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Freebooting on Facebook -- Should the Social Media Giant Face Liability?

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FREEBOOTING ON FACEBOOK—SHOULD THE SOCIAL MEDIA GIANT FACE LIABILITY?

*Nicholas J. Tait**

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I. INTRODUCTION

Advancements in the internet have provided a growing medium for people to publish and view original content.¹ The cost of publication is at the lowest it has ever been, and the amount of content available to internet users is at an all-time high. However, the internet also provides an easy way to make unauthorized copies of original works and share them with others.² The internet industry, content owners, and our legal system have experienced several growing pains in an attempt to strike a balance between incentivizing technological advancements in content production and publication while minimizing the ability or risk of copyright infringement.³

An excellent example of this balancing act is the website YouTube and the legal trouble it found itself in during its early days.⁴ Initially, big content owners argued that YouTube's website would destroy their industries because of how easy it was for YouTube's users to upload copyrighted works and many of these content owners filed lawsuits.⁵ Even though YouTube prevailed in most of this litigation, including a high-profile case against Viacom,⁶ the company still implemented safeguards, such as its Content ID filter system,⁷ which reduced the risk that its users would post infringing content. Moreover, YouTube has created a Partnership Program (and recently made it available to everyone who uploads

¹ See Edward Lee, *Developing Copyright Practices for User-Generated Content*, 13 J. INTERNET L. 1 (2009) (discussing how “technologies and platforms on the Internet . . . encourage users to engage, create, and share content online . . .”).

² See David Haskel, *A Good Value Chain Gone Bad: Indirect Copyright Liability in Perfect 10 v. Visa*, 23 BERKELEY TECH. L.J. 405, 405 (2008) (noting that “[i]n the digital age, anyone can make and distribute copies instantaneously anywhere in the world at very little cost”).

³ See Brian Leubitz, *Digital Millennium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417 (2003) (noting major litigation and congressional statutes in response to the internet “revolutioniz[ing] the entertainment industry”).

⁴ See Kurt Hunt, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH L. REV. 197, 202 (2007) (discussing the history of YouTube and some of the copyright infringement claims filed against it); *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

⁵ See Complaint for Declaratory and Injunctive Relief and Damages at 5, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 1:07-CV-02103 (S.D.N.Y. Mar. 13, 2007) (arguing that “rampant infringement will gravely undermine Plaintiffs and other companies that generate creative works, and will threaten the livelihoods of those who work in and depend upon these companies”).

⁶ *Viacom Int'l Inc.*, 940 F. Supp. 2d at 110. Note that this case was appealed by Viacom, but the two parties subsequently settled the suit. Peter Kafka, *It's Over! Viacom and Google Settle YouTube Lawsuit*, RECODE (Mar. 18, 2014, 6:38 AM), <http://www.recode.net/2014/3/18/11624656/its-over-viacom-and-google-settle-youtube-lawsuit>.

⁷ See Nicholas Thomas DeLisa, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 BROOK. L. REV. 1275 (2016).

content on its website)⁸ which provides content owners revenue based on the number of views their videos receive.⁹ These efforts create an incentive for the average person to create original content and upload it to the internet, which is perfectly in line with the aims of copyright law.¹⁰ Therefore, it is fair to say that YouTube, despite the fact that infringement still occurs on its website, is a success story in reaching the balance between incentivizing original content production and minimizing the risk of copyright infringement. However, other companies have since entered the video sharing market.

Recently, the social media giant Facebook has developed its video player interface to the point where it competes with YouTube in the number of video views from its users.¹¹ However, Facebook has not gone through the same growing pains YouTube has and therefore does not have the same safeguards to protect against the uploading and sharing of unauthorized videos.¹² As a result, many videos uploaded on Facebook are in fact stolen works from other users.¹³ This problem has been coined “freebooting” and has been publicized by many original content owners who post their videos to YouTube or other websites.¹⁴

These content owners claim that Facebook has turned a blind eye to its users uploading stolen content because Facebook is too busy reaping in the extra ad revenue.¹⁵ Moreover, content owners complain that Facebook does not

⁸ See Stan Schroeder, *YouTube Opens Partner Program to Everyone*, MASHABLE (Apr. 13, 2012), <http://mashable.com/2012/04/13/youtube-opens-partner-program/#mTadIdshXZqR>.

⁹ See Jennifer Beese, *What is the YouTube Partner Program?*, SPROUT SOCIAL (May 28, 2012), <http://sproutsocial.com/insights/how-to-youtube-partner-program/>.

