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The Digital Millennium Copyright Act And The Clash Between Authors And Innovators: The Need For A Legislative Amendment To The Safe Harbor Provisions

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THE DIGITAL MILLENNIUM COPYRIGHT ACT AND THE CLASH BETWEEN AUTHORS AND INNOVATORS: THE NEED FOR A LEGISLATIVE AMENDMENT TO THE SAFE HARBOR PROVISIONS

*Jessica Di Palma**

The Digital Millennium Copyright Act of 1998 (DMCA) was enacted with the goal of bringing copyright law into the digital age. Through the DMCA, Congress attempted to balance the interests of what were considered to be the traditional copyright holders—musicians, film studios, record companies, and television networks—with those of Internet Service Providers (ISPs) by combining key digital copyright protections with a series of “safe harbor” protections for qualifying ISPs. Over the past decade, conflicting and convoluted judicial interpretations of the safe harbor provisions have resulted in unpredictable legal standards and a deep divide between traditional media and new technology. This Note explores these judicial decisions and proposes a legislative amendment to the DMCA safe harbors. Further, this Note argues that to allow new technologies to evolve and to create an environment of economic prosperity for both old and new media—Congress must amend the vague safe harbor provisions with specific definitions and provide a higher level of protection for ISPs.

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I. INTRODUCTION

A teenager records and uploads an episode of his favorite television show to his YouTube account for his friends to watch. A mother posts a home video on YouTube of her eighteen-month-old son dancing to a hit song by pop star Prince to share with friends and family.¹ A music lover uploads digital music files of her favorite popular songs to a music-sharing website for other music fans to download.²

These are just a handful of the types of media that individuals can upload and access on YouTube.com.³ Three former employees of the successful online payment service PayPal founded YouTube in 2005.⁴ In a press release accompanying the site's official launch in December 2005, its founders described YouTube as a "consumer media company . . . that allows people to watch, upload, and share personal video clips at www.YouTube.com and across the Internet."⁵ Less than one year after the site's official launch, Google acquired YouTube in a stock-for-stock transaction valued at \$1.65 billion.⁶ YouTube has since become a popular and profitable global forum with site traffic reaching more than one billion daily digital video views in 2010.⁷ While the YouTube creators had intended it to be a forum for users to upload their own original content, it has also

1. See Chris Francescani, *The Home Video Prince Doesn't Want You to See*, ABC NEWS (Oct. 26, 2007), <http://abcnews.go.com/TheLaw/home-video-prince/story?id=3777651> (describing a high-profile case in which YouTube informed the user that her video had been removed from the site at the request of Universal Music Publishing Group because the video infringed its copyright, which caused the user to file a civil lawsuit against the music publisher, claiming it was abusing the Digital Millennium Copyright Act by sending out massive amounts of what are known in the industry as "take down notices" to websites such as YouTube).

2. See Barnesfam, *Janet Jackson - Go Deep*, YOUTUBE (Sept. 30, 2010), <http://www.youtube.com/watch?v=ApsK6qTaIZ4> (demonstrating YouTube users' common practice of uploading copyright-protected popular songs online). This user added the disclaimer "No Copyright Infringement intended" under this video. *Id.*

3. See *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/> (last visited July 25, 2013) ("YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small.").

4. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012); *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/> (last visited July 25, 2013).

5. *YouTube Opens Internet Video to the Masses*, MARKETWIRE (Dec. 15, 2005, 8:00 PM), <http://www.marketwire.com/press-release/youtube-opens-internet-video-to-the-masses-674526.htm>; see also *Viacom*, 676 F.3d at 28 (describing YouTube's history and services).

6. *Press Release: Google Acquires YouTube*, TIME (Oct. 9, 2006), <http://www.time.com/time/business/article/0,8599,1544289,00.html>.

7. *Viacom*, 676 F.3d at 28.

evolved into a breeding ground for digital piracy of copyrighted material.⁸

As technology has evolved and the Internet age has progressed, copyright law has attempted to keep up. Congress enacted the Digital Millennium Copyright Act (DMCA)⁹ in 1998 to bring federal copyright law into the digital age.¹⁰ Through the DMCA, Congress tried to balance the interests of what were considered to be the traditional copyright holders—authors, book publishers, film studios, musicians, record companies, and television networks—with those of Internet Service Providers (ISPs) by combining two key digital copyright protections with a series of “safe harbor”¹¹ protections for qualifying ISPs.¹² However, Congress failed to adequately define the requirements an ISP must meet to fall within a safe harbor provision,¹³ which has left the door open for courts to tailor these requirements appropriately to meet the needs of evolving technologies.¹⁴ However, the courts have failed to do so.¹⁵ In a series of recent high-profile decisions, the United States Courts of Appeals for the Second and Ninth Circuits initially disagreed on the interpretation of statutory phrases limiting ISPs’ liability for

8. *See id.* at 29 (describing that plaintiff Viacom alleged it had identified more than 63,497 video clips containing copyright-protected material that had been “copied, stored, displayed, or performed on YouTube without authorization”).

9. 17 U.S.C. § 512 (2006 & Supp. IV 2011).

10. *See generally* David Kravets, *10 Years Later, Misunderstood DMCA Is the Law That Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <http://www.wired.com/threatlevel/2008/10/ten-years-later/> (arguing that recent online innovation and the rise of major Internet companies like Google would not have occurred without the DMCA safe harbors).

11. BLACK’S LAW DICTIONARY 1453 (9th ed. 2009) (defining safe harbor as “[a] provision (as in a statute or regulation) that affords protection from liability or penalty”).

12. *See* S. REP. NO. 105-190, at 2, 8–11 (1998).

13. *See* 17 U.S.C. § 512(c) (2006 & Supp. IV 2011).

14. *See* *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“[R]ather than embarking on a wholesale clarification of the various doctrines of copyright liability, Congress opted to leave current law in its evolving state and, instead, to create a series of safe harbors for certain common activities of service providers.” (quoting S. REP. NO. 105-190, at 19 (1998)) (internal quotation marks omitted)).

15. *See* John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1879 (2013) (noting that “the DMCA is not a model of textual clarity”); Liz Brodzinski, *UMG Recordings, Inc. v. Veoh Networks, Inc.: The Future of Investor Liability for User-Generated Content*, 21 DEPAUL J. ART TECH. & INTEL. PROP. L. 75, 76 (2010) (arguing for the “need for further Congressional consideration of the investor liability question in the form of an amendment” to the DMCA); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 329 n.77 (2013) (“The section 512 safe harbors in particular have generated more than their fair share of litigation . . .”).

copyright-infringing content uploaded by individual users.¹⁶ Most recently in these cases, the two circuits resolved some differences in their interpretations of certain safe harbor provisions,¹⁷ but the damage has been done: these convoluted judicial interpretations of the safe harbors have resulted in unpredictable legal standards.¹⁸ These legal battles have further complicated the safe harbor provisions by “adding extra factors and layers of analysis to the statutory elements,”¹⁹ creating more confusion for lower courts, copyright owners, ISPs, and the attorneys who must decipher these complex court decisions.²⁰

While these legal sagas have resulted in many negative consequences for copyright-dependent industries costly and drawn-out litigation, forum shopping, and convoluted legal standards—these cases also have potential positive consequences since they can serve as a learning tool by providing Congress with examples of what not to do when redrafting the safe harbor provisions.²¹ Congress should examine these cases to identify and resolve the issues with the current safe harbor provisions to update and align the DMCA with technological advances.

This Note examines the Second and Ninth Circuits’ convoluted judicial interpretations of the safe harbor provisions. Part II describes the DMCA, its safe harbor provisions, and these provisions’ ambiguous key terms that have been left open to complex judicial interpretations. Part III describes the Ninth Circuit’s interpretation of

16. *Compare* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1042 (9th Cir. 2011), *withdrawn and superseded on rehearing* by 718 F.3d 1006 (9th Cir. 2013) (requiring knowledge of specific and identifiable infringements of individual items), *with* Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 36 (2d Cir. 2012) (requiring only a general awareness that there is infringement). *See generally* Kim J. Landsman, *Two Decisions in Battle Between Old and New Media Leave Little Resolved*, N.Y. L.J., May 24, 2012.

17. *UMG Recordings, Inc.*, 718 F.3d at 1030 (“We agree with the Second Circuit and hold that, in order to have the ‘right and ability to control,’ the service provider must ‘exert [] substantial influence on the activities of users.’” (quoting *Viacom*, 676 F.3d at 38)).

