stream of commerce. Second, the content must be in some way creative.¹⁷ In part, this requires that users “add their own value to the work,”¹⁸ such as adding background music, dubbing, captions, remixes, or synthesizing two or more works. In contrast, wholesale copying of part of a movie or television show is not UGC.¹⁹ This distinction is important since it excludes what copyright holders fear most from underneath UGC’s umbrella: outright copying with no value added.²⁰ Finally, the content must be “created outside of professional routines and practices.”²¹ This prong focuses on the creator’s motivation, or, just as importantly, what did *not* motivate the creator. The work must not be made with the expectation of remuneration or profit.²² Rather, the creator must act out of a desire to connect with others, for the sake of expression, or to gain fame or notoriety.²³ In other words, creative content created and published by a person as part of his or her job is not UGC, but con-

28, 2010, 12:50 PM) (defining Really Simple Syndication (RSS) as a “format used to provide subscribers with new content from frequently updated Web sites”).

15. OECD, *supra* note 8, at 4.

16. *Id.*

17. *Id.*

18. *Id.* at 8.

19. Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 VAND. J. ENT. & TECH. L. 729, 741–42 (2008).

20. *Id.* at 741. Of course, copyright holders are not fully satisfied by this reasoning in cases where the alleged infringer’s use of the copyright reduces the value of the copyright holder’s copyright in some way.

21. OECD, *supra* note 8.

22. *Id.*

23. *Id.*

tent developed and made publicly available by a person who is not getting paid (even if they hope their work product will lead to financial rewards down the road), assuming it also satisfies the other UGC requirements.²⁴

B. GENIE OUT OF THE BOTTLE: WHY UGC MATTERS

Largely non-existent at the turn of the millennium, UGC has become a fixture of Internet use.²⁵ Indeed, over half of American Internet users access UGC at least once a month²⁶ while over forty percent of American Internet users regularly use UGC.²⁷ With that explosion in popularity, UGC has transformed into big business.²⁸ For instance, in 2009, YouTube generated approximately a quarter billion dollars alone,²⁹ while UGC in the aggregate reportedly created over \$1 billion in ad revenue, and that figure is projected to rise to \$4.3 billion by 2011.³⁰ That is more money than the gross domestic product of at least forty-three countries.³¹

Given the soaring trajectory of online usage,³² the panoply of technologies that make UGC possible, and the wealth of available content to synthesize and inspire, UGC's growth will

24. *See id.* at 8–9.

25. *See User Content Creation around the World*, EMARKETER (Dec. 28, 2009), <http://www.emarketer.com/Article.aspx?R=1007440> (noting that over ninety-two million Americans and similar percentages of Internet users in China and Japan regularly manage social networking profiles, upload video, or blog).

26. John Horrigan, *Home Broadband Adoption 2006: Summary of Findings*, PEW INTERNET (May 28, 2006), <http://www.pewinternet.org/Reports/2006/Home-Broadband-Adoption-2006/1-Summary-of-Findings.aspx>.

27. *Id.*

28. Eric Krangel, *YouTube Will Take Half a Billion Off Google's Bottom Line This Year*, BUSINESS INSIDER (Apr. 3, 2009, 10:40 PM), <http://www.businessinsider.com/analyst-youtube-will-take-half-a-billion-off-googles-bottom-line-this-year-2009-4> (stating that YouTube earned \$240 million dollars in ad revenue in 2009); INTERACTIVE ADVERTISING BUREAU, *USER GENERATED CONTENT, SOCIAL MEDIA, AND ADVERTISING—AN OVERVIEW 1* (Apr. 2008), available at http://www.iab.net/media/file/2008_ugc_platform.pdf.

29. Krangel, *supra* note 28.

30. Paul Verna, *User Generated Content: Will Web 2.0 Pay Its Way?*, EMARKETER (June 2007), http://www.emarketer.com/Report.aspx?code=emarketer_2000421.

31. *Gross Domestic Product 2009*, WORLD BANK (2009), <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

32. *Internet users (per 100 people)*, WORLD BANK (2009) (showing a 75% increase in Internet usage in the United States between 1990 and 2008), <http://data.worldbank.org/indicator/IT.NET.USER.P2>.

almost certainly put considerable pressure on the existing copyright framework until changes to the status quo occur.³³ For example, simple blogging software accessible for free on sites like LiveJournal³⁴ and Blogger³⁵ enable anyone with access to the Internet to draw viewers to the website by copying and pasting copyrighted material and then commenting on that material. Similarly, iPod and iTunes, in conjunction with affordable recording hardware, make podcasting that may or may not include copyrighted material attainable for virtually anyone interested in trying their hand at it.³⁶ Likewise, editing programs (e.g., iMovie and Windows Movie Maker) in concert with low cost digital camcorders and sites for uploading videos (e.g., YouTube) have fundamentally altered the distributional scope of home movies.³⁷

The genie is out of the bottle. UGC producers have an extensive chest of tools to re-package and publish copyrighted material that copyright holders are ill-equipped to protect against and which generates significant revenue for UGC websites like YouTube. Moreover, as will be discussed below, what weapons copyright holders have are disproportionately leveled at UGC producers, which seldom derive financial benefit from their creative endeavors, rather than at UGC-centric websites, which profit from the copyright infringement. The status quo is problematic. It comes down too hard on UGC producers, inadequately protects copyright holders, and seemingly lets UGC-centric websites off the hook. A new legal framework is needed.

C. HISTORICAL UNDERPINNINGS OF COPYRIGHT

In wrestling with the conflicting goals of promoting

33. *But see* Tony Dokoupil, *Is User-Generated Content Out? Revenge of the Experts*, NEWSWEEK.COM (Mar. 6, 2008) <http://www.newsweek.com/id/119091> (suggesting that the rise of UGC will be moderated as people reset their preference back to reliable information provided by experts); Krangel, *supra* note 28 (highlighting that YouTube is hemorrhaging money and that this trend is likely to continue).

34. LIVEJOURNAL, <http://www.livejournal.com> (last visited Aug. 28, 2010).

35. BLOGGER, <http://www.blogger.com> (last visited Aug. 28, 2010).

36. *See generally* *What Is Podcasting?*, PODCASTING NEWS, http://www.podcastingnews.com/articles/What_is_Podcasting.html (last visited Jan. 23, 2011) (providing a general overview of podcasting).

37. *See* Rick Broida, *Alpha Geek: Video Editing 101*, LIFEHACKER (Dec. 11, 2006, 12:30 PM), <http://lifehacker.com/software/digital-video/alpha-geek-video-editing-101-220595.php>.

progress and innovation and guarding intellectual property, the Framers of the Constitution hoped to advance three principle aims: “the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author.”³⁸ Ultimately, the Framers balanced the tension by empowering Congress with the authority to create time-limited copyrights that permitted copyright holders the exclusive right to control and benefit from their original works with the express goal “[t]o promote the Progress of Science and useful Arts.”³⁹ In other words, the Framers sought to promote the expression of new ideas by allowing copyright holders a period to exclusively benefit from his or her copyrights, but, at the same time, foreclosed a monopoly over those copyrights into perpetuity by imposing time limits. In this way, the Framers made creativity a potentially profitable pursuit while guaranteeing society as a whole would benefit from that creativity.

D. WHERE THE RUBBER MEETS THE ROAD: COPYRIGHT INFRINGEMENT IN A UGC WORLD

1. Infringement

Copyright holders have a series of rights empowering them to control the dissemination of their work. For example, under 17 U.S.C. § 106 copyright owners have the exclusive right to reproduce their work,⁴⁰ prepare derivative works,⁴¹ distribute copies,⁴² publicly perform,⁴³ publicly display,⁴⁴ or publicly perform the work by means of a digital audio transmission (in the case of sound recordings).⁴⁵ In addition to protecting these rights against direct infringement,⁴⁶ once a direct infringer is found, copyright law permits the holder to go for the deeper

38. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001).

