OPTING OUT OF THE INTERNET IN THE UNITED STATES AND THE EUROPEAN UNION: COPYRIGHT, SAFE HARBORS, AND INTERNATIONAL LAW

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INTRODUCTION

In January 2007, CBS News chief foreign correspondent Lara Logan sent out an e-mail asking for help. She objected to the fact that a story developing two blocks from her office in Baghdad was being "ignored" by the CBS Evening News, which normally aired her reports.[1] Less than two miles away from the seat of Iraq's government, in Baghdad's "Green Zone," footage showed what appeared to be several Iraqi army soldiers fallen in combat, and the bodies of several Iraqi civilians showing clear signs of torture. Buildings smoldered and crumbled nearby.[2] The CBS Evening News didn't run the story, even though it found time in January for stories on the Super Bowl, soccer,

1 *See* Rory O'Connor & David Olson, Helping Lara Logan (Jan. 25, 2007), http://www.mediachannel.org/wordpress/2007/01/24/helping-lara-logan.

2 *See Battle for Haifa Street* (CBS online video Jan. 18, 2007), http://www.cbsnews.com/video/watch/?id=2371456.

lottery winners, horse racing, and reality television shows.[3] The footage appeared on YouTube, a subsidiary of Google, however, and has been viewed more than 25,000 times.[4]

Many Internet users sought out another Logan scoop on YouTube, where Logan's report about children starving nearly to death in an Iraqi orphanage, and her interview with CNN about attempts by the U.S. government to suppress the story, were viewed more than 10,000 times.[5] About a year after that story aired, Logan told The Daily Show that the American public was grossly uninformed on the wars in Iraq and Afghanistan, and that the soldiers fighting them felt forgotten. She noted that the media never shows footage of dead

3 *See, e.g.*, *CBS Evening News: Two African-American Coaches Face Off in Super Bowl* (CBS television broadcast Jan. 22, 2007) (transcript), *available at* http://lexisnexis.com; *CBS Evening News: Missouri Couple Wins Powerball Jackpot* (CBS television broadcast Jan. 29, 2007) (transcript), *available at* http://lexisnexis.com; (search of Lexis "ALLNWS" database for "'CBS Evening News' & 'CBS News Transcripts'" for dates Jan. 1, 2007 to Jan. 31, 2007). CBS did run other stories on Haifa Street, none of them as graphic or as troubling as the Logan piece.

4 *Battle for Haifa Street* (YouTube online video Jan. 26, 2007), http://www.youtube.com/watch?v=VJeNkQefPok.

5 On or about June 10, 2007, U.S. Army soldiers on patrol in Baghdad, along with Iraqi units they were advising, chanced upon a government-run orphanage housing twenty-four disabled Iraqi boys chained to their cribs in 100-degree heat, covered in flies and obviously starving. *CBS Morning News: U.S. Soldiers Find Starving Special Needs Orphans in Iraq Tied to Their Cribs* (CBS television broadcast June 19, 2007) (transcript available on Lexis Nexis; search "Transcripts" database for exact phrase "starving special needs orphans" using terms and connectors search). Even though the Iraqi Prime Minister ordered the officials in charge of the orphanage arrested, its manager appeared in a press conference with the Iraqi Labor and Social Affairs Minister to defend the orphanage and its leadership. *Id.* Ms. Logan found out about the story and saw photographs of the facility, but was initially told by a U.S. official that she needed Iraqi government permission to air the story in the United States. *Id.* The official relented when she reminded him or her that she had photographs of American, not Iraqi, soldiers carrying the boys out of the orphanage. *Id.* The Iraqi Labor and Social Affairs Minister called the story a manipulation and distortion of the facts in order to celebrate the Americans' "alleged kindness." *Id.* The Minister obtained his post by being affiliated with the political party of Muqtada al-Sadr, whose followers took over Iraq's Health Ministry and reportedly used it to torture and murder dozens of hospital patients, disposing of their bodies in mass graves. *See* Fareed Zakaria, *Iraq's Dark Day of Reckoning*, NEWSWEEK, Oct. 16, 2006, at 43; *CNN Reliable Sources: Bloomberg Leaves GOP* (CNN television broadcast June 24, 2007) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0706/24/rs.01.html). For the videos and viewer counts, see *First Look: Iraqi Orphanage (CBS News)* (CBS television broadcast June 19, 2007), *available at* http://www.youtube.com/watch?v=cwVGwbPUU8; *First Look: Piloting Success (CBS News)* (CBS television broadcast June 19, 2007), *available at* http://www.youtube.com/watch?v=O2tskEynogI (viewed 335,391 times, posted by CBS itself).

soldiers to the American public, so that "nobody really understands" the wars except those living them.[6] "If I were to watch the news that you're hearing in the United States . . . it would drive me nuts," she added.[7]

Several lawsuits are pending that could remove all such underreported and otherwise suppressed stories from YouTube and other Internet services. Viacom, which owned CBS until they split in 2005, is suing YouTube for $1 billion over copyrighted video.[8] Other plaintiffs have filed a putative class action against YouTube on behalf of thousands of copyright owners.[9] Both suits seek injunctions of the type that shut down Napster in 2001.[10]

These suits raise several important questions about the future of media policy and freedom of expression in both the United States and around the world, as YouTube is available in many other countries (unless they happen to be blocking it that day).[11] These questions include: What responsibility does an Internet corporation like YouTube have for the unauthorized posting of CBS or CNN footage onto its site? What procedures must a copyright holder like CBS or CNN follow to inform YouTube of its rights, or to institute a claim for infringement in the event that an amicable resolution cannot be reached? What will the effects be on access to information and freedom of expression in the United States and around the world if such lawsuits, or the threats that they will be filed, become widespread?