18. *See* Eric Goldman, *Viacom Loses Again—Viacom v. YouTube, TECH. & MKTG. L. BLOG* (Apr. 19, 2013), http://blog.ericgoldman.org/archives/2013/04/viacom_loses_ag.htm.

19. *Id.*

20. *UMG Recordings, Inc.*, 718 F.3d 1006 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013).

21. *See* Brodzinski, *supra* note 15, at 76 (arguing for the “need for further Congressional consideration of the investor liability question in the form of an amendment” to the DMCA); Goldman, *supra* note 18 (“[M]istakes with the DMCA safe harbors offer useful lessons for Congress’ next attempts to draft effective safe harbors.”); Pallante, *supra* note 15, at 329 (“On the one hand, [the DMCA] is our best model of future-leaning legislation. On the other hand, fifteen years have passed, and the world—including most notably the Internet—has evolved.”).

the safe harbor provisions, specifically the court's recent rehearing and opinion in *UMG Recordings, Inc. v. Shelter Capital Partners LLC*.²² Part IV describes the Second Circuit's interpretation of the DMCA, specifically the court's recent decision in *Viacom International, Inc. v. YouTube, Inc.*,²³ which deepened the divide between old and new forms of media by creating new requirements that ISPs must meet to qualify for safe harbor protection.²⁴ These cases exemplify the DMCA safe harbors' weaknesses, which Congress's defective drafting caused.²⁵

Part V proposes that to remedy the problems caused by convoluted judicial interpretations of safe harbors under the DMCA, Congress must amend the safe harbor provisions. Part VI ultimately concludes that to facilitate the DMCA's original goals—to allow new technologies to evolve and to create an environment of economic prosperity for both old and new media—and to avoid repeating the same mistakes, Congress must amend the vague provisions with specific definitions and provide a higher level of protection for ISPs.

II. THE EVOLUTION OF U.S. COPYRIGHT LAW

A. *The Copyright Act*

The Copyright Clause of the United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”²⁶ Congress exercises this power by enacting laws that establish a system of copyright protection in the United States.²⁷ Since Congress enacted the first federal copyright law in May 1790, it has aimed to strike a balance between securing authors' intellectual property rights promoting the progress

22. 718 F.3d 1006.

23. 676 F.3d 19 (2d Cir. 2012); *see also Viacom Int'l, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071.

24. *See* Goldman, *supra* note 18.

25. *See id.*; *see also* Ryne Hodkowski, *Rulings on Copyright Set Standard*, DAILY JOURNAL, Mar. 25, 2013, at 1 (“[S]ites that let users upload content still need to be wary of a few unresolved issues.”).

26. U.S. CONST. art. I, § 8, cl. 8.

27. *Id.*; *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited July 25, 2013).

of the “useful arts.”²⁸ The term “copyright” means the body of exclusive legal rights granted to authors to protect their “original works of authorship,” which includes literary, musical, dramatic, pantomime, choreographic, pictorial, graphic, sculptural, motion picture, architectural, cartographic, and audiovisual works.²⁹

The U.S. Copyright Act’s current version—Title 17 of the United States Code—was passed in 1976 and has since been amended more than thirty-two times as Congress has updated the law in an attempt to accommodate new forms of content.³⁰ The largest and most drastic of those amendments was passed in 1998 and was titled the Digital Millennium Copyright Act.³¹

B. The Digital Millennium Copyright Act

President Clinton signed the DMCA into law on October 28, 1998.³² New technology made it possible to create digital embodiments of traditional forms of media owned by the copyright holders—books, films, and music—making them readily and cheaply accessible to individual users with the click of a mouse.³³ The legislation’s purpose was to implement two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.³⁴ In doing so, the bill sought to address a number of emerging copyright issues related to the interests of traditional copyright holders and technological innovators becoming increasingly intertwined.³⁵

The DMCA is divided into five titles.³⁶ Title I implemented the WIPO treaties and added a new chapter 12 to the Copyright Act.³⁷

28. U.S. CONST. art. I, § 8, cl. 8.

29. 17 U.S.C. § 102 (2006).

30. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[C][1] (2012); accord DAVID NIMMER, COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 329–30 (2003).

31. NIMMER, *supra* note 30, at 329–30.

32. PUB. L. NO. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006) and 28 U.S.C. § 4001 (2006)).

33. See NIMMER & NIMMER, *supra* note 30, § 12B.01[C][1].

34. See WIPO Copyright Treaty, Dec. 20, 1996, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166; WIPO Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

35. See S. REP. NO. 105-190, at 8–9 (1998).

36. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 I (1998) available at <http://www.copyright.gov/legislation/dmca.pdf>. Only Titles I and II of the DMCA are relevant to this Note.

37. *Id.* at 2–3.

Within chapter 12, § 1201 provides two main protections for copyright holders of digital works—digital anti-circumvention measures and digital rights management.³⁸ The former states that it is a violation of the act to manufacture or sell a product that circumvents a measure that is in place to control access to a protected work.³⁹ The latter prohibits the unauthorized copying, downloading, or creating any other digital embodiment of copyrighted content.⁴⁰ Sections 1203 and 1204 add civil remedies and criminal penalties for violating these prohibitions.⁴¹

1. DMCA's Safe Harbor Provisions for Internet Service Providers

To balance the protection given to copyright holders for digital embodiments of their works against ISPs' interests, Title II of the DMCA,⁴² the Online Copyright Infringement Liability Limitation Act (OCILLA), limits ISPs' liability for copyright infringement.⁴³ These limitations are referred to as the "safe harbor" protections and are included in 17 U.S.C. § 512.⁴⁴ Congress did not intend for § 512 "to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify."⁴⁵ Rather, the limits on liability apply if the provider is found liable for copyright infringement under the Copyright Act's traditional, existing principles.⁴⁶

Section 512 protects a qualifying defendant ISP from copyright liability for all monetary relief⁴⁷ for four general categories of activity—forwarding, hosting, caching, and linking to copyright-protected content.⁴⁸ To qualify for safe harbor protection, a

38. Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2006).

39. *Id.* § 1201(a).

40. *See id.* § 1201(b).

41. *Id.* §§ 1203–04.

42. Codified as amended at 17 U.S.C. § 512 (2006 & Supp. IV 2011).

43. 17 U.S.C. § 512(c); *see also* Cassius Sims, *A Hypothetical Non-Infringing Network: An Examination of the Efficacy of Safe Harbor in Section 512(c) of the DMCA*, DUKE L. & TECH. REV. 9 (2009) (describing the elements of the DMCA § 512 safe harbor provisions).

44. *See* H.R. REP. NO. 105-551, pt. 2, at 50, 57 (1998).

45. *Id.* at 50; S. REP. NO. 105-190, at 40–41 (1998) (explaining that traditional forms of copyright liability include direct liability, as well as vicarious and contributory infringement).

46. *See* H.R. REP. NO. 105-551, pt. 2, at 50; S. REP. NO. 105-190, at 40–41.

47. 17 U.S.C. § 512(a)–(d), (k)(2) (defining "monetary relief" as encompassing "damages, costs, attorneys' fees, and any other form of monetary payment").

48. *See id.* § 512(a)–(d), (f); NIMMER, *supra* note 30, at 357.

defendant must meet the following threshold criteria: (1) qualify as a “service provider” under § 512(k)(1)(B);⁴⁹ (2) satisfy § 512(i)’s eligibility conditions;⁵⁰ and (3) satisfy the specific conditions of the particular safe harbor under which it seeks protection.⁵¹

One of the most commonly invoked safe harbors—and the safe harbor applicable to sites that feature user-generated content, such as YouTube—is § 512(c), which applies to infringement claims that arise “by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.”⁵² Section 512(c) states that “[a] service provider shall not be liable for monetary relief” if it does not know of its users’ infringing acts.⁵³ An ISP is also not liable under § 512(c) if it acts “expeditiously to remove, or disable access to, the material” when it (1) has actual knowledge; (2) is aware of facts or circumstances from which infringing activity is apparent; or (3) has received notification of claimed infringement meeting § 512(c)(3)’s requirements.⁵⁴

2. Policies and Principles Underlying the Existing Statutory Safe Harbors

While Congress intended the safe harbor provisions under § 512(c) to resolve potential digital copyright suits without the courts’ help,⁵⁵ § 512(c) has instead opened the floodgates to litigants disputing exactly how the safe harbor protections should be interpreted.⁵⁶ Congress anticipated the clash between copyright

49. “[T]he term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor . . .” 17 U.S.C. § 512(k)(1)(B).