¹⁰ See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 433 (2007) (discussing the incentivizing aims of copyright law for authors to create and distribute their works).

¹¹ See Dylan Tweney, *Facebook is Nipping at YouTube's Heels in the Race for Video Viewers and Advertisers*, VENTURE BEAT (June 22, 2015, 1:30 AM), <http://venturebeat.com/2015/06/22/facebook-is-nipping-at-youtubes-heels-in-the-race-for-video-viewers-and-advertisers/>.

¹² See Geoff Weiss, *As Facebook Video Swells, YouTube Creators Cry Foul Over Copyright Infringement*, ENTREPRENEUR (June 5, 2015), <https://www.entrepreneur.com/article/247047> (noting YouTube's prior lawsuit with Viacom and its development of the Content ID system while comparing that system to Facebook's notice and take down policies where “the onus falls on creators to hunt down stolen videos” (citing Evan DeSimone, *Can YouTubers Protect Themselves from Freebooting? Four Ways to Fight Back*, NEW MEDIA ROCKSTARS (May 12, 2015, 3:00 PM), <http://newmediarockstars.com/2015/05/can-youtubers-protect-themselves-from-freebooting-four-way-s-to-fight-back/>).

¹³ See Jason Abbruzzese, *Many Videos of Facebook are Stolen, and Only Facebook Can Fix it*, MASHABLE (July 8, 2015, 4:03 PM), <http://mashable.com/2015/07/08/facebook-video-theft-problem/#U86eWDgrkkqs>.

¹⁴ See Will Oremus, *Facebook's Piracy Problem – Are Plagiarized YouTube Videos Helping Fuel the Social Network's Astonishing Video Growth?*, SLATE (July 8, 2015, 11:44 AM), http://www.slate.com/articles/technology/technology/2015/07/freebooting_stolen_youtube_videos_going_viral_on_facebook.html.

¹⁵ See *id.* (noting that “YouTube personalities are convinced Facebook is profiting from [freebooting] – at their expense”).

cooperate with them in removing infringing videos.¹⁶ This problem, according to content owners, has resulted in billions of unauthorized views of their works.¹⁷ Instead of having those views credited to them, the views are instead credited to Facebook. This, of course, affects the content owners' ad revenue, which is dependent on the number of views they receive,¹⁸ and in turn, reduces the incentive to create the original work in the first place.

Although freebooting is not exclusive to Facebook, this Note will examine the issue, using Facebook as the focus. More specifically, this Note will analyze the possible redress available to content owners if they were to bring a lawsuit against the social media provider.¹⁹ To that end, this Note will explore whether Facebook can be held indirectly liable for the freebooted videos uploaded to its website by its users.

Part II of this Note will provide background information on copyright law as it pertains to content owners and internet service providers, including a brief synopsis of the Digital Millennium Copyright Act of 1988 (DMCA). This section will also discuss recent cases that have interpreted sections of DMCA and the eligibility requirements for the immunity from liability the act provides.

Part III will explore the viability of a copyright infringement claim brought by content owners against Facebook. This section will analyze Facebook's compliance (or lack thereof) with the DMCA and whether Facebook should avoid indirect liability for its users' infringement. This section will then use the case law interpretations of the DMCA discussed in Part II to determine whether a claim for copyright infringement is possible.

Finally, Part IV will conclude that a claim for indirect copyright infringement against Facebook is possible, if not likely, given the analysis of its compliance with the DMCA. This section will then conclude by suggesting to Facebook that it implement more stringent safeguards against copyright infringement and

¹⁶ See Abbruzzese, *supra* note 13 (noting that a content owner sent over 200 notices to Facebook regarding infringing videos on a fan page which have yet to be removed).

¹⁷ See Hank Green, *Theft, Lies, and Facebook Video*, MEDIUM (Aug. 2, 2015), <https://medium.com/@hankgreen/theft-lies-and-facebook-video-656b0ffed369#.p5fhmpv2u>.

¹⁸ See Beese, *supra* note 9 (explaining how content owners monetize their content on YouTube through video viewer advertisements).

¹⁹ It is worth noting that many individual claims that could be brought against Facebook for copyright infringement may be small in terms of monetary value (unless that individual claimant happens to own many copyrighted works that have been "freebooted" on Facebook's website). Therefore, individual copyright holders may strategically pursue a class action lawsuit against Facebook for indirect copyright infringement. However, there may be several difficulties associated with different content owners bringing a class action for copyright infringement, and that discussion is outside the scope of this Note. Instead, this Note will only look at the viability of an individual's claim of copyright infringement against Facebook.

update its take-down procedures to be more effective in order to avoid losing its safe harbor protections.