This Article will analyze the legal and human rights implications of efforts by copyright owners such as Viacom to "opt out" of sites such as YouTube. The thesis is that courts and legislatures should reject the argument by copyright owners that absent a license agreement

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6 *The Daily Show with John Stewart: Lara Logan* (Comedy Central television broadcast June 18, 2007), *available at* http://www.thedailyshow.com/video/index.jhtml?videoId=173871&title=Lara-Logan.

7 *Id.*

8 *See* Frank Ahrens, *Viacom Sues YouTube over Copyright*, WASH. POST, Mar. 14, 2007, at D2.

9 *See* Amended Class Action Complaint at 2–6, Viacom Int'l Inc. v. YouTube Inc., 2008 WL 2627388 (S.D.N.Y. 2007) (No. 07 Civ. 3582) (the class action between The Football Premier League Limited and Youtube was joined with the Viacom action).

10 *See id.* at 54; Ahrens, *supra* note 8 (noting that Viacom is seeking an injunction to prevent YouTube from posting additional copyrighted material); *Napster Forced to Shut Down*, BBC NEWS, July 3, 2001, http://news.bbc.co.uk/2/hi/entertainment/1420204.stm ("Song-swapping service Napster was forced to shut down its website temporarily . . . .").

11 *See, e.g.*, Thomas Fuller, *Thailand Blocks Users' Access to YouTube*, N.Y. TIMES, Apr. 5, 2007, at C12; Posting of Stan Schroeder to Mashable: All That's New on the Web, http://mashable.com/2007/05/30/youtube-bans/ (Mar. 30, 2007, 12:49 PM PDT).

respecting a copyrighted work, technology and Internet companies should be forced to monitor for and technologically filter out any quotations or clips on their sites unless a copyright owner "opts in" to being included on the site. Instead of this type of an "opt-in" framework, judges and policymakers should require the copyright owner to identify the location of a specific infringing copy on the Internet with adequate detail to permit an Internet service provider to respond by removing the copy from its site once it has confirmed that the copy is infringing. This "opt-out" framework will better preserve innovative technologies for guaranteeing the human rights to adequate information and freedom of expression than would a different, opt-in system, which would establish copyright holders and online intermediaries as more intrusive censors of Internet users' speech and available information.

Part I will briefly describe the development of Web 2.0 services such as YouTube, and the complex intellectual property issues they create. Part II presents a thumbnail sketch of copyright law and limitations on copyright in the United States and Europe. Part III traces the case law in the United States on opting out of the Internet, from the early cases in which courts struggled with the possibility that copyright law would chill the development of online services, to the more recent judicial consensus shielding online intermediaries from liability as long as they do not purposefully disregard opt-outs identifying specific infringing content. Part IV advances the scholarship in this field by showing that European courts have erected a similar knowledge-based opt-out framework for online intermediaries, although some cases have bucked this trend. Part V addresses, and rebuts, the common objection that international copyright treaties preclude the establishment of an opt-out regime in Internet copyright cases. Finally, Part VI provides an overview of currently pending cases that will define the future of Web 2.0 and other online services such as digital libraries and news aggregators. In conclusion, the benefits of adopting an opt-out rather than an opt-in framework for copyright disputes on Google, YouTube, eBay, Wikipedia, and other online services are surveyed and assessed against some potential costs. Weighing the harms to communication and access to knowledge posed by a general obligation of Internet service providers to monitor and censor their networks against the benefits, this Article comes down against such an obligation, and in favor of an opt-out system.[12]

12 For a previous publication addressing similar questions, see Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1804–05 (2007) (arguing that an opt-out rule regulat-

I. THE DEVELOPMENT OF WEB 2.0

Although the U.S. government pioneered computers as early as the 1940s and the precursor to the Internet starting in the late 1960s, members of the public only began to adopt these technologies in large numbers in the 1980s.[13] Starting in about 1991, the World Wide Web opened up the Internet to a wider universe of readers,[14] and politicians became more active in underwriting popular access to an "information superhighway" of electronic resources and federally collected information.[15] The Web doubled in size every year in the 1990s,[16] as tens of millions of Americans subscribed to the providers of Internet connectivity like America Online[17] and began to utilize Web hosting services like GeoCities, portals like Yahoo!, search engines like AltaVista, social networking sites like Classmates.com, and other Internet service providers (collectively, ISPs).[18] By 2007, most subscribers to providers of dial-up Internet service had migrated to high-speed broadband service.[19] The increased bandwidth of broadband Internet access facilitated the streaming and transfer of audio, video, and game content in Web 2.0.[20]

Web 2.0 is growing more popular as an umbrella term for diverse Internet-based services. They are distinguished by their somewhat

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ing online intermediaries' liability for copyright infringement by their users will better promote "socially beneficial initiatives," "a variety of online digital libraries," and therefore "cultural democracy").

13 *See* ACLU v. Reno, 929 F. Supp. 824, 831–32 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997); KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE 43–81 (1996).