39. U.S. CONST. art. I, § 8, cl. 8.

40. 17 U.S.C. § 106(1) (2006).

41. *Id.* § 106(2).

42. *Id.* § 106(3).

43. *Id.* § 106(4).

44. *Id.* § 106(5).

45. *Id.* § 106(6).

46. In order to prove copyright infringement, a plaintiff must show ownership of a valid copyright and unauthorized copying by the defendant. *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976) (citing *McGraw-Hill, Inc. v. Worth Publishers, Inc.*, 335 F. Supp. 415, 419 (S.D.N.Y. 1971)).

pockets of parties who may have contributed⁴⁷ or induced⁴⁸ the infringement directly or vicariously.⁴⁹ For instance, this plays out when someone uploads a video onto YouTube containing an artist's music in the background such as a slideshow of photos from a recent vacation to music. While copyright holder X may not be interested in suing John Doe for his home-made musical collage, YouTube's contribution and inducement to John's infringing use (as well as YouTube's much deeper pockets) make for a tempting target of litigation.

2. Fair Use

At the same time, use of a copyrighted work does not always constitute infringement. The fair use doctrine sometimes permits the use of copyrighted material regardless of the copy-

47. For contributory infringement, first, the accused must have contributed to a direct infringement. See *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005). Second, the contributory infringer (i.e., the accused) must have actually or constructively known about the direct infringement. See *id.* at 936–37. Given the difficulty in showing actual or constructive knowledge to demonstrate the infringer's intent to infringe, courts generally delve deeply into the facts to divine whether intent existed. See *id.* at 935 (noting that “where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement” liability may be found); see also *id.* at 936 (enumerating a list of cases where various courts made a fact-intensive inquiry into whether or not intent existed). For example, willful blindness (the ostrich defense), Marcelo Halpern, *User Generated Content—Key Issues*, 901 PLI/PAT 203, 212 (2007), or a business model that relies on copyright infringement, see *Metro-Goldwyn-Mayer*, 545 U.S. at 939–40, may suffice to show constructive knowledge of direct infringement. Third, the contributory infringer must materially contribute to the infringement. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 446–47 (1984).

48. Inducement requires an actual direct infringement. *Metro-Goldwyn-Mayer* 545 U.S. at 930. Additionally, the inducing infringer must act with the purpose of promoting infringement of copyrights and with awareness that the end users are directly infringing the copyrights. *Id.* at 930, 935–37. Finally, the inducing infringer must also materially contribute to the actual direct infringement. *Id.* at 930–31.

49. Similar to contributory infringement and inducement, to show vicarious infringement the plaintiff must show an actual direct infringement. Halpern, *supra* note 47, at 213. The vicarious infringer must also have a financial interest in the infringement. *Id.* To demonstrate this, courts regularly rely on evidence about the alleged infringer's business model. *Metro-Goldwyn-Mayer* 545 U.S. at 940–41. For instance, many websites make money based on the number of people who look at their website. The more traffic the site receives, the greater its ad revenue. *Id.* at 940. For blogs and video sites that rely on ad revenue generated from UGC-enticed traffic, claims of vicarious infringement loom as a potential consequence.

right owner's wishes.⁵⁰ Fair use is an affirmative defense for alleged infringers involving four factors: (1) the nature of the allegedly infringing use, (2) the nature of the copyrighted work, (3) the amount of the work copied, and (4) the market effect of the use.⁵¹

While a promising solution to the UGC dilemma at first blush, fair use offers minimal cover for UGC producers since fair use can only be raised after a content user's material has been removed and the copyright holder alleges copyright infringement.⁵² Because fair use is only triggered after a copyright holder alleges infringement, UGC producers meeting the fair use criterion do not presumptively have the right to produce the work.⁵³ Instead, UGC producers must risk removal and the cost of a lawsuit before even getting to raise fair use as an affirmative defense.⁵⁴ By then, the damage is often done.

3. Damages

U.S. copyright law provides for statutory damages of between \$750 and \$30,000 per work infringed⁵⁵ as well as lost profits and unjust enrichment.⁵⁶ Given the ubiquity of downloading and listening to songs online, statutory damages rise fast—too fast. For example, in *Viacom International v. YouTube, Inc.*, Viacom's complaint against YouTube alleged that more than 150,000 works violating Viacom's copyrights existed on YouTube, amounting to a minimum of \$112.5 million in damages.⁵⁷ Viacom's complaint asked for at least \$1 billion in

50. 17 U.S.C. § 107 (2006).

51. *Id.*

52. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

53. Ian Chung, *Be Wary of Adding Your Own Soundtrack: Lenz v. Universal and How the Fair Use Policy Should Be Applied to User Generated Content*, 29 LOY. L.A. ENT. L. REV. 163, 175 (2009).

54. *Id.*

55. 17 U.S.C. § 504(c) (2006).

56. 17 U.S.C. § 504(b) (2006). Lost profits can be difficult to determine for works not ordinarily distributed such as independent video projects later used in other projects. For example, the movie *Funny People* starring Adam Sandler used a number of real-life videos in the course of the movie. *FUNNY PEOPLE* (Universal Pictures 2009). Likewise, unjust enrichment often is difficult to prove, but generally involves an analysis of advertising revenue earned in connection with views of the infringed material. For example, if Metacafe or Veoh makes \$20,000 in ad revenue from displaying an infringing video, the money would constitute unjust enrichment.

57. Complaint at 3, *Viacom Int'l v. YouTube, Inc.*, (S.D.N.Y. 2007) (No. 07-cv-2103), 2007 WL 775611 (estimating the total based on 150,000 infringe-

damages.⁵⁸

E. PROTECTIONS FOR INTERNET SERVICE PROVIDERS: DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act (DMCA), enacted in 1998, sought to balance the interests of content owners, Online Service Providers (OSPs), and information users as well as encouraging the continued growth of the Internet and electronic commerce.⁵⁹ In particular, Congress intended the DMCA to enlist the aid of OSPs in reducing the growing level of copyright infringement on the Internet.⁶⁰ To that effect, the DMCA immunizes an OSP from liability where the OSP honors a copyright holder's takedown request in good faith.⁶¹ This "safe harbor" protects OSPs from liability for transitory digital network communications,⁶² system caching,⁶³ information residing on systems or networks at the direction of users,⁶⁴ and information location tools⁶⁵ (i.e., where the OSP is passive—merely providing access to its network for transmission or storage purposes).

To be eligible for the DMCA safe harbor, an OSP must first adopt, reasonably implement, and inform users of a policy that gives the OSP the power to terminate users who are repeat infringers. For instance, Facebook's terms of use state: "[i]f you repeatedly infringe other people's intellectual property rights, we will disable your account when appropriate."⁶⁶ The policy must also accommodate standard technical measures utilized by copyright owners in order to identify or protect copyrighted works.⁶⁷ Second, the OSP must demonstrate it did not have ac-

ments and statutory damages of \$750 per infringement).

58. *Id.* at 5.

59. H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

60. *See* Rossi v. Motion Picture Ass'n of Am. Inc., 391 F.3d 1000, 1003 (9th Cir. 2004).

61. *See* 17 U.S.C. § 512(c)(3) (2006).

62. *See* 17 U.S.C. § 512(a) (2006). Transitory digital network communications are transmissions initiated by someone other than the service provider.

63. *See* 17 U.S.C. § 512(b) (2006). System caching is the storing of materials from other networks on the service provider's network.