50. These eligibility conditions require that an ISP adopt and implement a “repeat infringer policy” to warn and subsequently terminate users who repeatedly use the ISP’s site or network to post or share copyright-infringing content. An ISP must also inform all users of its policy. 17 U.S.C. § 512(i); *see also* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1110 (9th Cir. 2007) (finding that the defendant ISP met the threshold requirement of establishing a repeat-infringer policy); *YouTube Copyright Center*, YOUTUBE, <http://www.youtube.com/yt/copyright/#yt-copyright-manage-content> (last visited July 25, 2013) (informing YouTube users of its repeat-infringer policy).

51. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

52. 17 U.S.C. § 512(c)(1).

53. *Id.* § 512(c)(1)(A)(i).

54. *Id.* § 512(c).

55. *See* S. REP. NO. 105-190, at 20 (1998) (stating that the DMCA should provide “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements”).

56. *See* Landsman, *supra* note 16, at 1.

owners and ISPs hosting copyright-protected content “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously.”⁵⁷ Congress further predicted that without flexible and broad legislation in place “copyright owners w[ould] hesitate to make their works readily available on the Internet without reasonable assurance that they [would] be protected against massive piracy.”⁵⁸ Thus, Congress’s primary goal in enacting the DMCA was to create “[l]egislation [that] provide[d] this protection and create[d] the legal platform for launching the global digital online marketplace for copyrighted works.”⁵⁹

In addition, Congress intended the act to further the hope represented by the new digital revolution: to “facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius.”⁶⁰ The legislative history behind the DMCA’s enactment demonstrates a forward-looking Congress predicting that a failure to create laws addressing the potential conflict between owners of traditional copyright-protected works and new technologies would result in the stifling of technological innovation. But, because the Internet has evolved greatly in the fifteen years since the DMCA’s enactment, the time has come for Congress to reexamine the safe harbor provisions’ goals.⁶¹

The constant evolution of technology demands such a reexamination.⁶² By the time a law is drafted, debated, revised, enacted, and goes into effect, the technology that law governs may well have evolved beyond that law’s scope.⁶³ Congress therefore intentionally did not fully define certain requirements for safe harbor protection so the statute would have flexibility to evolve as technology evolved.⁶⁴ The result has been a clash between ISPs, who

57. S. REP. NO. 105-190, at 8.

58. *Id.*

59. *Id.*

60. *Id.*

61. See Pallante, *supra* note 15, at 329–30.

62. See Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 113 (2007) (arguing that the DMCA safe harbors “almost immediately became obsolete as new technologies . . . were developed”).

63. See *id.*

64. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (stating that “[r]ather than embarking on a wholesale clarification of” copyright doctrines for the digital age, Congress made the decision “to leave current law in its evolving state and, instead, to create a series of

desire the most expansive safe harbor protections, and copyright holders, who prefer a narrower interpretation.

Because of this clash, the central issue in recent DMCA safe harbor litigation has been the interpretations of two statutory phrases in the § 512(c) safe harbor. The first is whether the DMCA safe harbor, § 512(c)(1)(A), which requires “actual knowledge that the material or an activity using the material on the system or network is infringing,” and “facts or circumstances from which infringing activity is apparent,” means an ISP must have a general awareness that there is infringement, or rather, knowledge of specific and identifiable infringements of individual items.⁶⁵ The second confusing interpretation is that of the specific circumstances in which the “right and ability to control infringing activity” would disqualify an ISP from safe harbor protection under § 512(c)(1)(B).⁶⁶

Judicial interpretation has not clarified these vague statutory sections. Instead, case law from the Second and Ninth Circuits has further confused lower federal district courts, lawyers attempting to counsel their clients in this area, and, most importantly, copyright holders and ISPs.⁶⁷ While the Second and Ninth Circuits have aligned their once-conflicting interpretations of the § 512(c) safe harbors, this agreement resulted in complicated case law and lingering issues and uncertainties.⁶⁸ If Congress fails to take action by redrafting the safe harbor provisions, these unresolved issues will ultimately stifle further economic and technological development for both ISPs and copyright holders.

‘safe harbors’ for certain common activities of service providers” (alteration in original) (quoting S. REP. NO. 105-190, at 19 (1998)).

65. See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022–23 (9th Cir. 2013); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012); *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071, at *4–5 (S.D.N.Y. Apr. 18, 2013).

66. See *UMG Recordings, Inc.*, 718 F.3d at 1029–30; *Viacom*, 676 F.3d at 37–38 (2d Cir. 2012); *Viacom Int’l, Inc.*, 2013 WL 1689071, at *5–9.

67. See Landsman, *supra* note 16, at 3.

68. Hodkowski, *supra* note 25, at 2 (“[W]hile both circuit courts agree that responding promptly to notifications of infringing material from users or copyright owners can qualify websites for safe harbor [protection], other problems can still arise.”).

III. THE NINTH CIRCUIT INTERPRETATION: PROVIDING BROAD SAFE HARBOR PROTECTION TO ISPS

The Ninth Circuit has consistently interpreted the safe harbor elements broadly, giving expansive protection to ISPs.⁶⁹ Much of the early case law interpreting the DMCA's safe harbor provisions comes from this circuit.⁷⁰

A. A History of Broad Protection for the Local Technology Industries

Shortly after the DMCA's enactment, the Ninth Circuit had the first opportunity to address the safe harbor provisions' scope in the 2001 case *A&M Records, Inc. v. Napster, Inc.*⁷¹ There, the Ninth Circuit held that an ISP will be liable for contributory copyright infringement⁷² only when it learns of specific infringing content available on its site but fails to remove that content.⁷³ The court also held that Congress intended the DMCA safe harbors to protect ISPs from liability for both direct⁷⁴ and contributory copyright infringement.⁷⁵

In *A&M Records*, defendant Napster created and operated a popular peer-to-peer file sharing website whose users could

69. See Kravets, *supra* note 10.

70. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (“[A]bsent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.”).

71. *Id.* at 1004.

72. Secondary copyright infringement imposes liability on a third party for acts of direct infringement committed by others. NIMMER & NIMMER, *supra* note 30, § 12.04. There are “three strands” of secondary liability: vicarious liability, contributory infringement, and inducement. *Id.* § 12.04[A][1]. “Vicarious liability exists when two elements are present. First, the defendant must possess the right and ability to supervise the infringing conduct. Second that defendant must have ‘an obvious and direct financial interest in the exploitation of copyrighted materials.’” *Id.* § 12.04[A][2]. “Contributory infringement requires that the defendant is either a participant in the infringement or contributes machinery or goods that provide the means to infringe.” *Id.* § 12.04[A][3][a]. Inducement liability is based on the defendant’s “active steps to encourage infringement” leading to actual infringement taking place. *Id.* (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 922 (2005)).

73. *A&M Records*, 239 F.3d at 1027.

74. Direct copyright infringement occurs when the defendant copies elements of an original work and the plaintiff owns a valid copyright in that work. See 3 NIMMER & NIMMER, *supra* note 30, § 13.01. A defendant may also be held liable for contributory infringement if the defendant did not directly infringe but provided the direct infringer with the machinery or goods that provide the means to commit direct infringement. *Id.* § 12.04[A][3][a].

75. *A&M Records*, 239 F.3d at 1025.

download Napster's "MusicShare" software for free.⁷⁶ MusicShare allowed any individual user with an Internet connection both to upload MP3 music files⁷⁷ from her personal computer's hard drive to Napster's website and to search for and download MP3 files stored on other users' hard drives.⁷⁸ Various music industry plaintiffs including A&M Records, Geffen Records, Interscope, and Sony Music Entertainment, argued that Napster's software and website facilitated the free and potentially unlimited copying of copyright-protected digital music files—music content owned by the plaintiffs.⁷⁹ The plaintiffs successfully proved to the district court that 87 percent of the music files available on Napster were copyrighted and that the plaintiffs owned 70 percent of this music.⁸⁰

The plaintiffs argued that Napster's users were guilty of direct copyright infringement, thus making Napster guilty of contributory infringement because it "knowingly encourage[d] and assist[ed] the infringement of plaintiffs' copyrights."⁸¹ While the Ninth Circuit agreed with the district court's holding that there was sufficient evidence supporting Napster's liability for contributory and vicarious infringement, it disagreed with the lower court's refusal to apply the safe harbor protections to Napster.⁸² The Ninth Circuit went on to hold that the district court erroneously concluded that § 512 does not apply to contributory infringers. Thus, the Ninth Circuit determined that the district court erred in rejecting Napster's defense to the contributory infringement claim.⁸³ The Ninth Circuit further held that Congress intended the safe harbors to protect ISPs from claims of contributory and vicarious liability based on actual infringement by their individual users.⁸⁴

76. *Id.* at 1011.