14 *See* TIM BERNERS-LEE, WEAVING THE WEB 49–60 (1999); Mike Mills, *Scientist's Brainchild Grows into a Global Phenomenon*, WASH. POST, June 30, 1996, at A15.

15 *See* Evelyn Richards, *Bush to Propose $2 Billion, High-Tech Initiative*, WASH. POST, Sept. 7, 1989, at F1.

16 *See* MTV Networks, Inc. v. Curry, 867 F. Supp. 202, 203 n.1 (S.D.N.Y. 1994).

17 *See* Ariana Eunjung Cha, *AOL 5.0 Unplugs Other Internet Providers*, WASH. POST, Dec. 24, 1999, at E1; Press Release, Number of Online Users in U.S. Reaches 70.7 Million, but Changes Loom (Aug. 8, 2001), http://www.tr.com/newsletters/rec/troc2q_pr.htm.

18 Federal law defines an Internet service provider as a provider of online services or network access, or the operator of facilities used for such services or access. *See* 17 U.S.C. § 512(k)(1) (2006).

19 *See* Posting of Aditya Kishore to Internet Evolution, http://www.internetevolution.com (Oct. 1, 2007); *see also* David Vise, *AOL and Cable Sibling Form Partnership*, WASH. POST, Feb. 1, 2005, at E5 (describing AOL & Time Warner's partnership as "aimed . . . at helping AOL stem the continuing loss of dial-up subscribers to faster or cheaper internet services").

20 *See* WORLD INTELLECTUAL PROP. ORG. (WIPO), INTELLECTUAL PROPERTY ON THE INTERNET 46–47 (2002), http://brownwelsh.com/Archive/2002_WIPO_eIssues_report.pdf.

richer multimedia content and higher degree of interactivity and user control from older, "Web 1.0" sites like online newspapers or portals. Web 2.0 sites range from social networking sites to virtual worlds, user-generated content platforms, peer produced–public domain encyclopedias, next-generation peer-to-peer file-sharing technologies, enhanced weblogs (also known as blogs), and audio and video blogs (also known as podcasts and vlogs, respectively).[21] Among social networking sites, MySpace, Facebook, and LinkedIn are leaders as measured by numbers of users and market value. Virtual worlds and online games like *World of Warcraft*, *Guild Wars*, *City of Heroes*, and *Second Life* claim tens of millions of virtual residents and participants.[22] Among user-generated content sites, YouTube, MySpace, Facebook, Google Video, MSN Video, DailyMotion, and Flickr are prominent in terms of their legions of viewers and contributors.[23] Wikipedia is the clear leader in the area of user-generated content based in large part on public domain material, although its imitators are also expanding rapidly.[24] BitTorrent is probably the most popular of the more advanced peer-to-peer file-sharing networks.[25] Podcasts seem to be everywhere, with more than 18.5 million listeners by the end of

21 *See* Eric Barbry, *Web 2.0: Nothing Changes . . . but Everything Is Different*, COMMC'NS & STRATEGIES, 1st Quarter 2007, at 91–92 (explaining that the Web 2.0 design, which favors "collaborative and social exchanges" is a "return to the basics of the original internet"); Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119 (2007); Sheila Dabu, *Reaching for Higher Learning on YouTube*, TORONTO STAR, Aug. 13, 2007, at L3, *available at* http://www.thestar.com/article/245619. Peer-to-peer file-sharing software accesses directories of users and files maintained by the software's provider or other users, which directories then communicate the Internet addresses of users with specific files to other users seeking those files, whose computers then establish connections with the providing users and download copies of MP3 or other files directly. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919–20 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011–12 (9th Cir. 2001).

22 For a brief description of one of these virtual worlds, *Second Life*, see Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 595–96 (E.D. Pa. 2007).

23 Press Release, Nielsen//NetRatings, User-Generated Content Drives Half of U.S. Top 10 Fastest Growing Web Brands (Aug. 10, 2006) (on file with author), *available at* http://www.nielsen-netratings.com/pr/PR_060810.pdf; Interactive Advertising Bureau Europe, *MySpace Becomes Most Visited U.S. Site*, THE INFORMER (London), July 2006, http://cecollect.com/ve/ZZns9667uqjx6562g3.

24 *See* Miguel Helft, *Wikipedia Competitor Being Tested by Google*, N.Y. TIMES, Dec. 15, 2007, at C3.

25 *See* Lee Gomes, *The Year in Technology: Pirates, Flash Memory and Hobbies—Oh, My!*, WALL ST. J., Jan. 2, 2008, at B1.

2007,[26] but among the most popular are those available on Apple's iTunes service.[27]

Web 2.0 raises intellectual property (IP) issues that are similar in kind to, but somewhat more complex than, those raised by more traditional Web and file-sharing technologies. Like the Web 1.0 sites of Free Republic, MP3.com, or Napster that preceded them, sites like MySpace and YouTube stand accused of facilitating the infringement of copyrights in thousands or even millions of songs, television shows, and motion pictures. As a result, the figure of the Internet user fighting a big corporation to access information, or to preserve the right of free expression in Web or video form, is becoming an iconic one in American culture. The World Wide Web and user-generated content sites such as YouTube frequently trigger threats from copyright holders when their users submit content referencing, parodying, or sampling copyrighted work.[28] Unlike Napster, however, these companies were not founded with the intent to distribute copyrighted music to

26 *See* Stephen Baker & Heather Green, *Social Media Will Change Your Business*, BUS. WK. ONLINE, Feb. 20, 2008, http://www.businessweek.com/bwdaily/dnflash/content/feb2008/db20080219_908252.htm.