64. *See* 17 U.S.C. § 512(c) (2006).

65. *See* 17 U.S.C. § 512(d) (2006). This section protects OSPs for electronically citing or linking to an infringing site.

66. *Statement of Rights and Responsibilities*, FACEBOOK (Oct. 4, 2010), <http://www.facebook.com/terms.php>.

67. 17 U.S.C. § 512(i)(1)(A).

tual knowledge that its system contained infringing materials or an awareness of facts or circumstances—“red flags”—from which infringement appears likely.⁶⁸ If at any time the OSP learns of potentially infringing material, it must immediately remove the content.⁶⁹ Third, the OSP must show that it did not receive a financial benefit directly linked to an infringing activity it had both the right and ability to control.⁷⁰ Fourth, upon a good faith notification by the copyright holder of infringement, the OSP must promptly block access or take down the infringing material.⁷¹ At the same time, the subscriber that put up the content can challenge the site’s removal (albeit usually after the fact).⁷² Assuming the subscriber follows the appropriate counter notification procedure the service provider must replace or restore the removed material within ten to fourteen days of receipt of the notice.⁷³

In a perfect world where everyone follows the spirit of the rules, the DMCA, with its requirements that websites police

68. See 17 U.S.C. § 512(c). To date, the case law suggests that these red flags must be rather conspicuous. See *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 763 (9th Cir. 2007), *amended by* *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (finding appellations depicting pornography as “illegal” and “stolen” insufficient to show infringement since the labels may have simply been “an attempt to increase the salacious appeal” of the photographs); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148–49 (N.D. Cal. 2008) (holding that the presence of the plaintiff’s trademark on a pornographic video uploaded by a user did not constitute a red flag because the plaintiff failed to provide enough evidence indicating the site knew about the trademarks).

69. 17 U.S.C. § 512(c)(1)(A)(iii). Interestingly, this provision may actually encourage OSPs to actively avoid investigating their networks so that they do not discover infringing content to remove. As a result, at least one author has suggested that with the genesis of Web 2.0 and its reliance on UGC, OSPs have broken their bargain with copyright holders. See Brandon Brown, Note, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L. J. 437, 437 (2008). That is, the DMCA was supposed to provide OSPs with limited immunity in exchange for greater policing and cooperation in protecting copyrighted works. However, since those same sites have come to increasingly rely on users to upload and control the content on the OSPs websites, OSPs effectively skirt their end of the bargain. *Id.*

70. 17 U.S.C. § 512(c)(1)(B).

71. *Id.* § 512(c)(1)(C). In practice, given the volume of complaints, the time and manpower requirements to check each takedown request are prohibitive. See Ian C. Ballon, *DMCA Liability Limitations for Social Networks, Blogs, Websites and Other Service Providers*, 978 PLI/PAT 641, 653 (2009). Given the cost and the fact that OSPs are immunized from liability for improper takedowns, OSPs have significant incentive to acquiesce to all takedown demands.

72. 17 U.S.C. § 512(g).

73. *Id.* § 512(g)(2)(C).

themselves for copyright violations and that copyright holders have a good faith before submitting a takedown request as well as its empowerment of UGC up-loaders to challenge takedown notices, seems more or less reasonable. However, as the discussion below will demonstrate, appearances can be deceiving.

III. ANALYSIS

A. THE DMCA AS A SWORD: TAKEDOWNS, TAKEDOWNS, AND MORE TAKEDOWNS

The DMCA has created an environment that rewards indiscriminate, hair-trigger takedown requests⁷⁴ and attempts to game the system.⁷⁵ For example, in early 2007, Viacom demanded that YouTube remove more than 100,000 unauthorized clips of video content;⁷⁶ a number of which were actually uploaded by Viacom itself.⁷⁷ Similarly, the Science Fiction Writers of America (SFWA) sent takedown notices en masse to Scribd.com, a public document database.⁷⁸ However, the SFWA did not own the copyright for a number of the items requested taken down.⁷⁹ The Recording Industry Association of America (RIAA) has also been a repeat abuser of DMCA takedown notices. For example, the RIAA has issued takedown notices against sites it recruited to promote its music.⁸⁰ The group also went after an unfortunate University of Pennsylvania faculty

74. See Jeffrey Cobia, Note, *The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 MINN. J. L. SCI. & TECH. 387, 403 (2009).

75. See Tom Krazit, *Google's Statement on YouTube-Viacom Court Case*, CNET NEWS (Mar. 18, 2010, 10:38 AM), http://news.cnet.com/8301-30684_3-20000711-265.html (noting that Viacom actively uploaded its own content onto YouTube through various covert means such as having employees rough up the video, then upload the material onto YouTube through fake e-mails on public computers).

76. Greg Sandoval, *Viacom Demands Google, YouTube to Pull 100,000 Clips*, CNET NEWS (Feb. 2, 2007, 9:20 AM), http://news.cnet.com/8301-10784_3-6155737-7.html.

77. Krazit, *supra* note 75.

78. Cory Doctorow, *Science Fiction Writers of America Abuses the DMCA*, BOING BOING (Aug. 30, 2007, 11:36 PM), <http://www.boingboing.net/2007/08/30/science-fiction-writ-1.html>.

79. *Id.*

80. See *RIAA DMCA's Sites It Recruited to Promote Music*, MASHTECHWORLD.COM (Feb. 20, 2010, 11:01 PM), <http://www.mashtechworld.com/2010/02/20/riaa-dmcas-sites-it-recruited-to-promote-music/>.

member named Peter Usher for performing an original *a capella* song about gamma rays because his last name resembles Usher, the singer.⁸¹ The RIAA even issued takedown notices to individuals and families that did not have a computer or Internet connection for allegedly uploading copyrighted material.⁸²

Moreover, even where the clip is a fair use, copyright holders have felt little constraint in issuing a takedown request.⁸³ For instance, the National Football League (NFL) sent a takedown notice to YouTube regarding a short clip of the NFL's copyright and broadcast policy posted by a law professor, Wendy Seltzer. Because Seltzer posted the clip for the purpose of criticism, comment, and research, the NFL's takedown request was almost certainly illegitimate.⁸⁴

A number of parties have also twisted the DMCA from a mechanism for protecting legitimate copyright holders' rights online into a tool for censorship.⁸⁵ For example, Michael Crook issued a number of takedown notices to content providers who rightfully possessed a picture of him. In an effort to censor use of the picture, Crook sent takedown requests, even though posting the picture was likely a fair use, and Crook did not own the

81. See *Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands*, ELEC. FRONTIER FOUND. (Sept. 2003), http://www.eff.org/files/20030926_unsafe_harbors.pdf.

82. See Carl Longino, *RIAA, Again, Sues Family Without a Computer*, TECHDIRT (Apr. 24, 2006, 11:43 AM), <http://techdirt.com/articles/20060424/1141216.shtml>; Ray Beckerman, *Marie Lindor to Move for Summary Judgment*, RECORDING INDUSTRY VS THE PEOPLE (Feb. 3, 2006, 10:00 AM), <http://recordingindustryvspeople.blogspot.com/2006/02/marie-lindor-to-move-for-summary.html>; Mike Masnick, *RIAA Sues Yet Another Person Without a Computer*, TECHDIRT (Feb. 2, 2006 8:22 PM), <http://www.techdirt.com/articles/20060202/2021204.shtml>.