II. BACKGROUND

A. AN OVERVIEW OF COPYRIGHT LAW AS IT PERTAINS TO INTERNET SERVICE PROVIDERS (ISP)²⁰

Congress is given the power to create copyright protections by Article 1, Section 8 of the United States Constitution.²¹ Congress has used this power to create copyright statutes that give content owners exclusive rights to their original works²² which include the right to reproduce the work in a copy.²³ When another person violates this right (or any other exclusive right in § 106), the statute makes them liable as an infringer.²⁴

To bring a claim for copyright infringement, the claimant must show “(1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original.”²⁵ In addition, there also exists a statutory fair use defense to copyright infringement.²⁶ Section 107 of the Copyright Act provides that:

[n]otwithstanding the provisions of section 106 and 106(A), the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁷

“[W]hen considering the purpose and character of a use, courts generally ask two questions: whether the use is for a commercial purpose and whether the use is

²⁰ 17 U.S.C. § 512(k)(1)(B) defines a service provider as “a provider of online services or network access, or the operator of facilities therefor. . . .”

²¹ U.S. CONST. art. I, § 8.

²² 17 U.S.C. § 102 (2012).

²³ *Id.* § 106.

²⁴ *Id.* § 910.

²⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

²⁶ 17 U.S.C. § 107.

²⁷ *Id.*

transformative.”²⁸ Uses that are for commercial purposes generally weigh against a finding of fair use while uses that are transformative, those that add expressive qualities to the original work, generally weigh in favor of such a finding.²⁹ However, none of the factors in § 107 are determinative and “each must be weighed in relation to the other factors in a particular case.”³⁰

Additionally, copyright holders are not limited to claims against those directly responsible for copyright infringement as they can also bring vicarious or contributory infringement claims.³¹ A claim for vicarious copyright infringement “extends beyond an employer/employee relationship to cases in which a defendant ‘has the right and ability to supervise the infringing activity and also had direct financial interest in such activities.’”³² A claim for contributory infringement liability “requires that the secondary infringer ‘know or have reason to know’ of direct infringement”³³ and “‘induce[], cause[] or materially contribute[] to the infringing conduct of another.’”³⁴

Copyright holders can also bring an action for the inducement of copyright infringement.³⁵ “To establish a claim for inducement, a plaintiff must show that the defendant (1) engaged in purposeful conduct that encouraged copyright infringement, with (2) the intent to encourage such infringement.”³⁶ Further “[a] defendant’s intent to foster infringement can be established by evidence of the defendant’s ‘clear expression’ of such an intent, or of ‘affirmative steps [the defendant has] taken to foster infringement.’”³⁷

These indirect theories of copyright infringement posed a serious threat to the development and advancement of the internet since the technology has made “copying and disseminating works around the world incredibly easy, [and] on a scale previously unimaginable.”³⁸ In response to this problem, Congress passed the DMCA in an “attempt to update copyright law to keep pace with

²⁸ Tara M. Warrington, *Harry Potter and the Doctrine of Fair Use: Conjuring a New Copyright Complaint*, 10 FLA. COSTAL L. REV. 621, 627 (2009) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994)).

²⁹ *Id.* at 627 (citing *Campbell*, 510 U.S. at 579, 585).

³⁰ *Id.* (citing *Campbell*, 510 U.S. at 577–78).

³¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (noting that plaintiffs brought an action for contributory and vicarious copyright infringement).

³² *Id.* at 1022 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996)).

³³ *Id.* at 1020 (quoting *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845–46 (11th Cir. 1990)).

³⁴ *Id.* at 1019 (quoting *Gershwin Publ’g Corp. v. Columbia Artist Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

³⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005).

³⁶ *Arista Records, LLC v. Lime Group LLC.*, 784 F. Supp. 398, 425 (S.D.N.Y. 2011).

³⁷ *Id.* (quoting *Grokster*, 545 U.S. at 937 (2005)).

³⁸ Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 233 (2009).

[technological advances of] the internet.”³⁹ The act created several safe harbors from liability under copyright law for internet service providers.⁴⁰ One of these safe harbor provisions limits liability for “information residing on systems or networks at the direction of users.”⁴¹ This section states in relevant part that:

- (1) In general. – A service provider shall not be liable . . . for infringement of copyright 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 if the service provider –
- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - (ii) in the absence of such knowledge, is not aware of facts or circumstances from which infringing activity is apparent;
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
 - (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
 - (C) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material claimed to be infringing or to be the subject of infringing activity.⁴²

Additionally, section (i), entitled “conditions for eligibility,” of the DMCA states that:

- The limitations on liability established by this section shall apply to a service provider only if the service provider –
- (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are

³⁹ *Id.* See also *Viacom International, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 114 (S.D.N.Y. 2013) (stating that the “DMCA was enacted because service providers perform a useful function, but the great volume of works placed by outsiders on their platforms . . . might well contain copyright-infringing material . . .”).