27 *See* Rob Pegoraro, *Zippity Zune? Nah.*, WASH. POST, Nov. 15, 2007, at D1; *see also* Posting of Rick to Burning Questions, http://blogs.feedburner.com/feedburner (Apr. 18, 2006) (noting that in 2006, all subscription services other than iTunes made up only 43% of subscription market share, according to one of Apple's competitors).

28 One recent scandal involved Volkswagen attempting to suppress a parody of one of its recent advertisements, which made a biting commentary on the company's Nazi past. *See* David Kravets, *VW 'Nazi' Subpoena Points Up YouTube Privacy Risks*, WIRED NEWS, Sept. 17, 2007, http://www.wired.com/entertainment/hollywood/news/2007/09/vw_parody_ad (reporting that after Volkswagen filed a subpoena seeking the identity of a user for allegedly violating copyrights, the doctored video was removed from YouTube). Another famous story involved the mother of a young baby who posted to YouTube a 29-second video of her child dancing to the tune of Prince's "Let's Go Crazy." *See* Jim Avila et al., *The Video Prince Doesn't Want You to See*, ABC NEWS, Oct. 27, 2007, http://abcnews.go.com/thelaw/story?id=3777651&page=1. YouTube informed her that her video had been removed from the site due to a complaint by Prince's record label Universal Music Group. She grew afraid that she would be sued for thousands of dollars, as some people have been sued for sharing hundreds of songs over peer-to-peer file-sharing sites like Kazaa. *See id.* Then she became angry, filed a response with YouTube that got her video placed back on the site, and filed a lawsuit against Universal in federal court seeking damages for misrepresentation of copyright infringement and interference with contract. *See id.* She remarked: "The idea that putting a little video of your kid up on YouTube can mean you have to go to court, and maybe declare bankruptcy and lose your house, is just wrong." Catherine Rampell, *Standing Up to Takedown Notices; Web Users Turn the Tables on Copyright Holders*, WASH. POST, Oct. 19, 2007, at D01. Her complaint was dismissed, but she was allowed to amend it. *See* Lenz v. Universal Music Corp., No. 07-3783, 2008 WL 962102, at *1 (N.D. Cal. Apr. 8, 2008).

the masses without charge. They have also responded expeditiously to allegations of infringement and developed filtering technology to keep repeat postings to as low a level as practically feasible.[29] BitTorrent is said to be emblematic of the radically decentralized model of many Web 2.0 services, with every user capable of becoming a producer in a matter of moments, and less surveillance and administration of the downloading process than, for example, Napster.[30] Virtual worlds, such as *City of Heroes*, and commons-based content, such as Wikipedia, have encountered and developed internal procedures to resolve scores of subtle copyright and trademark disputes every week, ranging from the scope of permissible copying of historical accounts, to imitation of comic book and movie characters, to trademark dilution.[31]

II. Copyright Law in the United States and the European Union

A. *Exclusive Rights*

In the United States, the Copyright Act of 1976[32] (Copyright Act) governs exclusive rights in works of authorship.[33] The Copyright Act provides an author with the exclusive right to reproduce, distribute, publicly display or publicly perform the work, or to prepare derivative works based upon it.[34] These rights may be implicated by online activ-

29 *See* Elise Ackerman, *Google to Filter YouTube*, Oakland Trib., Feb. 24, 2007, *available at* http://findarticles.com/p/articles/mi_qn4176/is_20070224/ai_n18638823 (quoting Google Chief Executive Eric Schmidt as saying that "filtering technology was one of the company's 'highest priorities'").

30 *See* Barbry, *supra* note 21, at 99.

31 *See, e.g.*, City of Heroes and City of Villains End User License Agreement (Feb. 2006), http://eu.cityofheroes.com/support/terms.html (stating that NCsoft Europe, publisher of *City of Heroes*, "reserves the right, in its sole discretion, to (1) delete or alter any Customer-created ingame data or (2) terminate any license granted herein, for any reason whatsoever, including, without limitation, any suspected or actual infringement of any trademark or trade name right, copyright, or other proprietary right"); Play NC Legal Notice, http://www.plaync.com/us/help/legal.html (last visited Sept. 21, 2008) ("NCsoft does not permit . . . infringement of Intellectual Property Rights on its Sites, and NCsoft will remove all User Submissions . . . if properly notified . . . without prior notice.").

32 Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

33 17 U.S.C. §§ 102, 103 (2006).

34 *Id.* § 106.

ities, such as duplicating, imitating, or simulating works;[35] disseminating of physical or electronic copies by sale, other transfer of ownership, rental, lease, or lending;[36] sending an image of a work to a material object such as a computer in which the work can be perceived;[37] transmitting a performance of a work to the public by means of a device or process;[38] or creating an independent work that incorporates, adapts, or constitutes a sequel to the copyrighted work.[39]

The Treaty on European Union permits the European Council of Ministers to issue directives, which are binding on the member states but may be implemented somewhat differently in various member states.[40] The EU Copyright Directive of 2001[41] (Copyright Directive) similarly requires E.U. members to guarantee authors, musicians, record producers, and movie and television producers the exclusive rights to reproduce or distribute their works, or communicate them to the public by wire or wireless communication.[42] Although the issue is not entirely clear, "communication to the public" is said to extend to the right to display publicly, publicly perform, or broadcast over the Internet.[43] E.U. member states provide varying levels of derivative work or "adaptation right" protection.[44]

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35 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 463–64 (1984) (Blackmun, J., dissenting) (citing H.R. REP. NO. 94-1476, at 61 (1976); S. REP. NO. 94-473, at 58 (1975)).