83. See *Legal Tags, The Blog, NFL Clip Down Again*, WENDY.SELTZER.ORG (Mar. 18, 2007, 10:38 AM), http://wendy.seltzer.org/blog/archives/2007/03/18/nfl_clip_down_again.html; see also Jacqui Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, ARS TECHNICA (Mar. 20, 2007, 12:35 PM), <http://arstechnica.com/news.ars/post/20070320-nfl-fumbles-dmca-takedown-battle-could-face-sanctions.html>; Peter Lattman, *Law Professor Wendy Seltzer Takes on the NFL*, WALL ST. J. L. BLOG (Mar. 21, 2007, 12:27 PM), <http://blogs.wsj.com/law/2007/03/21/law-professor-wendy-seltzer-takes-on-the-nfl>.

84. See Cheng, *supra* note 83.

85. See, e.g., Jason Lee Miller, *YouTube Caught in Malkin, EFF, UMG Crossfire*, WEBPRONNEWS (May 11, 2007), <http://www.webpronews.com/topnews/2007/05/11/youtube-caught-in-malkin-eff-umg-crossfire>.

picture or have the right to control it.⁸⁶ In another case, Akon, a rapper, and United Music Group, which produces Akon's records, sent a prominent blogger, Michelle Malkin, a takedown notice for a video in which Malkin spoke critically of Akon even though the DMCA has nothing to do with controlling critical speech.⁸⁷

In short, UGC producers have come under siege from a steady diet of takedown requests. At best, these efforts represent overzealousness and, on occasion, ignorance of applicable law by copyright holders. At worst, they constitute blatant abuses of the system by copyright holders. Either way, as will be discussed below, the status quo does a disservice to all involved.

B. DO AS I SAY, NOT AS I DO: THE CONTENT INDUSTRY'S UNAUTHORIZED "BORROWING" OF ORIGINAL YOUTUBE MATERIAL

While the commercial content industry continues its onslaught against any videos that may conceivably amount to a copyright violation, it has shown minimal concern for the intellectual property rights of YouTube users posting original content. Among the 100,000 removal requests noted above was a YouTube video of a 2006 campaign ad for the North Carolina Rockingham County Board of Education.⁸⁸ One of the candidates, Christopher Knight, produced an ad showing himself wielding a light saber and the Death Star destroying a school while a voice-over harangued No Child Left Behind.⁸⁹ Knight uploaded the ad onto YouTube⁹⁰ where the VH1 program Web

86. See Xenia Jardin, *Michael Crook Sends Bogus DMCA Takedown Notice to BoingBoing*, BOING BOING (Nov. 2, 2006, 10:52 EST), <http://www.boingboing.net/2006/11/02/michael-crook-sends-.html>; see also Jonathan Bailey, *How Not to Use the DMCA*, PLAGIARISMTODAY (Nov. 3, 2006), <http://www.plagiarismtoday.com/2006/11/03/how-not-to-use-the-dmca>.

87. See Miller, *supra* note 85.

88. See Sandoval, *supra* note 76; Jacqui Cheng, *Viacom's "Bass-Ackwards" Screw-up: Issues Takedown for Video it "Pirated"*, ARS TECHNICA (Aug. 30, 2007, 8:44 PM), <http://arstechnica.com/tech-policy/news/2007/08/viacom-caught-in-copyright-infringement-loop.ars>.

89. See Pam Belluck, *Local Issues Mirror National Ones, but the Special Effects Occasionally Stand Alone*, N.Y. TIMES, Nov. 2, 2006, at A22. Lucas Films Ltd. did not sue over the campaign advertisement. According to Christopher Knight's personal blog, the George Lucas Education Foundation Magazine *Edutopia* dubbed the commercial as the "[b]est campaign ad ever!". THE KNIGHT SHIFT, <http://theknightshift.blogspot.com/> (last visited Sep. 21, 2010).

90. See Christopher Knight, *Christopher Knight for School Board TV*

Junk 2.0, which operates similarly to America's Funniest Home Videos, but featuring online videos,⁹¹ spotted it. Web Junk 2.0, finding Mr. Knight's campaign ad good fodder for the show, made a segment lampooning Mr. Knight's advertisement. The short segment re-used Mr. Knight's original footage along with some additional commentary and the appearance of the show's host.⁹² Mr. Knight saw the piece and enjoyed it so much that he reposted it on YouTube.⁹³ However, Web Junk 2.0 did not appreciate Mr. Knight's unauthorized use and ordered YouTube to remove it under the DMCA's notice and takedown procedures. VH1 claimed that the extra commentary and the image of the show's host in the video transformed it into a derivative work exclusively owned by VH1.⁹⁴ Mr. Knight counter-notified and YouTube reposted the clip.⁹⁵ After considerable publicity, Viacom ultimately backed down.⁹⁶ While relatively undocumented, Web Junk 2.0 is probably not unique in their use of YouTube and other UGC as a source of fresh concepts.⁹⁷

Commercial #1, YOUTUBE (Oct. 6, 2006), <http://www.youtube.com/watch?v=nLi5B0Iefsk>.

91. Chris Marlowe, *VH1, iFilm unspooling "Web Junk,"* HOLLYWOOD REPORTER, Dec. 28, 2005, available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1001738403 (reporting on the new series, Web Junk 2.0, which uses viral Internet videos for its show). The aim is a democratic "viewer-generated" show. *Id.* Interestingly, no suggestion appears that permission will be sought to replay the videos. *Id.*

92. See *Web Junk 2.0: Episode 306: Animals and Other Crap* (VH1 Television Broadcast July 6, 2008).

93. *Web Junk 2.0 on VH1 Features My School Board Commercial*, YOUTUBE (July 11, 2007), <http://www.youtube.com/watch?v=ddyVQwpByug>.

94. See Christopher Knight, *Viacom Situation Update: YouTube Has Restored My Clip*, THE KNIGHT SHIFT, (Nov. 21, 2009, 11:50 PM), <http://theknightshift.blogspot.com/2007/09/viacom-situation-update-youtube-has.html>.

95. See *Viacom v. Knight*, CITIZEN MEDIA LAW PROJECT, (Aug. 29, 2008), <http://www.citmedialaw.org/threats/viacom-v-knight> (summarizing the events that took place between Knight and Viacom).

96. Compare Tim P., Comment to *YouTube-Related Legal Disputes, Part I*, WALL ST. J. L. BLOG (Sept. 1, 2007, 12:44 PM), <http://blogs.wsj.com/law/2007/08/31/youtube-related-lawsuits-part-i/> (noting that Viacom came off as "tin-eared" and suffered "a lot of negative publicity" for its actions toward Chris Knight), and Vindu Goel, *Followup: Chris Knight Wins Battle with Viacom over YouTube Clip*, VINDU'S VIEW FROM THE VALLEY, <http://blogs.mercurynews.com/vindu/2007/09/11/followup-chris-knight-wins-battle-with-viacom-over-youtube-clip/> (commenting that Viacom elected not to file suit).

97. Since 2006, there have been a number of business initiatives to profit on UGC by using everyday peoples' creative work posted online. See Halbert,

C. PROTECTING UGC: SOME SENSIBLE SUGGESTIONS

In its current form, copyright law protects all forms of creativity, but favors major content providers.⁹⁸ Until recently this disconnect did not raise many issues. However with the rise of the Internet and, in particular, the explosion of UGC, the system has come under assault. UGC providers have more or less used copyrighted materials with impunity. Copyright holders have responded to the onslaught with a broad brush, challenging almost all unauthorized uses of their copyright when discovered. To remedy the inadequacies of the system, Congress should amend the DMCA with three broad themes in mind: sharply reducing (or preferably eliminating) liability for non-economic UGC, increasing the copyright policing responsibility of sites specializing in UGC content, and reducing frivolous and/or non-particularized claims of infringement. To that effect, this Note suggests that the legal framework should (1) carve out an exception for key historical and cultural interactions, (2) turn fair use into a presumption, rather than an affirmative defense, (3) put some teeth into the requirement that copyright holders must show a good faith basis for issuing a takedown request, (4) provide useful guidelines for legal UGC, (5) develop a mutually beneficial creative licensing system, (6) cap damages for garden variety UGC, and (7) increase the responsibility of UGC-centric websites to police their content for copyright infringement.