⁴⁰ Lee, *supra* note 38, at 235–36.

⁴¹ 17 U.S.C. § 512(c) (2012).

⁴² *Id.* § 512(c)(1).

repeat infringers; and (B) accommodates and does not interfere with standard technical measures.⁴³

Based upon this safe harbor provision, ISPs can avoid liability for its users' copyright infringement if the ISP meets the several statutory requirements listed above. If, however, the ISP does not abide by the requirements of the provision, it loses the immunity afforded to it by the Act and could face indirect liability for copyright infringement.⁴⁴

B. VIACOM INTERNATIONAL V. YOUTUBE

In 2007, content owner Viacom International brought suit against YouTube for copyright infringement “based upon approximately 79,000 video clips appearing on the YouTube website.”⁴⁵ The district court found that YouTube was protected by the DMCA’s safe harbor provisions and the case was appealed to the Second Circuit Court of Appeals.⁴⁶ On appeal, the circuit court interpreted the DMCA to determine (among other things): (1) what level of knowledge is required by § 512(c)(1)(A)(i)–(iii); (2) whether the common law doctrine of willful blindness could be used to establish that knowledge; and (3) the meaning of “ability and control” as used in § 512(c)(1)(B).⁴⁷

As for the first issue, the circuit court held that § 512(c)(1)(a)(i) “turns on whether the provider actually or ‘subjectively’ knew of specific infringement, while [§ 512(c)(1)(a)(ii)] [] turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”⁴⁸ Further, the court stated that “[b]oth provisions [(a)(i) and (a)(ii)] do independent work, and both apply only to specific instances of

⁴³ *Id.* § 512(i)(1). *See generally id.* § 512(i)(2) (providing a definition of the term “standard technical measures” as used in section 512(i)(1)).

⁴⁴ *See Capitol Records, LLC. v. Escape Media Group, Inc.*, No. 12-CV-6646 (AJN), 2015 WL 1402049, at *5 (S.D.N.Y. Mar. 25, 2015) (noting that for a service provider to “qualify for any of the DMCA safe harbors, the service provider must first satisfy the ‘conditions for eligibility’ described in 17 U.S.C. § 512(i) . . .”); *Viacom*, 676 F.3d at 26 (noting that “[t]he § 512(c) safe harbor will apply only if the service provider [abides by the requirements of that section]”). Seventeen U.S.C. § 512(m) “provides that safe harbor protection shall not be conditioned on ‘a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i).’” *Viacom*, 676 F.3d at 35 (quoting 17 U.S.C. § 512(m)).

⁴⁵ Jack C. Schecter, *Is it Safe? The Digital Millennium Copyright Act’s “Safe Harbor” in the Wake of Viacom v. YouTube*, 59-AUG FED. LAW. 16 (2012).

⁴⁶ *Viacom*, 676 F.3d at 26 (citing *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010)).

⁴⁷ *Id.* at 26, 41–42.

⁴⁸ *Id.* at 31.

infringement.”⁴⁹ After making these interpretations, the circuit court affirmed the district court’s holding that “actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement will disqualify a service provider from the safe harbor.”⁵⁰ Therefore, all knowledge requirements in § 512(c)(1)(A) only refer to “specific and identifiable” infringing activities and thus general knowledge that infringement is occurring does not remove an ISP from the protections of the safe harbor.⁵¹

Regarding the second issue, the circuit 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.”⁵² However, the court did note that section 512(m) denies any affirmative duty on an ISP to monitor for infringing activity but that the “willful blindness [doctrine] cannot be defined as an affirmative duty to monitor.”⁵³ In other words, “willful blindness . . . entail[s] a purposeful avoidance of knowledge of specific instances of infringement” but does not create a duty to monitor for infringing activity.⁵⁴ The circuit court went on to remand back to the district court the question of whether YouTube “made a ‘deliberate effort to avoid guilty knowledge.’”⁵⁵

Lastly, for the ability and control issue, the circuit court rejected the Ninth Circuit’s interpretation of section 512(c)(1)(B) that the ability and control language requires specific knowledge of infringing activities because such an interpretation would render section 512(c)(1)(A) superfluous.⁵⁶ Instead, the Second Circuit held that the “‘right and ability to control’ infringing activity under § 512(c)(1)(B) ‘requires something more than the ability to remove or block access to materials posted on a service provider’s website.’”⁵⁷ The court noted the difficulty in defining what constitutes “something more” but gave two examples and said that both “involve[d] a service provider exerting substantial influence on the activities of users, without necessarily — or even frequently — acquiring knowledge of specific infringing activity.”⁵⁸ Commentators have

⁴⁹ *Id.* at 32.