36 *See* 17 U.S.C. § 101 (2006) (defining "publication"); *see also* N.Y. Times Co. v. Tasini, 533 U.S. 483, 495 n.4 (2001) (noting the definition of 17 U.S.C. § 106); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 718 (9th Cir. 2006) (noting that 17 U.S.C. § 106, as amended, prohibits distribution of copies of copyrighted material "by sale or other transfer of ownership, or by rental, lease, or lending" (quoting 17 U.S.C. § 106)).

37 *See* 17 U.S.C. § 101; *see also* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 194 (3d Cir. 2003) (holding that showing video clips on a website constitutes copyright infringement).

38 *See* 17 U.S.C. § 101; *see also* NFL v. Primetime 24 Joint Venture, 211 F.3d 10, 12 (2d Cir. 2000) (holding that unlicensed transmissions of NFL games to satellite subscribers were public performance sufficient to constitute copyright infringement).

39 Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967–69 (9th Cir. 1992).

40 *See* Consolidated Version of the Treaty Establishing the European Community art. 249, 2006 O.J. (C321) 37, 153.

41 Council Directive 2001/29/EC, 2001 O.J. (L 167) 10 [hereinafter Copyright Directive].

42 *Id.* arts. 2–4.

43 WORLD INTELLECTUAL PROP. ORG. (WIPO), WIPO GUIDE ON THE LICENSING OF COPYRIGHT AND RELATED RIGHTS 35 (2006) [hereinafter WIPO].

44 *See* PASCAL KAMINA, FILM COPYRIGHT IN THE EUROPEAN UNION 217–26, 322–32 (2002).

B. Fair Use

The exclusive rights guaranteed by copyright law do not extend to "the fair use of a copyrighted work,"[45] however. "Fair use" is defined by statute in the United States to include reproduction for purposes such as teaching, scholarship, research, criticism, comment, or news reporting.[46] Whether any particular use is "fair" is determined by reference to several factors, specifically: whether the use is commercial or nonprofit, what type of work is made use of, the amount and substantiality of the portion of the work used, and the effect of the use on the potential market for or value of the work.[47] For example, television owners who recorded copyrighted movies and television programs on videocassettes for viewing at a more convenient time engaged in a fair use that had no demonstrable detrimental effect on copyright owners.[48] Similarly, parody of a copyrighted work is a creative, "transformative" use that may be fair despite commercial motives, depending on the effect of a particular parody on the licensing market for the original.[49]

The Copyright Directive also permits E.U. members to create statutory exceptions and limitations on copyright that do not supplant the main market for a work. For example, it allows exceptions or limitations to a copyright holder's reproduction and communication rights, assuming appropriate credit is provided, for purposes including: "incidental inclusion" of one work in another work; non-commercial illustration of information for teaching or scientific research; library terminals reproducing or communicating portions of books or movies; news reporting or broadcasting; quotations in a criticism or review "in accordance with fair practice"; caricature or parody; dissemination of information concerning political speeches and "public lectures or similar works"; official or religious celebrations; public architecture or sculpture; a demonstration or repair of equipment; and "certain other cases of minor importance where [non-digital] exceptions or limitations already exist under national law."[50]

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45 *See* 17 U.S.C. § 107 (2006).

46 *Id.*

47 *Id.*

48 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454–55 (1984).

49 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

50 Copyright Directive, *supra* note 41, art. 5(3)(o).

C. Other Exceptions to Copyright

The Copyright Act contains several other limitations on copyright designed to implement Congress' public policy objectives to preserve specific corporations, industries, and technologies from litigation and licensing fees that threaten to become excessive in the absence of special immunities. Employers, for example, are exempt from the requirement that they license their employees' works in writing for commercial use or face copyright infringement suits;[51] the law instead vests the copyright directly in the employer, even without a contract specifying as much, under the fiction that the work was "made for hire."[52] Libraries and archives enjoy immunity for their role in the reproduction and distribution of books, articles, and recorded audio to library patrons, and for the reproduction and distribution of up to three copies of a work for preservation purposes or transfer to another library or archive.[53] Used book, music, and movie sellers benefit from the limitation of copyright to the "first sale," and refusal of any resale royalty right to the copyright owner.[54] Musical compositions are subject to a statutory license that precludes songwriters from preventing record labels from making new arrangements of their songs as long as they pay a set fee.[55] Owners and operators of radio, cable television, and satellite radio and television facilities benefit from exemptions and statutory licenses that likewise stop copyright holders from exercising the sort of control they do over books.[56] Mak-

51 *See* 17 U.S.C. § 201 (2006).

52 *Id.* § 101 (defining "work made for hire"); *id.* § 201(b) (establishing employers, rather than actual creators, as authors of works "made for hire"); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 738–39 (1989) (laying out four criteria to define "work for hire").

53 *See* 17 U.S.C. § 108(b)–(c) (2006); *see also* Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989, 1013–18 (2007) (detailing the "complex and highly nuanced set of rules" contained in the library reproduction exception of section 108 of the Copyright Act).