1. Carving Out an Exception for Important Cultural Moments and Interactions

The DMCA should provide immunity to users who copy an entire work that is an important cultural moment or interac-

supra note 6, at 949, n.131 (citing Peter Grant, *Invasion of the Hamster Video; Comcast and Verizon Test Market for Putting Homemade Videos on TV*, GLOBE & MAIL (Canada), Nov. 8, 2006, at B13). The content generated by users is considered raw material rife with potential for creating new products. *Id.* Grant does not discuss the ways in which users might be personally compensated for the commercial appropriation of their videos. *Id.*

98. *See id.* at 923–24 (commenting that a few companies have come to dominate commercial culture and that those juggernauts wield copyright as a sword against the “little guy” while freely borrowing from non-commercial sources). As such, copyright actively protects the commercial culture industry, which has the resources to enforce its rights, but also lets commercial culture poach from non-commercial culture since non-commercial culture suffers from a lack of resources, expertise, and the will to fight back consistently.

tion⁹⁹ and reproduce it with no attempt to profit or reduce the value of the work.¹⁰⁰ Copyrighted works on YouTube often prove resilient to even zealous removal efforts.¹⁰¹ Frequently, multiple users have already posted largely similar clips many of which are not discovered and ordered removed.¹⁰² In other cases, the removed clip might be reposted either by the original or new posters.¹⁰³ Moreover, individuals post with the knowledge (or at least they ought to know) that they risk litigation. And, meaningfully, they (usually) entertain that small risk of litigation even though they have little to no hope of profiting from their efforts.

If financial gain is seemingly not the goal, what explains the pervasiveness of copyright material on sites like YouTube and users' resistance to permanently removing infringing material? YouTube and its brethren open up a vast vista of oppor-

99. What constitutes important cultural moments or interactions has many permutations. At minimum, key national events like electoral debates, the State of the Union, Inaugural Addresses or the moon landing would fall under the penumbra of "important cultural moments or interactions." Also, chart topping music hits, bestselling books, and leading television shows like Oprah, Seinfeld, and The Office in addition to blockbuster movies such as Star Wars, Forrest Gump, and Gone with the Wind would, after a fair period of time to recoup financial outlays, earn a profit, and then settle into the national conscious (for example, five years after publication) would constitute important cultural moments or interactions. Even after that period, UGC producers would not be allowed to reproduce entire commercial works, but, rather parts of a work to make mash-ups, parodies, and other creative works without fear of a copyright infringement lawsuit.

100. Cf. Halbert, *supra* note 6, at 936–37 (showing that beyond the obvious copyright infringers that purposefully rip off copyrights in an effort to profit, groups that infringe copyrights as a matter of principle (e.g., "copyfighters" that oppose the copyright system) and infringers that provide free access to a song in its entirety that consumers would otherwise have to buy would generally not be eligible for this exemption).

101. See Branwen Buckley, Note, *SueTube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 238–39 (2008) (commenting that despite NBC Universal's best efforts, removed postings on YouTube would invariably pop up again for popular works).

102. See Kevin C. Hormann, Comment, *The Death of DMCA? How Viacom v. YouTube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345, 1355–56 (2009) (highlighting that the amount of bandwidth usage on YouTube—on par with the whole Internet circa 2000—combined with simple means of hiding infringing material through, for example, seemingly innocuous file appellations makes it unfeasible to find all infringing material).

103. See Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 591 (2008) (describing the takedown-re-post cycle as "hydra-like" since for each video removed, two more spring up to replace it).

tunities for users to share and adapt one of the United States' most common forms of cultural expression: the commercial culture.¹⁰⁴ The result adds value by “decommodify[ing] these cultural moments and giv[ing] them authentic meaning . . . that cannot exist without the shared value contributed by the people who are linked through a common cultural experience.”¹⁰⁵ For instance, in the 2006 White House Correspondents' Association dinner, Stephen Colbert roasted President Bush. Among the mainstream media, the speech was considered an unmitigated flop,¹⁰⁶ but it quickly became a fixture on YouTube, surviving repeated efforts to remove it as a copyright violation.¹⁰⁷ One viewer comment from a YouTube version of the speech nicely summarizes a key aspect of how UGC has altered communication:

This whole thing is interesting, because he's not playing to the crowd who was in that dinner hall that night. He was playing to the people at home and those (like us) who would watch it on the Internet later. WE were the ones who found it hilarious. Not just because of what he said, but because the crowd there TOTALLY DIDN'T.¹⁰⁸

In a world where cultural references are primarily visual (rather than text-based), having a venue like YouTube that provides a medium for distributing and commenting on visual content plays much the same role as newspapers, books, and the agoras of old. Here allowing the established, old format media to bar the clip from YouTube would do a disservice to political discourse. Instead of relying on the punditry's thoughts about an event, a viewer can sit down, see the clip in its entirety, discuss it with the rest of the “unwashed masses,”¹⁰⁹ and

104. See Halbert, *supra* note 6, at. at 936.

105. Halbert, *supra* note 6, at. at 937.

106. See Michael Scherer, *The Truthiness Hurts*, SALON (May 1, 2006, 3:28 PM), <http://www.salon.com/opinion/feature/2006/05/01/colbert/> (providing one account of the press reaction regarding many who were uncomfortable with Colbert's approach; it was not what they expected).

107. One version (among many) of the speech posted has over 2,000,000 views and more than 6000 comments. *Colbert Roasts Bush*, YOUTUBE (Aug. 26, 2007), http://www.youtube.com/watch?v=BSE_saVX_2A.

108. JamesOhGoodie, Comment to *Colbert Roasts Bush*, YOUTUBE (Nov. 2008), http://www.youtube.com/comment_servlet?all_comments=1&v=BSE_saVX_2A&page=10 (last visited Feb. 6, 2010).

109. The author uses the colloquialism “unwashed masses” in contrast to the political “elite” (i.e., the traditional fare of professional pundits, political strategists, and columnists) generally brought in to comment on the news of the day by traditional news sources.

form an opinion based on that collective dialogue. In an era of news media consolidation,¹¹⁰ UGC offers an avenue for maintaining healthy, vigorous debate.

2. Turn Fair Use into a Presumption

Currently fair use can only be raised as an affirmative defense once litigation has begun. However, works on platforms like YouTube that include more than de minimis creative additions should be presumptively considered fair use.¹¹¹ Take, for example, Stephanie Lenz. Stephanie Lenz posted a twenty-nine-second video on YouTube of her baby dancing to Prince's "Let's Go Crazy."¹¹² Though seemingly innocuous, a request to take down the material was issued and only after Lenz challenged the removal request via YouTube's counter-notification process did the video stay.¹¹³ Although the counter-notification process worked in Lenz's case, many (if not most) YouTube posters would not similarly challenge a removal request (due to the time, financial commitment, or, perhaps, out of a sense of discomfort with their legal position).¹¹⁴ The current form of the DMCA encourages these kinds of egregious removal requests¹¹⁵ since the copyright holder has an investment in policing his or her copyright property while the content user has much less

110. See Paul Wellstone, *Growing Media Consolidation Must Be Examined to Preserve Our Democracy*, 52 FED. COMM. L.J. 551, 551 (1999–2000).