⁵⁰ *Id.*

⁵¹ Schechter, *supra* note 45, at 16 (stating that Second Circuit “rejected Viacom’s argument that generalized awareness of infringing activity is sufficient to oust an ISP from the safe harbor”).

⁵² *Viacom*, 676 F.3d at 35.

⁵³ *Id.*

⁵⁴ Schechter, *supra* note 45, at 17.

⁵⁵ *Viacom*, 676 F.3d at 35 (citing *In re Aimster*, 334 F.3d 643, 650 (7th Cir. 2003)).

⁵⁶ *Id.* at 36.

⁵⁷ *Id.* at 38 (quoting *Capitol Records, Inc. v. MP3Tunes, LLC.*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

⁵⁸ *Id.* One of the examples given by the court came from *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal 2002) where the “service provider instituted a monitoring program

described the examples given by the Second Circuit as “suggest[ing] that something *much* more than the ability to block access is required” and that “[a]s long as an [ISP] is not purposefully and actively inserting itself in dictating the content of the materials of its users, it seems unlikely it would forfeit safe harbor protection by reason of the right and ability to control.”⁵⁹

The case was remanded to the district court who then found that: Viacom lacked proof that YouTube had knowledge of any specific infringement; YouTube was not willfully blind to any specific instances of infringements; and that YouTube did not have the right and ability to control infringing activities from its users as defined by section 512(c)(1)(B).⁶⁰ Viacom appealed that ruling but the case was settled before the second appeal was heard.⁶¹

III. VIABILITY OF A COPYRIGHT INFRINGEMENT CLAIM AGAINST FACEBOOK

A. DIRECT COPYRIGHT INFRINGEMENT

Since Facebook is not directly responsible for the freebooting on its website, any copyright infringement claim against it must arise under a secondary theory of liability.⁶² “It is well-established that ‘[s]econdary liability for copyright infringement does not exist in the absence of direct infringement. . . .’”⁶³ Therefore, a claimant must first establish whether a Facebook user who freeboots someone else’s video could be held directly liable for copyright infringement.

This inquiry is fairly straightforward assuming the video uploaded to Facebook is an exact copy of the original video. As noted above, a claimant for copyright infringement must show “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶⁴ An exact copy satisfies the second element,⁶⁵ so the only question is whether such a video is

[and gave] detailed instructions [to its users and] refused access to [those] users who failed to comply with its instructions.” *Viacom*, 676 F.3d at 38. The other example came from *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) which involved a service provider inducing copyright infringement from its users.

⁵⁹ Schechter, *supra* note 45, at 23.

⁶⁰ *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

⁶¹ *Id.*, *appeal withdrawn*, No. 13-1720 (2d Cir. Mar. 19, 2014).

⁶² For the purposes of this Note, we are only looking at examples of freebooting that arose from a Facebook user who uploaded someone else’s video on Facebook’s website. The Note does not assess whether or not Facebook itself have uploaded such videos to its own website.

⁶³ *UMG Recordings, Inc. v. Shelter Capital Partners, LLC.*, 718 F.3d 1006, 1031 (9th Cir. 2013) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)).

⁶⁴ *Feist*, 499 U.S. at 361.

⁶⁵ It is worth noting that if the video is not an exact copy, this Note would have to address what elements of the video were taken and whether those elements were original. *See Harper & Row*,

copyrightable. For a work to be copyrightable, it must have been created by the author and possess “at least some minimal degree of creativity.”⁶⁶ This required “level of creativity is extremely low; even a slight amount will suffice.”⁶⁷ Therefore, content owners could likely meet the required showing for direct copyright infringement.

Of course, Facebook could argue that the use of the copied videos by its users is protected by the fair use defense of section 107. However, assuming the videos are exact copies, this defense likely fails. Since the videos would be completely duplicative, they would not add any additional expression. Thus, the use of these videos would not be transformative.⁶⁸ Additionally, when courts find that a use of a copyrighted work is not transformative, they typically rule against the application of section 107 if the use is also commercial.⁶⁹ While some Facebook users only use the website for personal, noncommercial activities, others who use it promote their businesses or other commercial activity.⁷⁰ Therefore, content owners likely have a viable claim for direct copyright infringement against Facebook users who upload exact copies of their videos on Facebook pages that include some commercial activity.