54 LAWRENCE LESSIG, CODE 177 (2006).

55 *See* 17 U.S.C. § 115(a)(2) (2006); *see also* H.R. REP. NO. 94-1476, at 108 (1976) (stating that *absence* of statutory license would place, for example, background music producers "at a great competitive disadvantage with [copyright owners], allow discrimination, and destroy . . . businesses"); LAWRENCE LESSIG, FREE CULTURE 55–58 (2004) (describing laws governing rights of recording artists).

56 17 U.S.C.A. §§ 111, 112, 114 (West 2005 & Supp. 2008); 37 C.F.R § 260.2(b) (2006); *see also* H.R. REP. NO. 94-1476, at 89, 361 (1976) (discussing the limits on liability of cable television providers for copyright infringement); ROGER A. GORMAN, FED. JUDICIAL CTR., COPYRIGHT LAW 110–16 (2d ed. 2006) (discussing the ability of actors in the music industry to reproduce copyrighted works); LESSIG, *supra* note 54, 53–61; 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.14[A] (2005) (discussing the lack of an exclusive performance right in sound recordings).

ers of digital audio home recording devices also receive special treatment in the form of a prohibition on copyright suits.[57] Finally, webcasters qualify for a statutory license of about one-thousandth of one dollar for every time a user listens to a song,[58] a rate that may seem low but that actually dwarfs the royalties paid by traditional or satellite radio.[59]

The Copyright Directive also authorizes a number of analogous exceptions. These include reproductions by: network intermediaries to allow third persons to transmit information to one another; natural persons for private noncommercial use assuming fair compensation in the aggregate to copyright owners; libraries, universities, schools, and archives for purposes other than "direct or indirect economic or commercial advantage"; broadcasters making recordings of other broadcasters' works and preserving such works in archives, hospitals or prisons; and users of sheet music in certain circumstances.[60]

III. Opting Out of the Internet in the United States

A. The Early Cases: Threats of "Unreasonable" Liability

The Copyright Act, standing alone, provides little support for the contention that Internet companies should be held liable for indexing or hosting webpages or other user-generated content, or for maintaining databases summarizing the contents of libraries, Internet users' hard drives, or other vast troves of information. Nothing in the Copyright Act makes a company liable for the actions of its customers or other persons.[61] By contrast, the Patent Act[62] does establish liability for contributing to or inducing infringement by another,[63] indicat-

57 17 U.S.C. § 1008 (2006); *see also* H.R. Rep. No. 102-873, pt. 1, at 24 (1992) (explaining the breadth of the § 1008 prohibition on copyright suits).

58 *See* 17 U.S.C.A. § 114; *see also* Digital Performance Right in Sound Recordings: Final Rule and Order, 72 Fed. Reg. 24,084, 24,096 (2007) (setting forth commercial webcaster royalties of $.0014 per play for 2008 and $.0018 for 2009); John C. Dvorak, *Killing Internet Radio*, PC Mag., Mar. 4, 2002, http://www.pcmag.com/article2/0,2817,4212,00.asp (describing "the 0.07-cent royalty proposed for the commercial broadcasters who do Internet broadcasting, versus the 0.14-cent royalty for those who do Internet-only broadcasting" as a conspiracy orchestrated by the radio stations).

59 The legislation obliging webcasters to pay special royalties to record labels does not apply to traditional radio broadcasters, who pay no such royalties. *See* 17 U.S.C. § 114(b).

60 Copyright Directive, *supra* note 41, arts. 5(1)–(2).

61 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434, 439 (1984).

62 35 U.S.C. §§ 1–376 (2006).

63 *See id.* § 271(b)–(c).

ing that Congress knew how, but refused, to establish similar liability for persons or companies facilitating copyright infringement.[64] Similarly, section 107 of the Copyright Act suggests that many of the core uses of the Internet—to send or receive information for research, scholarship, education, news reporting, criticism, and "comment"—are the archetypal "fair uses" that are "not an infringement of copyright."[65] At the time that the Copyright Act was enacted, courts understood that the reproduction of elements of copyrighted works in order to create an index of them is a fair use, because it is an enterprise that may "save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information."[66] Likewise, they held that the widespread photocopying of copyrighted books and journals in their entirety was a fair use because the free dissemination of information is in the public interest and advances the progress of the arts and sciences.[67]

Despite the sharp distinction drawn in the Copyright Act between informational and entertaining uses, and between one person's actions and those of another, in the 1980s and 1990s the federal courts increasingly imposed liability for efforts to improve access to information, and expanded the scope of secondary liability for infringement.[68] The imposition of such new forms of liability expanded in several stages. First, in *Sony Corp. of America v. Universal City Studios, Inc.*,[69] the *Sony* case, the Supreme Court endorsed a series of lower court decisions holding that the operators of entertainment

64 *See Sony*, 464 U.S. at 434–35, 440 (contrasting the Copyright Act, which "does not expressly render anyone liable for infringement committed by another," with the Patent Act, which holds contributory actors liable for infringement); *cf.* Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 176–77 (1994) (declining to recognize aiding and abetting liability under section 10(b) of the Securities Exchange Act, because Court's review of related statutes revealed that "Congress knew how to impose aiding and abetting liability," but had not expressly done so).

65 17 U.S.C. § 107 (2006).