111. See Halbert, *supra* note 6, at 941.

112. See "Let's Go Crazy" #1, YOUTUBE, <http://www.youtube.com/watch?v=N1KfJHFWhQ> (Feb. 7, 2007).

113. See Lawrence Lessig, *In Defense of Piracy*, WALL ST. J., Oct. 11, 2008, at W3. Lenz countered and argued her video was a fair use. See *Lenz v. Universal Music Corp.*, No. 07 Civ. 3783 (N.D. Cal. Aug. 20, 2008), 2010 WL 1610074 (granting Lenz's motion to dismiss); Timothy B. Lee, *Fair Use Gets a Fair Shake: YouTube Tot to Get Day in Court*, ARS TECHNICA (Aug. 21, 2008, 10:30 AM), <http://arstechnica.com/old/content/2008/08/fair-use-gets-a-fair-shake-youtube-tot-to-get-day-in-court.ars>.

114. See BATUR OKTAY & GREG WRENN, WORLD INTELLECTUAL PROP. ORG., WORKSHOP ON SERVICE PROVIDER LIABILITY: A LOOK BACK AT THE NOTICE-TAKEDOWN PROVISIONS OF THE U.S. DIGITAL MILLENNIUM COPYRIGHT ACT ONE YEAR AFTER ENACTMENT 17 (1999), available at www.wipo.int/edocs/mdocs/mdocs/en/osp_lia/osp_lia_2.doc (noting that in Yahoo!'s experience very few users utilize the counter-notification process).

115. Another form of egregiousness has also been suggested—perjury. Cobia, *supra* note 74, at 399 (arguing that the DMCA's truth-telling requirement has little value in dissuading copyright holders from committing perjury since most takedown requests are not challenged and that when contested the perjuror can simply decline to file a lawsuit and thereby avoid the statements from ever coming before a judge).

stake in the fight. As such, a very interested minority (copyright holders) can abuse a much less invested majority (content up-loaders). But this all too common pattern does not accord with the purposes underlying copyright law, stands in stark contrast to other creative activities, may actually conflict with the First Amendment, and wrongly relies on the supposition that UGC producers necessarily harm the value of the copyright holder's copyright.

First, copyright law aims to "promote the Progress of Science and useful Arts . . ." ¹¹⁶ Put differently, the Framers aimed to benefit society by promoting a robust marketplace of ideas that flourishes best when public access to new works is readily available since the ideas underlying the works keep progress churning by facilitating discourse and spawning new works. ¹¹⁷ For example, scientists use past experiments as a starting point in designing new experiments while artists use past artwork (albeit unconsciously much of the time) as the basis of future works. ¹¹⁸ Unfortunately, the current framework works at cross-purposes opposing works that parlay a small piece of copyrighted work into a new, original work.

Second, a presumption of fair use for UGC that only borrows modest amounts of other's work would bring UGC jurisprudence in line with academic writing in which citations to other academic works are presumptively legal. For instance, this Note cites to over a hundred other sources. Likewise, a fair use presumption would also bring UGC in line with pre-computer era re-creations of commercial culture. For example, at some point even the most closeted of people experience exchanges that draw heavily on cultural products from liberal quoting of Monty Python, ¹¹⁹ Seinfeld, ¹²⁰ and Saturday Night

116. U.S. CONST. art. I, § 8, cl. 8.

117. Of course, not all re-uses produce something socially desirable, but neither does all traditional speech and yet the Founders went out of their way to protect speech via the First Amendment.

118. See DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 19 (P. H. Nidditch ed., Oxford University Press Third ed. 2000) (1777) (writing that "though our thought seems to possess . . . unbounded liberty . . . [the] creative power of the mind amounts to no more than the faculty of compounding, transposing, augmenting, or diminishing the materials afforded us by the senses and experience").

119. For example, the Black Knight saying, "It's just a flesh wound" after King Arthur chops off both of his arms. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975).

Live to the re-enactment of other famous scenes or images. Before the days of uploading onto the Internet, these interactions would seldom, if ever, have been prosecuted. Likewise, they should not be now.¹²¹

Third, the current DMCA takedown procedure as used may actually constitute a prior restraint¹²² and therefore violate the First Amendment.¹²³ That is, copyright holders often issue takedowns for non-infringing works (i.e., speech) which websites as a matter of course will take down until and unless the UGC up-loader successfully challenges the request. In other contexts, such as newspapers and books, courts would strike down such a scheme as a violation of the First Amendment.¹²⁴ Similarly, here, because of the almost non-existent burden required of copyright holders before they demand allegedly infringing content taken down, copyright holders can effectively restrain First Amendment rights without judicial oversight. And while copyright law is generally carved out of First Amendment jurisprudence, the sheer volume of inappropriate takedown re-

120. Elaine telling Jerry and George “Yeah, I met this lawyer, we went out to dinner, I had the lobster bisque, we went back to my place, yada yada yada, I never heard from him again.” George replies, “But you yada yada’d over the best part” to which Elaine retorts, “No, I mentioned the bisque.” *Seinfeld* (NBC television broadcast Apr. 24, 1997).

121. While re-hashing Monty Python may seem silly or insignificant at first blush, UGC serves an important role as society increasingly transitions from text-centric to video-based communication. When cultural consumers re-create or adapt a cultural work without a financial motive “they are decommodifying culture by taking it out of its profit-oriented platform and transforming it not only into a derivative work under copyright law, but also into something that has cultural meaning that goes beyond monetary value.” Halbert, *supra* note 6, at 940 (footnote omitted). Websites like YouTube have caught on to a powerful phenomenon that provides people from various communities and, even, continents the ability to interact with others through a common language based on shared cultural experiences.

122. A prior restraint is when speech is halted or stopped, usually through legal means, before a court can properly assess whether it is constitutional or not. For example, if a city mayor issued a rule barring the local newspaper from printing an unfavorable article, that would be a prior restraint. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–72 (1997).

123. A lengthy discussion of the First Amendment, prior restraint, and the DMCA is beyond the scope of this paper, but for a fuller discussion, see *id.* Parts II, IV (discussing the First Amendment implications of copyright law generally and arguing that copyright infringement injunctions at least sometimes violate the First Amendment). Note that thus far the Supreme Court has consistently ruled that the First Amendment does not protect copyright-infringing speech against injunctions and other prior restraints. *Id.* Part II.A.

124. *Id.* at 149.

quests suggests that the DMCA does a disservice to free speech by letting copyright holders trample on the First Amendment in the name of copyright.

Moreover, even if one ignores the underlying purpose of copyright law and the First Amendment issues in favor of focusing solely on the self-interest of copyright holders, it is fallacious to assume that remuneration of copyright holders and limited unauthorized use by garden-variety UGC up-loaders cannot coexist happily. Indeed, re-use may actually increase the popularity of the work, which likely aids the content owner.¹²⁵ For example, more than a million views of Ms. Lenz's video raised the profile of Prince's song, "Let's Go Crazy."¹²⁶ Or, take for instance, a YouTube video of a Minnesota wedding in which the entire wedding party danced down the aisle to Chris Brown's song, "Forever." After the video went viral, sales of the song soared on iTunes.¹²⁷ And, even if the particular UGC work does not generate riches for the copyright holder, by the point a work has to worry about mass infringement (through minor infringements like soundtracks to collages or trip videos) the work usually has garnered sufficient popularity that the copyright holder has already been well rewarded.

Unfortunately, the current copyright regime overzealously combats potential infringement by making UGC producers guilty until proven innocent¹²⁸ while failing to sufficiently consider the non-monetary value of later adaptations¹²⁹ as an out-

125. This is particularly true where the content user provides a link to the iTunes store (or another commercial outlet) for those interested in buying the song, movie, or other work. Also, note that under current fair use jurisprudence, expansion of a copyright holder's market generally would militate in favor of finding a fair use. *Kelly v. Arriba Soft*, 336 F.3d 811, 821 (9th Cir. 2003).