77. The abbreviation MP3 stands for MPEG-3, which is the "standard [digital] file format for the storage of audio" files. *Id.* at 1011. MP3 files were originally created through a process called "ripping," in which a user would use computer software to copy a compact disc (CD) "onto a computer hard drive by compressing the audio" data from the CD to the MP3 format. *Id.*

78. *Id.*

79. *Id.* at 1004, 1012–13.

80. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000), *rev'd*, 239 F.3d 1004.

81. *A&M Records*, 239 F.3d at 1020.

82. *Id.* at 1025.

83. *Id.*

84. *Id.*; see also Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75

A&M Records marks the beginning of the Ninth Circuit's tendency to read the safe harbor provisions in a way that favors ISPs. The court used this case as an opportunity to correct what is perceived as the district court's error by explicitly noting that Congress intended the DMCA safe harbors to protect ISPs against liability for both contributory and direct copyright infringement.⁸⁵ Without the safe harbor protections, Napster would likely have been found liable for contributory and vicarious copyright infringement⁸⁶ since Napster created its website and software to allow users to make copies and transfer copyrighted music for free.⁸⁷ In fact, Napster did not even contest on appeal the district court's holding that the plaintiffs successfully presented a prima facie case of direct infringement by Napster's users.⁸⁸

Six years later, in *Perfect 10, Inc. v. CCBill LLC*,⁸⁹ the Ninth Circuit refused to shift from the copyright holder to the ISP the burden of investigating potentially infringing content.⁹⁰ There, plaintiff Perfect 10 published an adult entertainment magazine and website whose users had to pay a subscription fee to access the website's images.⁹¹ Perfect 10 was the registered copyright holder for the nearly 5,000 images displayed on its website.⁹² Defendant CWIE was an ISP providing both an Internet connection and webhosting services to its website-owner clients.⁹³ A second defendant, CCBill, allowed individual consumers to pay the subscription or access fees to websites via credit card or check payment.⁹⁴

Perfect 10 alleged that CWIE and CCBill infringed Perfect 10's copyrights by knowingly providing Internet hosting services to clients who posted images taken from Perfect 10's magazine and Perfect10.com on their own websites, allowing users to access the

WASH. L. REV. 1005, 1028–31 (2000) (“[T]he committee reports leave no doubt that Congress intended to provide some relief from vicarious liability.”).

85. *A&M Records*, 239 F.3d at 1025.

86. *See id.*

87. *See id.* at 1011–12.

88. *Id.* at 1013.

89. 488 F.3d 1102 (9th Cir. 2007).

90. *Id.* at 1113.

91. *Id.* at 1108.

92. *Id.*

93. *Id.*

94. *Id.*

photos without paying the subscription fee required by Perfect10.com.⁹⁵ Perfect 10 further alleged that the defendants did not qualify for protection from liability under the DMCA's safe harbors because they failed to "reasonably implement" a policy to deal with users who were repeat infringers.⁹⁶

To qualify for safe harbor protection, an ISP must meet the threshold requirement stated in § 512(i) by adopting and reasonably implementing a policy to notify and terminate individual users who are repeat copyright infringers.⁹⁷ Although the statute does not define "reasonably implemented," the court held that an ISP implements a policy if it "has a working notification system, a procedure for dealing with DMCA-complaint notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications."⁹⁸ The court also held that the defendants reasonably implemented repeat-infringer policies by maintaining "DMCA logs" to record each time one of their website-owner clients committed an infringing act and effectively terminated those clients who continued to infringe even after being warned.⁹⁹

The court also addressed the level of knowledge of user infringement an ISP must possess to "reasonably implement" a repeat-infringer policy that meets § 512(i)'s requirements.¹⁰⁰ The court held that to effectively identify and terminate repeat infringers, an ISP "need not affirmatively police its users for evidence of repeat infringement."¹⁰¹ If an ISP were required to terminate users when the ISP possessed only a general awareness of infringing activity, rather than actual knowledge or awareness, "§ 512(c)'s grant of immunity would be meaningless."¹⁰² The court's interpretation of the safe harbor is supported by legislative history, which states that § 512(h) is not intended to "undermine the . . . knowledge standard of new

95. *Id.*

96. *Id.* at 1109–10.

97. *See* 17 U.S.C. § 512(i) (2006); *Perfect 10*, 488 F.3d at 1109 (stating that an ISP meets the threshold requirement of establishing a repeat-infringer policy when it "[h]as adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers" (quoting 17 U.S.C. § 512(i)(1)(A) (2006))).

98. *Perfect 10*, 488 F.3d at 1109.

99. *Id.* at 1110–11.

100. *Id.*

101. *Id.* at 1111.

102. *Id.*

subsection (c).”¹⁰³ Perfect 10 alleged that the defendants maintained unreasonable repeat-infringer policies that turned a blind eye to their users’ “red flag” copyright infringement, and then ignored Perfect 10’s notices of the infringement.¹⁰⁴

The court rejected Perfect 10’s argument, reasoning that “[t]he DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider.”¹⁰⁵ Therefore, because it appeared that Perfect 10 had failed to provide the defendants with knowledge or awareness within § 512(c)(1)(A)’s standard, the court remanded the case to the district court to determine whether CWIE met § 512(i)’s threshold requirements.¹⁰⁶ If CWIE did not have knowledge of their users’ infringing activity, it would be entitled to safe harbor under § 512(c).¹⁰⁷ As to CCBill, the court remanded to the district court for further consideration on the issue of whether CCBill’s online activity of transmitting credit card information was enough for it to qualify as a service provider under § 512(a).¹⁰⁸

Perfect 10 also argued that CWIE was liable for contributory copyright infringement because it had hosted “password-hacking websites,”¹⁰⁹ which provide users with passwords that allow illegal access to copyrighted material.¹¹⁰ Perfect 10 argued that hosting such websites should have served as a “red flag” of copyright infringement to CWIE.¹¹¹ The court rejected this argument and held that for a website’s activity to qualify as a “red flag” of infringement to the ISP, it must “be apparent that the website instructed or enabled users to infringe another’s copyright.”¹¹² Further, the court stated that the burden is not on the ISP to determine whether the illegal passwords available on a website enabled user infringement because “[t]here is simply no way for a service provider to conclude that the

103. H.R. REP. NO. 105-551, pt. 2, at 61 (1998).

104. *Perfect 10*, 488 F.3d at 1110–11.

105. *Id.* at 1113.

106. *Id.* at 1117–18.

107. *Id.*

108. *Id.* at 1116.

109. *Id.* at 1114.

110. *Id.*

111. *Id.*

112. *Id.* (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001)).

passwords enabled infringement without trying the passwords, and verifying that they enabled illegal access to copyrighted material.”¹¹³ The Ninth Circuit refused to impose such investigative duties on ISPs.¹¹⁴

B. The Current State of the Law in the Ninth Circuit

In a high-profile December 2011 decision, the Ninth Circuit reaffirmed that the “right and ability to control under § 512(c) requires control over specific infringing activity the provider knows about.”¹¹⁵ In March 2013, the Ninth Circuit withdrew its December 2011 opinion and filed a superseding opinion in an effort to align its interpretation of the safe harbor provisions with the Second Circuit’s more complex interpretation.¹¹⁶ While the later opinion reaffirmed the Ninth Circuit’s broad interpretation of the safe harbors, it left other issues unresolved and vulnerable to further confusion for potential litigants and lower courts.¹¹⁷

In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*,¹¹⁸ plaintiff Universal Music Group (UMG), one of the world’s largest record companies and the copyright owner of volumes of popular music, sued Veoh Networks (“Veoh”) for direct, vicarious, and contributory copyright infringement, as well as for inducement of infringement.¹¹⁹ Veoh operated a website with a concept similar to YouTube—a publicly accessible site that allowed users to create a profile to upload and share music videos with other users.¹²⁰ Veoh attempted to preempt copyright infringement by sending warning messages to users and by using software that automatically identified and disabled infringing content.¹²¹ Despite Veoh’s efforts, however, some of its users could still download videos containing songs for

113. *Id.*

114. *Id.*

115. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1043 (9th Cir. 2011), *overruled by* 718 F.3d 1006 (9th Cir. 2013).

116. *UMG Recordings, Inc.*, 718 F.3d at 1020; *see also infra* Part IV.A–B (outlining the Second Circuit’s interpretation of the DMCA’s safe harbor provisions).

117. *See* Goldman, *supra* note 18; Hodkowsky, *supra* note 25.

118. 718 F.3d 1006.

119. *Id.* at 1013.