66 N.Y. Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977); *see also* Fin. Info., Inc. v. Moody's Investors Serv., Inc., No. 81 Civ. 6001, 1984 WL 2119, at *4 (S.D.N.Y. Jan. 10, 1984), *aff'd*, 808 F.2d 204 (2d Cir. 1986) ("[C]ommercial interest does not alone defeat a fair use defense . . . . [I]n making available needed . . . information, [plaintiff] is performing a public function which clearly brings it within the ambit of the first requirement for fair use protection." (citations omitted)).

67 *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352–53 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975) (per curiam).

68 For a nice overview on the fair use principles announced in the cases discussed below, see Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092–1107 (2007).

69 464 U.S. 417.

facilities or events such as concerts, dance halls, cocktail lounges, racetracks, or radio stations could be liable for contributing to or profiting from the infringement of their subcontractors, while remaining somewhat unclear about whether its decision would apply to the operators of facilities for research or information such as libraries, photocopying equipment, or computer networks.[70] Second, the Supreme Court in 1985 reached the surprising conclusion that a political magazine could not paraphrase and quote as it wished from a former President's political memoirs to comment upon his presidency.[71] The Court relied heavily in its opinion on a case involving the screenplay for a motion picture about a high-society murder, thereby continuing the unfortunate aspect of the *Sony* case to collapse informational and entertaining copies.[72] Third, lower court cases in the 1990s began to hold that computer and Internet services could be liable for information uploaded or transferred by their users. In so finding, these courts combined the doctrine of contributory or vicarious infringement of copyright from the videocassette case with the overly narrow construction of fair use articulated in the presidential memoirs case.[73]

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70 *Id.* at 437 (citing, inter alia, Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, 554 F.2d 1213 (1st Cir. 1977); Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304 (2d Cir. 1963); Deutsch v. Arnold, 98 F.2d 686 (2d Cir. 1938); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929); KECA Music, Inc. v. Dingus McGee's Co., 432 F. Supp. 72 (W.D. Mo. 1977); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966)).

71 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985).

72 *See id.* at 568–69 (1985); *see also* Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406 (1940) (holding that a copyright holder may recover all the proceeds of a performance in violation of the copyright, even where the copyrighted material is only a small part of the final performance).

73 *See, e.g.*, Sega Enters. v. MAPHIA, 948 F. Supp. 923, 933 (N.D. Cal. 1996) (holding that a computer network operator is "liable if he knew of the users' infringing actions, and substantially participated by inducing, causing or materially contributing to the users' infringing conduct," and that the network's "role in the copying, including providing facilities, direction, knowledge, encouragement, and seeking profit, amounts to a prima facie case of contributory copyright infringement" (citing Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., Inc. (*Netcom I*), 907 F. Supp. 1361, 1382 (N.D. Cal. 1995))); Religious Tech. Ctr. v. Lerma (*Lerma II*), 40 U.S.P.Q.2d (BNA) 1569, 1574–75 (E.D. Va. 1996) (finding that a critic of Scientology who posted its relevant documents to the Internet did not engage in fair use where he added little or no commentary or categorization to the documents); *Netcom I*, 907 F. Supp. at 1373 ("Liability for participation in the infringement will be established where the defendant, 'with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another'" (quoting *Gershwin*, 443 F.2d at 1162)); Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1524–28

One of the first large entities to attempt to opt out of the Internet with respect to its copyrighted works was the Church of Scientology, which achieved mixed results for its efforts. Scientology officials promise to solve "most human problems" by revealing to the group's members purportedly secret teachings showing that many emotional or psychological problems "can be traced to lingering spirits of an extraterrestrial people massacred by their ruler, Xenu, over 75 million years ago."[74] They have earned hundreds of millions of dollars per year selling access to various teachings, documents, and narratives of extraterrestrial activity.[75]

Scientology leaders alleged that the religion's critics infringed copyrights when exercising their free speech rights, and initially subjected these critics to a harsh campaign of privacy violations in the course of enforcing these copyrights. Federal marshals, and the Scientology private investigators that they brought with them, searched the critics' computer hard drives and private papers, seizing their computer and paper files for copying and retention by Scientology officials.[76] Federal judges later indicated that these searches and seizures may not have been necessary or appropriate. One declared: "The court is disturbed by the possibility that [the Scientologists] copied the entirety of [a] hard drive onto a tape for examination at their leisure . . . . [Without] consent . . . this would constitute a significant intrusion into [its owner's] private affairs that was not justified . . . ."[77]

Scientology sued Dennis Ehrlich and its other critics in an effort to suppress their exposure of damaging, but supposedly "secret" and copyrighted, documents. Mr. Erlich's case resulted in significant deci-

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(D. Colo. 1995) (stating that scanning documents onto a computer for private research was a fair use, but distributing them over the Internet might not be under *Sony* in the absence of significant commentary or transformation); Playboy Enters. v. Frena, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993) (citing *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451) (stating that the owner of a computer network infringed copyright by selling access to users who uploaded allegedly infringing content).

74 *Lerma II*, 40 U.S.P.Q.2d (BNA) at 1571.

75 *See* Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 6, 1991, at 50–57 (detailing history and activities of the Church of Scientology and arguing that the organization falsely presents itself as a religion in order to perpetuate a "ruthless global scam").

76 *See* Religious Tech. Ctr. v. Netcom Online Commc'n Servs., Inc. (*Netcom II*), 923 F. Supp. 1231, 1240 (N.D. Cal. 1995).