B. INDIRECT THEORIES OF COPYRIGHT INFRINGEMENT LIABILITY

Assuming that freebooted videos likely constitute direct copyright infringement, the inquiry turns to whether Facebook could be held liable under a secondary theory of liability.

One theory of secondary infringement a content owner may wish to pursue against Facebook is contributory infringement. As noted above, a claimant for contributory copyright infringement must show that the secondary infringer had actual or constructive knowledge of the direct infringement and that the secondary infringer either induced, caused, or materially contributed to the infringement.⁷¹ It is unlikely Facebook has actual knowledge of any specific

Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). However, such an inquiry is outside the scope of this Note.

⁶⁶ *Feist*, 499 U.S. at 345.

⁶⁷ *Id.*

⁶⁸ See Warrington, *supra* note 28, at 627.

⁶⁹ *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1244 (N.D. Ca. 1995) (“Where the use is not highly transformative, as here, the court will focus on whether the use is of a commercial nature.” (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994))).

⁷⁰ For example, Facebook allows for the creation of “pages” to promote companies or raise brand awareness. See Kyli Singh, *What’s Really the Difference Between Facebook Pages, Groups and Profiles?*, MASHABLE (Oct. 19, 2014), <http://mashable.com/2014/10/19/facebook-pages-groups-profiles/#Lc.6Atin0iqB>.

⁷¹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020–21 (9th Cir. 2001).

instances of freebooting on its website, so the question becomes whether it had reason to know that its users are freebooting other people's copyrighted videos. The Supreme Court has held that "the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes . . .," or, indeed is "merely capable of substantial noninfringing uses."⁷² Since Facebook can be used for a wide range of purposes that do not result in copyright infringement,⁷³ it is very unlikely a claimant can establish Facebook had constructive knowledge of any copyright infringement occurring on its website. Therefore, a contributory copyright infringement claim against Facebook is unlikely to succeed.⁷⁴

The next theory of indirect copyright infringement a claimant may wish to pursue against Facebook is the inducement theory. As indicated above, a claimant must show that the defendant has intentionally engaged in conduct that encouraged copyright infringement.⁷⁵ It has been held that "[d]irect evidence of inducement is an 'advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations.'"⁷⁶ However, establishing this theory of liability against Facebook appears to be difficult.

Although, apparently by design, Facebook seems to prioritize videos uploaded to its website over other videos that are posted as links (which makes the former appear more frequently to other users),⁷⁷ it does not appear that Facebook has encouraged users to upload other people's videos as opposed to the user uploading their own videos. However, one could argue that Facebook has intentionally prioritized uploaded videos over links knowing a significant portion of the uploaded videos will be infringed copies of original works. Moreover, a content owner could argue that such freebooted videos keep users on Facebook's website longer (as opposed to links which might result in users leaving the website to find the original source), leading to more ad revenue.⁷⁸ This argument has its challenges, though, and appears to rely on speculation as to what Facebook's

⁷² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

⁷³ See Daniel Nations, *What is Facebook?*, LIFEWIRE, <https://www.lifewire.com/what-is-facebook-3486391> (last updated Oct. 4, 2016).

⁷⁴ See *Arista Records, LLC. v. Lime Group LLC.*, 784 F. Supp. 398, 433–34 (S.D.N.Y. 2011) (applying the *Sony-Betamax* rule and determining if the defendant's internet service was capable of substantial non-infringing for the purposes of assessing plaintiff's contributory infringement claim).

⁷⁵ *Id.* at 425 (quoting *Grokster*, 545 U.S. at 936–37).

⁷⁶ *Id.* (quoting *Grokster*, 545 U.S. at 937).

⁷⁷ Brent Sutoras, *Videos on Facebook: Native vs YouTube. Which Wins?*, SEARCH ENGINE J. (June 29, 2015), <https://www.searchenginejournal.com/videos-facebook-native-vs-youtube-wins/134389/>.