120. *Id.* at 1011–12.

121. *Id.* at 1012 (“Each time a user begins to upload a video to Veoh’s website, a message appears stating, ‘Do not upload videos that infringe copyright, are pornographic, obscene, violent, or any other videos that violate Veoh’s Terms of Use.’”).

which UMG owned the copyrights.¹²² The district court held that Veoh met all of the § 512(c) safe harbor requirements and therefore granted Veoh's motion for summary judgment.¹²³

On appeal, UMG claimed that Veoh had "receive[d] a financial benefit" from its users' infringement¹²⁴ and did not qualify for safe harbor protection because it did not meet three statutory requirements.¹²⁵ UMG argued that the threshold requirement of "infringement of copyright by reason of the storage . . . at the direction of a user" must be interpreted narrowly, and, therefore, Veoh's site did not fall within this category because "[f]acilitation of access [to user uploaded videos] . . . goes beyond 'storage.'"¹²⁶ Second, UMG argued that Veoh had had actual knowledge of infringing content but had failed to take adequate steps to remove this content.¹²⁷ Finally, UMG argued that Veoh had received "a financial benefit 'directly attributable to . . . infringing activity that it had the right and ability to control under Section 512(c)(1)(B)'"¹²⁸ because Veoh had had "the ability to locate infringing material and terminate users' access."¹²⁹ The Ninth Circuit disagreed with UMG's arguments and affirmed the district court's ruling.¹³⁰

In addressing each of UMG's arguments, the court offered its own definition of the contested safe harbor requirements.¹³¹ The court held that the threshold requirement of a qualifying ISP is statutorily broader than the narrow definition of "web host" suggested by UMG, and includes activities that go beyond storage.¹³² As to the knowledge requirement, the court held that "merely hosting a category of copyrightable content . . . with the general knowledge that one's services could be used to share infringing material, is

122. *Id.* at 1013.

123. *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1118 (C.D. Cal. 2009), *aff'd in part and remanded in part* by *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1042 (9th Cir. 2011), *withdrawn and superseded on rehearing* by 718 F.3d 1006 (9th Cir. 2013)

124. *UMG Recordings, Inc.*, 718 F.3d at 1015 (internal quotation marks omitted).

125. *Id.*

126. *Id.* at 1016.

127. *Id.*

128. *Id.* at 1015.

129. *Id.* at 1027.

130. *Id.* at 1015.

131. *Id.*

132. *Id.* at 1019–20.

insufficient to meet the actual knowledge requirement under § 512(c)(1)(A)(i).”¹³³

Finally, the court explicitly agreed with the Second Circuit and held that “in order to have the ‘right and ability to control,’ [under § 512(c)] the service provider must ‘exert [] substantial influence on the activities of users.’”¹³⁴ Further, the court explained that “[s]ubstantial influence’ may include, as the Second Circuit suggested, high levels of control over activities of users . . . [o]r it may include purposeful conduct.”¹³⁵ Finally, the court examined Veoh’s conduct under this standard and concluded that Veoh’s interactions with its users did not reach that high level of control.¹³⁶

The court’s decision was a victory for ISPs, allowing them to focus on creating new technology since the Ninth Circuit explicitly reaffirmed its view that the burden of investigating digital copyright infringement must remain on the copyright owner.¹³⁷ The court noted that UMG’s decision to forgo the DMCA notice protocol, on grounds that Veoh must have known of the apparent infringing content on its site, “stripped it of the most powerful evidence of a service provider’s knowledge—actual knowledge of infringement from the copyright holder.”¹³⁸ The court emphasized that

[i]f merely hosting material that falls within a category of content capable of copyright protection, with the general knowledge that one’s services could be used to share unauthorized copies of copyrighted material, was sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a dead letter.¹³⁹

Further, the court noted that “[a]lthough the parties agree, in retrospect, that at times there was infringing material available on Veoh’s services, the DMCA recognizes that service providers who do not locate and remove infringing materials they do not specifically know of should not suffer the loss of safe harbor

133. *Id.* at 1022.

134. *Id.* at 1030 (quoting *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012)); *see also infra* Part IV.B.

135. *UMG Recordings, Inc.*, 718 F.3d at 1030 (quoting *Viacom*, 676 F.3d at 38).

136. *Id.* at 1030–31.

137. *See UMG Recordings, Inc.*, 718 F.3d at 1023.

138. *Id.* at 1020 (quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wash. 2004)).

139. *Id.* at 1021.

protection.”¹⁴⁰ The court also gave great deference to the legislative purpose underlying the safe harbors by emphasizing that “[a]lthough Congress was aware that the services provided by companies like Veoh are capable of being misused to facilitate copyright infringement, it was loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions.”¹⁴¹

The Ninth Circuit’s decision has effectively given ISPs—a significant number of which are in the Silicon Valley—the freedom to innovate, because the responsibility for monitoring user-uploaded, copyright-infringing content is on the copyright holder. But while the safe harbors ultimately protect ISPs from liability, they do not protect ISPs from being sued by media-giant copyright holders. For example, Veoh may have won the court battle, but it lost the “overall war” because it was forced to file for Chapter 7 bankruptcy protection in 2010 due, in part, to the enormous cost of defending itself against UMG.¹⁴² Forcing ISPs into bankruptcy in such circumstances does not comport with Congress’s intent that the DMCA provide “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements.”¹⁴³ Finally, the Ninth Circuit did not adequately address the issue of whether ISPs may qualify for safe harbor protection if they incite users to store copyright-infringing materials.¹⁴⁴ Therefore, this storage issue will likely become yet another area of contentious litigation in the future.

IV. THE SECOND CIRCUIT INTERPRETATION: A STATE OF CONFUSION FOLLOWING *VIACOM V. YOUTUBE*

While the Ninth Circuit was protecting ISPs’ ability to innovate, on the other side of the country the Second Circuit was narrowing the safe harbor protections in favor of traditional media industries. In 2007, Viacom and various other copyright holders—including Paramount Pictures, Country Music Television, and Black

140. *Id.* at 1023.

141. *Id.* at 1014.

142. Hodkowski, *supra* note 25, at 2 (“The DMCA is supposed to make it safe for online service providers, and it’s not safe if they can still be subject to excessive litigation.”).

143. S. REP. NO. 105-190, at 40 (1998).

144. *See UMG Recordings, Inc.*, 718 F.3d at 1019 (noting only that Congress intended the DMCA’s safe harbors to shield not only ISPs that host sites but those that store content as well).

Entertainment Television—sued YouTube for direct and secondary copyright infringement seeking damages of nearly one billion dollars.¹⁴⁵ The plaintiffs sought to hold YouTube liable for violations by individual users who had uploaded thousands of videos containing copyright-protected content to YouTube’s site.¹⁴⁶ In 2010, a federal district court in Manhattan granted summary judgment for the defendant, holding that YouTube qualified for safe harbor protection.¹⁴⁷

*A. The Second Circuit’s Interpretation of Section 512(c)(1)(A):
Reading Willful Blindness into the Specific Knowledge or
Awareness Requirement*

In April 2012, the Second Circuit partially reversed the lower court’s ruling, holding that the district court’s interpretation of the safe harbor provisions was incorrect. The circuit court remanded the case for fact-finding, asking the district court to determine whether YouTube qualified for safe harbor protection.¹⁴⁸ The Second Circuit agreed with the district court—and the Ninth Circuit’s view¹⁴⁹—that an ISP is not disqualified from safe harbor protection merely because it possesses general knowledge that its users have uploaded infringing content.¹⁵⁰ But, the court went on to hold that although the district court had correctly interpreted § 512(c)(1)(A), granting summary judgment for YouTube was inappropriate because a reasonable juror could conclude that YouTube had had actual knowledge of specific instances of infringement, which it had failed to remove.¹⁵¹

The court based its holding on evidence presented by Viacom, including evidence that YouTube employees conducted surveys and found that 75 to 80 percent of the site’s videos contained copyrighted

145. *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff’d in part, vacated in part* by 676 F.3d 19 (2d Cir. 2012); *see also* Steven Seidenberg, *Viacom v. YouTube Raises Copyright Infringement Questions*, INSIDE COUNSEL July, 2012, *available at* <http://www.insidecounsel.com/2012/07/01/viacom-v-youtube-raises-copyright-infringement-que#.UPDMA4FJrTw>.email (providing an overview of Viacom’s lawsuit and an explanation of the subsequent holdings).

146. *Viacom*, 676 F.3d 19.

147. *Viacom*, 718 F. Supp. 2d at 529.

148. *Viacom*, 676 F.3d at 41–42.