126. See "Let's Go Crazy" #1, YOUTUBE (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KfJHFWlhQ> (listing a view count of 1,050,576 on August 28, 2010).

127. Brad Stone, *YouTube Wedding Video Spurs Music Sales*, N.Y. TIMES BITS BLOG, (July 30, 2009, 1:26 PM), <http://bits.blogs.nytimes.com/2009/07/30/youtube-trumpets-popularity-of-viral-wedding-dance/>.

128. USER GENERATED CONTENT PRINCIPLES, <http://www.ugcprinciples.com/> (last visited Apr. 21, 2009); *Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights*, VEOH.COM (Oct. 18, 2007), http://www.veoh.com/corporate/pressroom/article/10_18_2007 (claiming in essence that any "user" activity inevitably infringes).

129. Over-inclusive takedown requests also ignore potential positive finan-

let of self-expression or for the potential transformative aspect of art that can result from the adaptations.¹³⁰ Re-fashioning fair use from a shield into a sword would do much to mitigate the more significant abuses rampant under the current legal framework.

3. Putting Some Teeth into the Good Faith Requirement

Abusers of the DMCA's takedown procedure should face repercussions.¹³¹ Overly aggressive notice and takedown procedures that harm free speech rights as well as frivolous and overzealous protection of copyrighted material need to have consequences that make copyright owners pause, even for a moment, to consider whether or not to bring a claim. Perhaps if Mr. Knight could have successfully countersued VH1 for excessive notice and takedown procedures, VH1 and its parent organization, Viacom, given their unclean hands, would not have filed a takedown notice. After all, VH1, not Mr. Knight, set the matter in motion by coming across Mr. Knight's original campaign spot on YouTube and then electing to use it on a for-profit program without compensating Mr. Knight or even trying to get his authorization.

Of course, the DMCA technically has a provision preventing abusive takedown procedures.¹³² However, in practice, this provision has little teeth since courts have been reluctant to apply it in all but the most flagrant cases of misuse.¹³³ Rather than applying the DMCA test as currently interpreted, the DMCA language or case law should become more evenhanded. This could come in several different forms. For example, courts could raise a copyright holder's burden before asking a site to take down material. Another (similar) option is to require a

cial repercussions of UGC. *Infra* Part II.C.ii.

130. See, e.g., *Red vs. Blue / Why Are We Here?*, YOUTUBE, <http://www.youtube.com/watch?v=9BAM9fgV-ts> (June 2, 2008). *Red vs. Blue* is a comic science fiction video series based on Halo, a popular Xbox video game. Originally produced without permission, Bungie, the developer of Halo gave the series its blessing. Within a year of that magnanimity *Red vs. Blue* had acquired a viewership of between 650,000 and 1,000,000. See Kevin J. Delaney, *When Art Imitates Videogames, You Have "Red vs. Blue,"* WALL ST. J., Apr. 9, 2004, at A1 (exemplifying the Machinima artistic movement); *Interview of Red vs. Blue*, MACHINIMA.COM (Dec. 22 2003), <http://machinima.com/article/view&id=390>.

131. Halbert, *supra* note 6, at 957.

132. 17 U.S.C. § 512(f).

133. See *Online Policy Grp. v. Diebold*, 337 F. Supp. 2d 1204, 1204–05 (N.D. Cal. 2004); see also Chung, *supra* note 53, at 171.

copyright holder to satisfy an objective good faith standard before requesting a takedown notice. For instance, courts could use a three-part analytical framework akin to the fair use test. Under this framework, before requesting a takedown a copyright holder must ask: (1) whether the user profited from the UGC, (2) whether the UGC harmed or diminished the value of the copyrighted work or threatened to do so, and (3) whether the UGC producer uploaded most, if not all, of the copyrighted work without adding value to it such as with new content or other creative elements.¹³⁴ If the answer to all three questions is “no,” the DMCA should prohibit the copyright holder from sending a takedown notice.¹³⁵

4. Creating Order Out of Chaos: Less Quibbling, More Guidance

Copyright infringement in UGC cases inevitably turns on a case-by-case factual analysis.¹³⁶ While a highly fact-specific analysis has its advantages—namely justice in the individual case—it also has some significant drawbacks such as unpredictability. Unpredictability in the UGC-context stacks the deck in favor of copyright holders since it makes litigation more expensive and enables copyright holders to make what are in reality bad faith takedown requests while credibly claiming good faith given the current low bar under the DMCA. Instead of a highly fact-intensive analysis, the DMCA should provide more explicit guidance on what is and is not acceptable. For instance, transformative and other productive uses of copyright works¹³⁷ should be exempt from statutory actual damages.¹³⁸ While a court can later do justice, it makes sense simply to re-work the

134. Chung, *supra* note 53, at 182–87.

135. *Id.* at 182.

136. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (stating that the fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute.”).

137. This Note does not propose to flesh out the exact line for what uses deserve exemption, but hopefully has provided some initial guidelines to start the decision-making process.

138. John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1207. See also Zahr Said Stauffer, *Po-Mo Karaoke or Postcolonial Pastiche? What Fair Use Analysis Could Draw from Literary Criticism*, 31 COLUM. J. L. & ARTS 42, 44 (2007) (arguing that courts should adopt categories of *per se* acceptable derivatives to make downstream creative derivative works less perilous).

law to avoid the necessity of judicial proceedings in the first place for most cases by installing guidelines that allow actors to predict outcomes ahead of time.

5. A Win-Win: Implementing a Creative License System

Congress should consider implementing a mandatory creative licensing system. Copyright law's attempts to impose liability on a defendant for the acts of a third party have not worked well in the Internet context.¹³⁹ Rather than fighting rapidly advancing distribution technology, copyright holders could try to turn a profit from it instead. For example, some websites have pursued pre-emptive licensing that shares revenue with content owners so that users could post copyrighted material under the terms of that license.¹⁴⁰ Under a licensing scheme, if a UGC photo or video were posted on a site, the owner of the site would direct some of the ad revenue generated from traffic to the UGC to the relevant copyright holder.¹⁴¹

6. Capping Damages

The current DMCA damages computation needs revisiting

139. See Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 117 (2009) (stating that "surreptitious digital duplication and distribution of copyrighted material and the inability of Internet Service Providers . . . to monitor the activities of their customers" has proved too much for traditional copyright to successfully police).

140. YouTube, for instance, entered into a revenue sharing agreement with the NBA to let users post clips. Keith Regan, *YouTube Scores Licensing Deal with NBA*, E-COMMERCE TIMES (Feb. 27, 2007, 2:12 PM), <http://www.ecommercetimes.com/story/55996.html>; Dianna Dilwoth, *YouTube Slammed With \$1B Viacom Suit after Netting NBA, BBC Deals*, DIGITAL MARKETING NEWS (Mar. 22, 2007), <http://www.dmnews.com/youtube-slammed-with-1b-viacom-suit-after-netting-nba-bbc-deals/article/94943/>. YouTube has also reached agreements with CBS Corporation, Vivendi Universal, Warner Music Group, and Sony BMG Music Entertainment among others to proactively deal with posting copyrighted material. See Meghan Keane, *YouTube Goes Legit, Begins Streaming Approved CBS Content*, WIRED, (Oct. 10, 2008, 12:38 PM), <http://www.wired.com/epicenter/2008/10/youtube-goes-le/>; Adam Satariano & Brian Womack, *Bono Plays Matchmaker as YouTube, Universal Create Music Site*, BLOOMBERG, (Apr. 14, 2009, 12:00 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aaEHAG7vyT94>; Erika Morphy, *Warner, YouTube Dance to New Music Deal*, E-COMMERCE TIMES (Sept. 29, 2009 12:23 PM), <http://www.ecommercetimes.com/story/68244.html>.