⁷⁸ See Green, *supra* note 17 (arguing the unfairness of Facebook's approach to video content).

intentions were in creating its video player interface. For these reasons, it seems unlikely a claimant would prevail on an inducement theory of liability.⁷⁹

The last theory of secondary liability a content owner may want to pursue is the vicarious liability theory. As noted above, a claimant must show that the defendant receives a financial benefit from the direct infringement and that the defendant had the right and ability to control such infringing activity.⁸⁰ It has been held that “[f]inancial benefit exists where the availability of infringing material ‘acts as a “draw” for customers.’”⁸¹ Since Facebook receives ad revenue based on its users’ activity on its website,⁸² and since having creative video content on its website encourages more user interaction,⁸³ a claimant should have no trouble establishing that Facebook receives financial benefit from freebooted videos.

As for the ability and control showing, the claimant must establish that Facebook had the ability to control the user’s infringing activities but neglected to do so.⁸⁴ Since Facebook’s Terms of Service state that “[the user] will not post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law” and the “[w]e can remove any content or information you post on Facebook if we believe that it violates this Statement or our policies,”⁸⁵ a claimant should be able to establish that Facebook had the right and ability to control (by removing) a user’s freebooted videos. Additionally, if the freebooted videos have not been removed, the claimant can establish that Facebook failed to exercise this control. Based on these circumstances, a claim for vicarious liability is likely to succeed⁸⁶ (except for possible defenses which are discussed below).

⁷⁹ See *GlobalOptions Servs., Inc. v. N. Am. Training Grp., Inc.*, 131 F. Supp. 3d 1291, 1300 (M.D. Fla. 2015) (“Bare legal conclusions are not sufficient and NATG must state more factual allegations in support [of its inducement claim].”). It is worth pointing out that once a content owner files suit, they can take advantage of the discovery rules to acquire more facts that may provide insight into Facebook’s intentions when designing its video player interface.

⁸⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996)).

⁸¹ *Id.* at 1023 (quoting *Fonovisa*, 76 F.3d. at 263–64).

⁸² See Deepa Seetharaman, *Facebook Revenue Soars on Ad Growth*, WALL ST. J. (Apr. 28, 2016, 12:59 AM), <http://www.wsj.com/articles/facebook-revenue-soars-on-ad-growth-1461787856> (discussing ad-generated revenue increases).

⁸³ See Tim Peterson, *Facebook’s Strategy to Take on YouTube Comes into View*, ADVERTISINGAGE (Sept. 9, 2014), <http://adage.com/article/digital/facebook-s-biggest-weapon-youtube-algorithm/294873/> (discussing Facebook’s efforts to generate more revenue and views from video content).

⁸⁴ *Arista Records, LLC v. Lime Group LLC.*, 784 F. Supp. 398, 435 (S.D.N.Y. 2011).

⁸⁵ See *Statement of Rights and Responsibilities*, FACEBOOK (Jan. 30, 2015), <https://www.facebook.com/legal/terms>.

⁸⁶ See *Lime Group*, 748 F. Supp. 2d at 435–36.

C. SAFE HARBOR DEFENSE

Regardless of which indirect theory of copyright infringement is brought against it, Facebook will undoubtedly raise the DMCA safe harbor defense. The most applicable safe harbor provision for freebooted videos posted on Facebook by its users is 17 U.S.C. § 512(c), which limits liability for copyrighted information residing on systems or network resulting from the direction of users. As discussed above, there are certain requirements an ISP must meet to take advantage of this safe harbor listed under § 512(c) and § 512(i).

As for the first requirement of § 512(c)(A)(i), and as previously mentioned, it is very unlikely that Facebook has actual knowledge of specific instances of infringing activity occurring on its website.⁸⁷ Therefore, we can move straight to the second requirement, whether Facebook is “aware of facts or circumstances from which infringing activity is apparent.”⁸⁸ But as pointed out above, interpretations of this requirement have made it very difficult to show that an ISP “was subjectively aware of facts that would have made the *specific infringement* ‘objectively’ obvious to a reasonable person.”⁸⁹ Facebook can easily argue that just because infringement is possible on its video player interface and that some people have used it for that purpose in the past, these facts do not make *specific infringement* obvious. Therefore, Facebook likely meets the second requirement.

As for the third requirement, under § 512(c)(a)(iii), whether Facebook expeditiously removes infringing content, Facebook can point to 17 U.S.C. § 512(m) that states that an ISP does not have to monitor its website for infringing activity.⁹⁰ However, that section provides an exception to that rule to the extent that such monitoring is consistent with the standard technical measure requirement of § 512(i).⁹¹ Here, a content owner can argue that since Facebook does not have any filter process that prevents the uploading of infringing material, it has not complied with § 512(i). To further advance this argument, a content owner can show that other video player websites have implemented such filter systems, such as YouTube’s content ID system. By pointing to other ISPs that have implemented these filters, the content owners can argue that they have become a “standard technical measure.” Even though, there does not appear to be much case law on what exactly is a standard technical measure, it seems likely that Congress intended the term to adapt to future technological advances in the internet industry. Therefore, it is plausible that a filter system could fit the definition.