149. *See supra* Part III.

150. *Viacom*, 676 F.3d at 41–42.

151. *Id.* at 33–34.

content.¹⁵² Even more damaging was a 2006 report in which one of YouTube's founders listed popular television programs that had been posted on the site and not removed.¹⁵³ The report further stated that "although YouTube is not legally required to monitor content . . . and complies with DMCA takedown requests, we would benefit from *preemptively* removing content that is blatantly illegal and likely to attract criticism."¹⁵⁴ The plaintiffs also presented a series of email exchanges among the three YouTube cofounders, in which the three acknowledged the need to be diligent in removing copyrighted content. In reference to a video clip originally shown on CNN, one email stated: "[W]e can remove it once we're bigger and better known, but for now that clip is fine."¹⁵⁵ Taken together, this evidence confirmed YouTube's knowledge of specific copyright-infringing content on its site, defeating its safe harbor defense.¹⁵⁶

The Second Circuit's opinion further complicated DMCA interpretation by addressing an issue "of first impression"¹⁵⁷ that the plaintiffs had raised: whether the common law willful-blindness doctrine applies in the context of the DMCA's safe harbor provisions.¹⁵⁸ The plaintiffs argued that the district court had erred in dismissing the case because the plaintiffs had presented clear evidence that YouTube was "willfully blind" to specific infringing activity, which amounted to knowledge or awareness of infringement under § 512(c)(1)(A).¹⁵⁹ Second Circuit precedent has held that defendants in patent or trademark infringement cases are willfully blind, and deemed to have knowledge of infringement, "where the person was aware of a high probability of the fact in dispute and consciously avoided confirming that fact."¹⁶⁰ On the other hand, the court stated that "willful blindness cannot be defined as an affirmative duty to monitor"—the concept lies somewhere in the middle.¹⁶¹ The court noted that although the "principle that willful

152. *Id.* at 33.

153. *Id.* (noting that some of the television shows listed in the report are owned by Viacom, including *The Daily Show*).

154. *Id.* (emphasis in original) (internal quotation marks omitted).

155. *Id.* at 34.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 34–35.

160. *Id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

161. *Id.* (citing *Aina-Marshall*, 336 F.3d at 170).

blindness is tantamount to knowledge is hardly novel,” the DMCA makes no mention of willful blindness.¹⁶² Nevertheless, the court determined that this statutory silence did not, by itself, abrogate the willful blindness doctrine.¹⁶³ Therefore, the court held that “the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.”¹⁶⁴ Notably, the court did not specify when these “appropriate circumstances” might arise and instead remanded the issue to the lower court to decide whether YouTube willfully had blinded itself to infringement to an extent that would constitute knowledge.¹⁶⁵

B. The Second Circuit’s Interpretation of § 512(c)(1)(B): The Knowledge Requirement of the “Control and Benefit Provision”

In the next portion of the opinion, the Second Circuit disagreed with the Ninth Circuit’s initial interpretation of § 512(c)(1)(B), the safe harbor provision, stating that an eligible ISP must “not receive a financial benefit directly attributable to the infringing activity, in a case in which the [ISP] has the right and ability to control such activity.”¹⁶⁶ Originally, before the Ninth Circuit reheard and reissued its opinion in *UMG Recordings*, the court had held that “until the [ISP] becomes aware of specific unauthorized material, it cannot exercise its ‘power or authority’ over the specific infringing item.”¹⁶⁷ The Second Circuit disagreed with this interpretation, calling it “fatally flawed,”¹⁶⁸ because that construction seemingly imported a specific knowledge requirement into § 512(c)(1)(B), rendering it identical to the safe harbor provision in § 512(c)(1)(A) and, therefore, redundant.¹⁶⁹ The Second Circuit went on to state that if the Ninth Circuit’s interpretation were followed, “no additional

162. *Id.* at 34–35 (quoting *Tiffany, Inc., v. eBay, Inc.*, 600 F.3d 93, 110 n.16 (2d Cir. 2010)).

163. *Id.* at 35.

164. *Id.*

165. *Id.*

166. *Id.* at 36 (quoting 17 U.S.C. § 512(c)(1)(B) (2012)).

167. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1042 (9th Cir. 2011) (quoting *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 3, 4 (2002)), *overruled by* 718 F.3d 1006 (9th Cir. 2013).

168. *Viacom*, 676 F.3d at 36.

169. *Id.*

service provider would be excluded by Section 512(c)(1)(B) that was not already excluded by Section 512(c)(1)(A).”¹⁷⁰

Instead, the Second Circuit held that § 512(c)(1)(B) did not include a specific-knowledge requirement because having the “right and ability to control” infringing activity “requires something more than the ability to remove or block access to materials posted on a[n ISP’s] website.”¹⁷¹ This means that an ISP may be disqualified from safe harbor protection under § 512(c)(1)(B) even if it lacks item-specific knowledge of user infringement.¹⁷² The court went on to note that the “remaining—and more difficult—question is how to define the ‘something more’ that is required.”¹⁷³ Unfortunately, the Second Circuit left this question unanswered, instead remanding the case to the district court to consider whether a reasonable juror could conclude that YouTube had the requisite right and ability to control its users’ infringing activity, which would disqualify YouTube from safe harbor protection.¹⁷⁴

Although the Second Circuit was ultimately likely correct that the Ninth Circuit’s 2011 interpretation would have made § 512(c)(1)(B) into essentially a duplicate of § 512(c)(1)(A), the Second Circuit’s “solution” leaves the parameters of the safe harbor even less clear than before. It takes the easily understood Ninth Circuit interpretation and replaces it with “something more”—which has yet to be defined—further complicating the § 512(c) legal standard. As noted earlier, the Ninth Circuit compounded the confusion when it superseded this earlier, clearer interpretation and brought its view more in line with that of the Second Circuit.

C. Remand to the District Court

On remand, the Southern District of New York once again granted summary judgment in YouTube’s favor.¹⁷⁵ Judge Louis L.

170. *Id.*

171. *Id.* at 38 (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

172. *Id.*

173. *Id.* (quoting *Capitol Records, Inc.*, 821 F. Supp. 2d at 645).

174. *Id.*

175. *Viacom Int’l, Inc. v. YouTube, Inc.*, No. 07 Civ. 2103 (LLS), 2013 WL 1689071, at *11 (S.D.N.Y. Apr. 18, 2013); see also Pio Szamel, *District Court Grants Summary Judgment to YouTube in Viacom v. YouTube (Again)*, HARV. J.L. & TECH. JOLT DIGEST 1 (May 2, 2013), <http://jolt.law.harvard.edu/digest/copyright/district-court-grants-summary-judgment-to-youtube-in-viacom-v-youtube-again>.

Stanton, who originally presided over the case in 2010, now attempted to clarify his ruling in light of the Second Circuit's opinion and end the litigation once and for all.¹⁷⁶ The judge requested that both parties report "what precise information was given to or reasonably apparent to YouTube identifying the location or site of the infringing matter."¹⁷⁷ In response, "YouTube submitted a list of 63,060 clips-in-suit [and] claimed it never received adequate notices of any of those infringements."¹⁷⁸ Viacom then made the damaging admission in its opposition brief that "[i]t has now become clear that neither side possesses the kind of evidence that would allow a clip-by-clip assessment of actual knowledge" and that "Viacom has failed to come forward with evidence establishing YouTube's knowledge of specific clips-in-suit."¹⁷⁹ The court held that "the burden of showing that YouTube knew or was aware of the specific infringements of the works in suit cannot be shifted to YouTube to disprove" because that would defeat the safe harbors' purpose.¹⁸⁰ Therefore, because Viacom lacked proof that YouTube had knowledge or awareness of any specific infringements, summary judgment in YouTube's favor on this issue was proper.¹⁸¹

The court then tried to untangle the mess the Second Circuit had made of the willful blindness issue.¹⁸² Citing to the Second Circuit opinion, the court added that "[u]nder § 512(m), nothing in the applicable section of the DMCA shall be construed to require YouTube's affirmatively seeking facts indicating infringing activity."¹⁸³ Therefore, the court held that YouTube had not maintained willful blindness to users' specific infringements.¹⁸⁴

Finally, as to the issue of YouTube's right and ability to control infringements, the court rearticulated the Second Circuit's legal standard that having "knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the

176. See Goldman, *supra* note 18, at 13.

177. *Viacom Int'l Inc.*, 2013 WL 1689071, at *1 (internal quotation marks omitted).

178. *Id.*

179. *Id.*

180. *Id.* at *3.

181. *Id.*

182. *Id.* at *3-4.