141. In addition to paying copyright holders for revenue derived from the page with their content, the copyright holder should also get a piece of the revenue for page views resulting from their work drawing the user to the website.

in the context of UGC. As mentioned earlier, U.S. copyright law provides for statutory damages of between \$750 and \$30,000 per work infringed.¹⁴² For even an unpopular non-commercial video clip posted on YouTube, the minimum damage adds up quickly. If a travel collage of a recent trip uses five copyrighted songs, the poster would face at least \$3,750 and as much as \$150,000 in damages. Instead, the DMCA should differentiate between commercial and non-commercial uses. Where an amateur content producer uses copyrighted material for a non-commercial use, fines should be nominal or, at least, significantly curtailed. Much room exists for how to accomplish the reduction,¹⁴³ but the failure to distinguish between commercial and non-commercial uses of a copyrighted work gives copyright holders a significant sword to threaten the average UGC producer in situations involving minor appropriations of copyrighted work.

7. Police Thysself: Holding UGC Sites Responsible for Their Content

While copyright law and the DMCA treat individual users too harshly, they fail to treat OSPs strongly enough. The DMCA exemplifies the phrase “ignorance is bliss” since OSPs need not act unless they know of a violation.¹⁴⁴ If the OSP does not investigate, it will not discover any violations and, therefore, will not have to take action. Additionally, a plaintiff’s burden of proof for showing an OSP’s knowledge is significant.¹⁴⁵

142. 17 U.S.C. § 504(c) (2007).

143. To name a couple options, damage could be allotted based on the extent of the infringement (such as whether the infringing work used a little or a lot of the copyrighted material) or based on the number of views.

144. See Ballon, *supra* note 71, at 687 (stating that copyright holders have the primary investigative responsibility); H.R. REP. NO. 105-551(11), at 53 (1998) (asserting that “a service provider need not monitor its service or affirmatively seek facts indicating infringing activity . . .”).

145. For example, in *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1105–08 (W.D. Wash. 2004), the court noted that “[a]ctual knowledge of blatant, repeat infringement cannot be imputed merely from the receipt of notices of infringement. . . . Instead, the question is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware . . . [or] turned a blind eye to ‘red flags’ of obvious infringement.” Consider also *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007) which found that a “red flag” must be “fire engine red” before an OSP needs to take down material on its own initiative (assuming that the OSP did not have actual knowledge or a substantially complying notification).

In concert, a copyright holder's high burden of proof and OSPs' studious ignorance effectively insulates OSPs from liability.

However, when a website derives a significant portion of its revenue from UGC content, a higher standard of care should be triggered.¹⁴⁶ That is, when a site does not rely on copyright suspect UGC, the current DMCA standard should remain. Conversely, if a site explicitly or implicitly attempts to draw UGC that has a heightened tendency to violate copyright law and which amounts to a significant part of the site's business in absolute or relative terms, that site should have a higher duty to investigate the material on its site.¹⁴⁷ For instance, YouTube would probably fall in the latter category¹⁴⁸ since it maintains quite a bit of infringing material and historically has profited from the ad revenue that copyright suspect content draws to the website. Sites like Blogger.com, which do not rely on suspect classes of copyrighted material¹⁴⁹ as part of its business model, on the other hand, would retain the DMCA's current standard.

Amending the knowledge requirement for UGC sites would have a second benefit as well. Copyright holders, especially small copyright holders, have considerable difficulty policing individual violations against their works.¹⁵⁰ Amending the DMCA's knowledge requirement in order to transfer some of the enforcement burden to sites that significantly profit from UGC material would, at a minimum, make it easier for copy-

146. The DMCA's lack of an investigatory requirement also does injustice to small copyright holders. *See* Cobia, *supra* note 74, at 397. As vast as the Internet is, individuals and small companies simply do not have the resources to patrol the Web for copyright infractions. Perhaps the lesson for purposeful copyright infringers is to look for copyrights not attached to major corporations. That way they can infringe with near impunity given the unlikelihood small copyright holders would uncover the infringer's work.

147. The investigatory requirement should not be too onerous. A small staff of researchers or some other means of a good faith basis for reviewing material should be sufficient to trigger the DMCA safe harbor. If the requirement became too steep, websites would remove anything conceivably infringing to avoid liability.

148. However, YouTube's use of copyright filtering software might push it into the first, less infringing category, where the current DMCA standard remains.

149. Suspect classes of UGC means UGC with a significant propensity to contain copyright infringing material.

150. Given the sheer volume of UGC, "[c]hasing individual consumers is [a] time consuming . . . teaspoon solution to an ocean problem." Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 442 (2002).

right holders to protect their property and, at best, might actually make a small copyright holder's copyrights more lucrative.¹⁵¹

IV. CONCLUSION

Though the rise of UGC has taxed the copyright legal structure, it is worth remembering that UGC's recent emergence is but the latest in a string of challenges to copyright law. And just like previous squalls, copyright law will weather this storm too. Rather than giving in to the current panic in which many copyright holders have used the DMCA and copyright law as a sword against any and all UGC, Congress and the courts should instead keep a level head and institute a number of small, simple alterations that would make copyrights more profitable while giving the average UGC creator greater opportunities to express their creativity.

First, non-financial UGC should be presumptively permissible. Such a presumption would cover the (mostly) harmless and inadvertent use of copyrights by people putting together the odd vacation video collage or party video.

Second, UGC copyright litigation needs less fact-sensitive analysis and more broad guidelines. This would enable copyright users to have a better sense of what uses fall on the permissible or impermissible side of the line. Also, because clear guidelines give litigants a better sense of their legal position, it would lighten the docket load of courts under siege with YouTube and other UGC copyright infringement cases by discouraging some lawsuits, settling others, and only encouraging a few to go all the way through the litigation process.

Third, the DMCA's provision permitting UGC providers to sue copyright holders for bad faith use of the takedown procedure needs more teeth. Like broad guidelines, strengthening bad faith mechanisms would lessen docket loads and reduce litigation costs by incentivizing copyright holders like Vivendi to pause for a moment before issuing an avalanche of takedown requests, many of which might be groundless.

151. Currently, small copyright holders do not have the time, resources, or incentive to actively police their copyrights. A UGC site that polices itself when it makes use of the small copyright holder's copyright would direct some of their ad revenue earned from using the copyrighted material to the copyright holder. This would create revenue for the copyright that it would not generate under the current system.

Fourth, a creative licensing system should be installed to more justly spread UGC revenue. Websites like YouTube that profit from works using unauthorized copyrights should not profit disproportionately. Instead, a creative licensing system would be a win-win. Websites like YouTube would garner revenue, but so too would copyright holders earn revenue that they might not have otherwise.

Fifth, damages for UGC with a non-commercial purpose and/or effect should be significantly curtailed. The key here is non-commercial. The run-of-the-mill up-loader making videos because he enjoys producing videos should not be on the hook for up to \$210,000 for a two-minute video that uses snippets from seven songs.

Finally, the DMCA should be amended to require more self-policing by OSPs specializing in copyright suspect UGC. In the current environment, the law's expectation—that copyright holders police their own work—can be a full-time job and a half. Extending that responsibility to website purveyors of UGC that fully expect to profit from the use of those copyrights seems only fair. Applying the above recommendations with a clear focus on diminishing liability for non-economic UGC, imposing increased responsibilities on sites specializing in UGC content, and reducing frivolous lawsuits would go a long way toward mitigating the worst of the conflicts between UGC and copyrights while paving the way to an amicable online future.