⁸⁷ See *id.* at 433–34.

⁸⁸ 17 U.S.C. § 512(c)(1)(A)(ii) (2012).

⁸⁹ *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (emphasis added).

⁹⁰ 17 U.S.C. § 512(m) (2012).

⁹¹ *Id.*

Additionally, a content owner can point to the fact that searching Facebook for specific infringing videos is much more difficult than other video player websites, like YouTube.⁹² Thus the claimant can argue that Facebook's interface interferes with and does not accommodate searching mechanisms that have also become "standard technical measures." These arguments on what constitutes a standard technical measure will certainly require expert testimony, but by showing that YouTube has implemented these safeguards,⁹³ it makes the argument that they have become standard technical measure more likely. Therefore, based on these reasons, Facebook could potentially lose safe harbor protection for violations of § 512(i).

As for the fourth requirement under § 512(c)(B), whether Facebook receives financial benefit from infringement with the ability to control it, this Note has already established that Facebook does receive financial benefit from the freebooted videos with the ability to control the infringing activity. However, in the context of the DMCA, courts have added additional requirements. As noted above, the Ninth Circuit requires that the ISP have specific knowledge of the infringing activities.⁹⁴ The Second Circuit rejects that interpretation but still requires "something more" than the mere ability to control the infringing activity.⁹⁵ Since Facebook would not have specific knowledge of the infringement, it would not lose its safe harbor protection in the Ninth Circuit. Additionally, since it appears that the Second Circuit requires something "much more" than the mere ability to control,⁹⁶ it also seems unlikely Facebook would lose protection under this interpretation. Therefore, Facebook is likely to establish its compliance with § 512(c)(B).

As for the final requirement, under § 512(c)(C), whether Facebook acts expeditiously to remove infringing activity once it receives a notification, Facebook can point to its Copyright Report Form and policies regarding its take-down procedure.⁹⁷ Nevertheless, as some content owners have pointed out, a claimant can argue that even with this procedure, Facebook is not acting "expeditiously."⁹⁸ However, commentators have noted the lack of case law and direction as to what constitutes "expeditiously" as well as the wide range of time

⁹² See Green, *supra* note 17.

⁹³ See DeLisa, *supra* note 7.

⁹⁴ UMG Recording, Inc. v. Shelter Capital Partners, LLC, 667 F.3d 1022, 1041 (9th Cir. 2011), *withdrawn*, 718 F.3d 1006 (2013).

⁹⁵ Schecter, *supra* note 45, at 17.

⁹⁶ *Id.*

⁹⁷ *Copyright Report Form*, FACEBOOK (2016), <https://www.facebook.com/help/contact/1409697672616547>.

⁹⁸ Paul Tamburro, *b3h3productions Exposes Facebook's Anful Approach to Stolen Videos*, CRAVE (Dec. 16, 2016), <http://www.craveonline.com/design/934513-h3h3productions-exposes-facebo-oks-awful-approach-stolen-videos>.

frames that have withstood the test.⁹⁹ Therefore, the resolution of this question will likely be case specific¹⁰⁰ and may result in different outcomes depending on which content owner brings suit and their specific interactions with Facebook.

IV. CONCLUSION

Given Facebook's lack of safeguards and protections to prevent copyright infringement from occurring on its website, it may be in danger of losing its DMCA safe harbor protections and could be subject to indirect liability. However, Facebook does have an argument that it has met the requirements of the DMCA and therefore should not face liability. But even if that is the case, Facebook should still take YouTube's example and implement safeguards regardless. If it does not, it could scare away content creators that would ultimately help the ISP in its competition with other video player websites. For these reasons, Facebook should implement a filter system similar to YouTube's Content ID system that would aid in the prevention of users uploading infringing videos. Moreover, by addressing the issue of freebooting, Facebook could restore the proper balance between technological advancement and incentivizing content creation that copyright law aims to achieve.

⁹⁹ Darin M. Klemchuck & Ryan Jones, *How Quickly do Internet Companies Need to Take Content Down Following a DMCA Notice?*, 18 No. 10 J. INTERNET L. 1, 37–38 (2015).

¹⁰⁰ *Id.* at 37 (citing S. REP. NO. 105-190, at 44 (1998)).