183. *Id.* at *5.

184. *Id.*

infringement.”¹⁸⁵ The court did not elaborate on the vague meanings of “influence” or “participate” but went on to conclude:

There is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity.¹⁸⁶

While the district court ruled for YouTube on every issue, this seemingly never-ending legal saga continues. On July 26, 2013, Viacom once again appealed the district court’s ruling, further perpetuating an already expensive and drawn-out legal battle.¹⁸⁷

In summary, *Viacom* increased the DMCA confusion by adding a “willful blindness” caveat to its interpretation of § 512(c)(1)(A), and by interpreting § 512(c)(1)(B) as not requiring item-specific knowledge of infringement for a party to have the right and ability to control users’ infringing activity.¹⁸⁸ Further, the court failed to specify when an ISP possesses the level of willful blindness of infringement—or the “something more” required to have the right and ability to control infringement—that will disqualify the ISP from safe harbor protection.¹⁸⁹ While this particular legal battle was temporarily resolved on remand, the district court’s most recent opinion did little to clarify the § 512 legal standard.

The Second Circuit’s unclear interpretation of the safe harbors in *Viacom* demonstrates the problems that have resulted from Congress’s vague safe harbor provisions. Although the Second and Ninth Circuits have aligned their interpretations of some safe harbor provisions, confusion remains. Congress must remedy this confusion with an amendment to the safe harbor provisions.

185. *Id.* at *6.

186. *Id.* at *9.

187. See Eriq Gardner, *Viacom Demands New Judge in YouTube Copyright Fight*, HOLLYWOOD REPORTER (July 30, 2013, 7:56 AM), <http://www.hollywoodreporter.com/thr-esq/viacom-demands-new-judge-youtube-595471> (“[The Second Circuit] is primed to review the long-running dispute a second time.”).

188. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41–42 (2d Cir. 2012).

189. *Id.* at 38.

V. PROPOSAL: A LEGISLATIVE AMENDMENT TO THE SAFE HARBOR PROVISIONS IS NEEDED TO REMEDY THE PROBLEMS EXEMPLIFIED IN CONVOLUTED CASE LAW

Since the DMCA was enacted in 1998, the two circuit courts that are most influential on the cultures of media and technology have failed to clearly define the safe harbor provisions' vague elements.¹⁹⁰ This has occurred in part because Congress intentionally left key safe harbor provisions undefined to allow innovative technologies to evolve without the ominous threat of liability for copyright infringement.¹⁹¹ This ambiguity has, however, resulted not in the malleable and consistent development of jurisprudence but in massive amounts of expensive and high-profile litigation in already congested federal courts over statutory elements' meanings.¹⁹² Furthermore, judicial interpretations of the policy behind the safe harbor provisions differ depending on the court's jurisdiction and the parties involved.¹⁹³ The confusion created by the Second and Ninth Circuits' interpretations of these DMCA provisions is representative of the larger issue of the battle between old and new media—the traditional forms of copyright-protected materials versus their digital alter egos, and the East Coast publishers' and media giants' resistance to the changing landscape of digital innovation in the West Coast's Silicon Valley.¹⁹⁴

190. See *id.* at 36; *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

191. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (explaining that “[r]ather than embarking on a wholesale clarification” of copyright doctrines for the digital age, Congress made the decision to “leave current law in its evolving state and, instead, to create a series of ‘safe harbors’ for certain common activities of service providers” (quoting SEN. REP. NO. 105-190, at 19 (1998))).

192. See *Hodkowski*, *supra* note 25, at 2 (“Crippling litigation fees remains a major issue for service providers—a situation where they can win a court battle but lose the overall war.”); *Seidenberg*, *supra* note 145, at 1 (detailing courts' interpretations of the safe harbor clause and the substantial resources and litigation involved).

193. See *Landsman*, *supra* note 16, at 2–3 (describing the Second and Ninth Circuits' different approaches and the parties involved).

194. See Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 76. The Second Circuit Court of Appeals is located on the East Coast, primarily encompassing New York, original home to the traditional media conglomerates—publishing companies, record labels, and television networks. *Second Circuit*, WASHLAW WEB, <http://www.washlaw.edu/uslaw/circuits/2ndCircuit/index.html> (last visited July 25, 2013); see Robert W. Hamilton, *Liability for Third-Party Content on the Internet*, 8 SETON HALL CONST. L.J. 733, 733 (1998).

*A. A Call to Congress:
Proposed Amendment to the DMCA Safe Harbors*

The Second and Ninth Circuits' convoluted interpretations of the DMCA safe harbor provisions represent a larger legal and ideological battle: traditional forms of media are resistant to adapting to keep pace with new technological advancements. Following the state of confusion in the wake of *Viacom* and *UMG Recordings*, finding safe harbor clarification through lower court decisions seems nearly impossible. The safe harbor provisions can now be clarified in only two ways: a judicial resolution by the Supreme Court or a legislative amendment to the DMCA. While a judicial ruling may temporarily clarify the safe harbor provisions, it is ultimately Congress's responsibility to enact and amend copyright legislation.¹⁹⁵ Therefore, amending the DMCA to clearly define the roles and responsibilities of ISPs and copyright holders in response to user-uploaded infringing material is the best solution to achieving the proper balance between old and new media.

Indeed, Maria Pallante, the Register of Copyrights and Director of the Copyright Office, has advocated for "comprehensive review and revision of U.S. copyright law" in its entirety, including the DMCA.¹⁹⁶ Congress has not amended the DMCA since the statute's inception in 1998.¹⁹⁷ Because the world of technology and the Internet have greatly evolved in the last sixteen years,¹⁹⁸ the entire DMCA is due for a facelift.¹⁹⁹

To remedy the confusion created by circuit court case law, Congress should redraft the safe harbor provisions to clearly define the limits of ISP protections. Because of Congress's clear intent that the safe harbors be construed broadly to provide a high level of protection for potentially infringing ISPs,²⁰⁰ the amendment should minimize and streamline the list of formalities that ISPs must meet to be granted safe harbor protection. This will allow innovators—both

195. The Copyright Clause of the Constitution grants Congress the power to promote the "useful [a]rts." U.S. CONST. art. I, § 8, cl. 8.

196. Pallante, *supra* note 15, at 315, 329.

197. See 1 NIMMER ON COPYRIGHT, *supra* note 30, § TL (laying out a timeline of significant events in the history of U.S. copyright law, including all amendments, revisions, and updates to the Copyright Act).

198. See Lemley, *supra* note 62, at 113; Pallante, *supra* note 15, at 329.

199. Pallante, *supra* note 15, at 329.

200. See *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

the inexperienced and the largest technology companies—the freedom to focus on developing new products, free from the fear of being sued for copyright infringement. Providing ISPs with a minimal set of requirements to invoke safe harbor protection will ensure that only ISPs that actively encourage users to post infringing content will lose protection. This will effectuate the central goal behind the DMCA’s enactment, which is to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”²⁰¹ Congress must also specifically define key terms within the safe harbors to avoid lower courts’ confusion caused by the current broad and vague safe harbor provisions.²⁰² Finally, Congress must update the DMCA to foster the twenty-first century’s technology-centered culture by clearly stating that the burden of policing copyright infringement must remain with copyright owners rather than shifted to ISPs.

Because the knowledge provision of § 512(c)(1)(A) does not mention willful blindness, the Second Circuit’s willful blindness doctrine should not be applied to the safe harbor provisions as a way to demonstrate an ISP’s knowledge of specific infringement instances. Further, Congress should replace § 512(c)(1)(B)’s vague “right and ability to control” language with specific language stating that an ISP will not qualify for safe harbor protection if it has knowledge of and control over specific infringing activity. This level of “control” must also be defined to encompass specific activities, such as an ISP’s encouraging users to upload infringing content.²⁰³

A legislative amendment that provides specific, bright-line requirements that ISPs must meet to qualify for safe harbor protection is necessary for three reasons: (1) to avoid repeating the same mistakes created by Congress’s defective and vague drafting of the 1998 safe harbors, which resulted in confusing judge-made standards; (2) to economically benefit both copyright holders and ISPs; and (3) to ensure that the United States remains a competitor in the global technology industries.

201. S. REP. NO. 105-190, at 1–2 (1998).

202. 4 NIMMER ON COPYRIGHT, *supra* note 30, § 12A.17[B].

203. *See* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1030 (9th Cir. 2013).

1. Bright-Line Rules Prevent Case Law Confusion

First, an amendment to the safe harbor provisions that contains clear, bright-line rules is necessary to avoid the confusion created by the vague legal standards of the original safe harbors. In 1998, Congress intentionally drafted vague safe harbor provisions—leaving them open to judicial interpretation—to provide broad and flexible protection for qualifying ISPs.²⁰⁴ Congress knew that ISPs would be placed in the difficult position of providing online services to users that might raise the danger of copyright infringement.²⁰⁵ Congress decided that including safe harbor protections in the DMCA, limiting ISPs' liability, would “ensure[] that the efficiency of the Internet w[ould] continue to improve and that the variety and quality of services on the Internet w[ould] continue to expand.”²⁰⁶ While these goals are still relevant, the technological landscape has evolved since 1998, particularly in the area of user-generated content sites.

The amended safe harbors must therefore be accessible to technological innovators and the general public, who may be deterred from creating or using new technology for fear of copyright infringement liability. The general public must be capable of easily understanding DMCA safe harbors because new technologies continue to make traditional forms of media—books, music, art, and motion pictures—readily and inexpensively available to the public at the click of a mouse.²⁰⁷ Indeed, user-generated content sites such as YouTube, Facebook, and Twitter encourage innovation by allowing individuals to upload and share their own innovations with the world.²⁰⁸

2. Economic Benefits

Second, a clearly defined legislative amendment to the safe harbors will benefit both copyright holders and ISPs, reducing expensive litigation by parties arguing over the correct interpretation

204. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116 (9th Cir. 2007) (“Section 512(a) [of the DMCA] provides a broad grant of immunity to service providers whose connection with the material is transient.”).

205. See *UMG Recordings, Inc.*, 718 F.3d at 1014 (“Although Congress was aware that the services provided by companies like Veoh are capable of being misused to facilitate copyright infringement, it was loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions.”).

206. S. REP. NO. 105-190, at 8.

207. See *id.*

208. See *id.*

of vague statutory provisions.²⁰⁹ In *Viacom*, twenty-seven lawyers appeared on behalf of the plaintiffs and twenty-five groups filed amicus briefs in support of the parties.²¹⁰ The time and money both sides currently allocate toward policing websites for infringement and bringing or defending infringement lawsuits could be spent on creating new technology.²¹¹ A safe harbor clarification will also close the “floodgates” to the large amount of ongoing litigation arising from uncertainties in the law.²¹²

3. The DMCA Must Evolve Along with Technology

Finally, the variety and quality of services on the Internet have grown far beyond what Congress envisioned when it drafted the DMCA in 1998.²¹³ Because the Copyright Clause of the Constitution grants Congress the power to promote the “useful arts,”²¹⁴ a legislative amendment to the safe harbor provisions will ensure that traditional forms of media will continue to evolve in the digital age.²¹⁵ Amending the safe harbor provisions to provide clearly defined protection to ISPs will also ensure that the United States continues to be a leader in the global marketplace for innovations.²¹⁶ Otherwise, the threat of liability for copyright infringement and the

209. See Eric Goldman, *Want to End the Litigation Epidemic? Create Lawsuit-Free Zones*, FORBES (Apr. 10, 2013, 2:40 PM), <http://www.forbes.com/sites/ericgoldman/2013/04/10/want-to-end-the-litigation-epidemic-create-lawsuit-free-zones> (“Section 512 runs for thousands of words, creating dozens of different vectors to attack a safe harbor defense. As a result, with so many more words to fight over, Section 512 judicial opinions are typically much lengthier—and more expensive to the litigants—than Section 230 opinions.”).

210. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 22–25 (2d Cir. 2012).

211. See Brodzinski, *supra* note 15, at 103 (“Such a reduction in the restrictiveness of copyrights would not mean an end to authorial prosperity, but would rather be an opportunity to profit in new ways, and would allow more freedom for the investment that drives innovation.”).

212. See Landsman, *supra* note 16, at 1.

213. See Maria A. Pallante, *supra* note 15, at 329 (“On the one hand, it is our best model of future-leaning legislation. On the other hand, fifteen years have passed, and the world—including most notably the Internet—has evolved.”).

214. U.S. CONST. art. I, § 8, cl. 8.

215. See Kravets, *supra* note 10.

216. See THE TASK FORCE ON THE FUTURE OF AMERICAN INNOVATION, THE KNOWLEDGE ECONOMY: IS THE UNITED STATES LOSING ITS COMPETITIVE EDGE? 1 (2005), available at http://cte.ed.gov/nationalinitiatives/gandctools_viewfile.cfm?d=600189; *About the Task Force on American Innovation*, TASK FORCE ON AMERICAN INNOVATION, http://www.innovationtaskforce.org/index.php?p=1_4 (last visited Aug. 7, 2013) (“Innovation is central to American jobs, competitiveness, and prosperity. In today’s world, many nations compete very well on the basis of cost or quality. It is the ability to innovate—to create new high-value, high-margin goods and services—that sets a country, a state, or a locality apart.”).

lack of clearly defined protections will deter innovators from creating new technologies.

C. Supreme Court Clarification Is Only a Temporary Solution

A Supreme Court ruling that attempts to remedy the confusion over the interpretation of the safe harbors in the lower courts will only temporarily solve the problem.²¹⁷ A congressional amendment to the safe harbor provisions under 17 U.S.C. § 512(c), using the issues exemplified by Second and Ninth Circuit case law, will allow Congress to address and solve the original DMCA's weaknesses.²¹⁸

Without a statutory amendment, lower courts will perpetuate the confusion that resulted from *UMG Recordings* and *Viacom*. ISPs will continue to face the great burden of using time and money to actively police user-loaded content to avoid the threat of defending themselves in ever-impending litigation. ISPs' fear of liability—and large monetary penalties that accompany putting on a defense, even with the safe harbors on their side—will discourage the creation of new technologies.²¹⁹ Further, existing ISPs will be forced to establish strict user policies to prevent individuals from posting potentially infringing content for which the ISP could be held liable. This, in turn, will discourage individuals from posting content online.²²⁰ The freedom to create, share, and use cutting-edge technologies will be stifled.

VI. CONCLUSION

U.S. copyright law represents a set of values that are quintessentially American: freedom, progress, property, and striving for a perfect balance between practicality and creativity. Since the first copyright law's enactment, Congress and the courts have endeavored to strike that perfect balance between providing copyright protection for authors and promoting progress. At the

217. See Brodzinski, *supra* note 15, at 103 (“[B]ecause policy is often open to varying interpretations, it is important that Congress amend current copyright law in order to create a stable, lower liability environment for content-hosting sites, which are a necessary step on current technological advancement, and the investors that make such sites possible.”).

218. See 4 NIMMER ON COPYRIGHT, *supra* note 30, § 12A.17 (“At the same time that Congress intended to redress certain problems by enacting the provisions [of the DMCA], it realized that the world of the Internet is still quite young, and may yet evolve in unanticipated directions.”).

219. Seidenberg, *supra* note 145, at 1.

220. *Id.*

dawn of the new millennium, achieving this balance became a greater challenge as the law struggled to keep up with new technologies developing at light speed. These technologies have resulted in online forums, such as Napster, Veoh, Grooveshark, and YouTube, which have both revolutionized traditional media and blurred the lines of legal responsibility and liability for digital copyright infringement. Because of the speed at which technology changes in our digital culture, it is nearly impossible to keep copyright legislation current.²²¹ The responsibility must therefore fall on Congress to resolve the conflict over DMCA interpretation between the authors and innovators, by amending the safe harbor provisions.

Judicial interpretation, rather than creating clearly defined safe harbor provisions, has resulted in a convoluted and confusing area of copyright law for both the copyright holders and the ISPs. Chief Judge Kozinski wisely cautioned his fellow Ninth Circuit judges that “[o]verprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before.”²²² A legislative amendment to the DMCA safe harbors will resolve the confusion created by convoluted judicial interpretations by effectively providing the perfect amount of copyright protection to digital embodiments of traditional, copyright-protected works. To ensure that innovators will continue to create new technologies that benefit the public, Congress must reassure ISPs that they will not be punished for copyright infringement because of the actions of the users of their innovations. Congress must therefore draft specific statutory definitions of the safe harbor provisions stating that a copyright holder cannot hold an ISP liable for the infringing acts of its users, unless the ISP is aware of the infringement and fails to act or is itself committing copyright infringement.

In conclusion, to ensure that new technologies continue to evolve and to create an environment of economic prosperity for both

221. See H.R. REP. NO. 105-551, pt. 2, at 21 (1998); Lemley, *supra* note 62, at 113.

222. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting).

old and new media, Congress must redraft the safe harbor provisions to provide clearly defined and adequate protection to the ISPs.