77 *Id.* at 1264 n.39 (N.D. Cal. 1995); *see also* Lucy Morgan, *At Home: Critics Public and Private Keep Pressure on Scientology*, ST. PETERSBURG TIMES, Mar. 29, 1999, at 1A, *available at* http://www.sptimes.com/News/32999/Worldandnation/At_home__Critics_publ.html.

sions by a federal court on the liability of online intermediaries for copyright infringement, and received coverage from CNN and the *New York Times* for its implications on the rights of Internet users to quote from or reproduce a copyright holder's own damning words in order to discredit its message.[78] Other Scientology critics helped to establish significant precedents or drew noteworthy publicity to the ways in which civil laws ranging from IP to defamation may censor Internet speech.[79] Most important, however, was the conclusion of Judge Ronald Whyte in the Northern District of California, which covers Silicon Valley, that Netcom's networks "do no more than operate or implement a system that is essential if [its] messages are to be widely distributed. There is no need to construe the [Copyright] Act to make all of these parties infringers."[80] Judge Whyte analogized ISPs to telephone companies who are not liable for infringing calls.[81] As with the telephone companies, an ISP's "lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system."[82]

B. The "Safe Harbors" of the Digital Millennium Copyright Act

In 1998, Congress established several additional copyright exemptions that were necessary to ensure the continued operation and growth of the Internet. In the Digital Millennium Copyright Act

78 *See Netcom I*, 907 F. Supp. at 1361; Rose Aguilar, *No Answers in Scientology Case*, CNET NEWS.COM, Aug. 5, 1996, http://www.news.com/No-answers-in-Scientology-case/2100-1023_3-220158.html?tag=item; Don Knapp, *Scientologists Claim Victory in Internet Copyright Lawsuit*, CNN.COM, Nov. 28, 1995, http://www.cnn.com/TECH/9511/scientology/index.html; Deborah Shapley, *Corporate Web Police Hunt Down E-Pirates*, N.Y. TIMES, May 19, 1997, at D5.

79 *See Lerma II*, 40 U.S.P.Q.2d (BNA) at 1575–76; Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1519 (D. Colo. 1995); Religious Tech Ctr. v. Lerma (*Lerma I*), 897 F. Supp. 260, 261–63 (E.D. Va. 1995); Matt Hines, *Scientology Loss Keeps Hyperlinks Legal*, CNET NEWS.COM (Sept. 8, 2003), http://www.news.com/2100-1028_3-5072581.html; Troy Wolverton, *Amazon to Restore Scientology Title*, CNET NEWS.COM (May 20, 1999), http://news.cnet.com/2100-1017-226171.html.

80 *Netcom I*, 907 F. Supp. at 1369–70. The court referred to Usenet messages, rather than Internet messages, but Usenet could be fairly characterized as part of the Internet, a global network of computer networks. *See* Bryan Pfaffenberger, *"A Standing Wave in the Web of our Communications": Usenet and the Socio-Technical Construction of Cyberspace Values*, *in* FROM USENET TO COWEBS 20, 20 (Christopher Lueg & Danyel Fisher eds., 2003).

81 *Netcom I*, 907 F. Supp. at 1368–69, 1370 n.12, 1374.

82 *Id.* at 1374. The court also stated that Netcom does not invite copyright infringement based on offering its users "regulation-free Internet access." *Id.* at 1377.

(DMCA) of 1998,[83] Congress enacted several "limitations of liability" that are intended to apply even if an ISP "is found to be liable under existing principles of law."[84] These safe harbors largely mirrored the conclusions of Judge Whyte in the *Netcom I* case.[85] As a senator and key architect of the DMCA stated:

> [T]he potential of the Internet, both as information highway and marketplace, depends on its speed and capacity. Without clarification of their liability, service providers may hesitate to make the necessary investment to fulfill that potential. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.
>
> For example, service providers must make innumerable electronic copies in order simply to transmit information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material. In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.[86]

Another senator who was a driving force behind the DMCA explained that he "did not come to Washington to vote for a bill that could be used to ban the next generation of recording equipment," and emphasized that "nothing in the bill should be read to make it unlawful to produce and use the next generation of computers or VCRs or whatever future device will render one or the other of these familiar devices obsolete."[87] He declared that "safe harbor" should be construed broadly to encourage "entrepreneurship" and the development of "consumer oriented products."[88]

Under the DMCA, no copyright action may lie for damages against companies providing Internet connectivity or transmitting or routing material over the Internet, and injunctive relief against them

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83 Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, 35 U.S.C.).

84 H.R. REP. NO. 105-796, at 73 (1998) (Conf. Rep.).

85 MARK A. LEMLEY ET AL., SOFTWARE AND INTERNET LAW 741 (3d ed. 2006); *see also Netcom I*, 907 F. Supp. at 1377 (explaining that even if a copyright holder's exclusive rights were violated, there would not be an infringement if limited by a defense of "fair use").

86 144 CONG. REC. 9234 (1998) (statement of Sen. Hatch).

87 *Id.* at 9240 (statement of Sen. Ashcroft).

88 *Id.* at 9239.

must be limited to a court order requiring the termination of the Internet access of a subscriber or account holder adjudged to have engaged in infringing activity, or reasonable steps to block access from within the United States to a specific online location outside the United States adjudged to be infringing.[89] For certain companies providing caching, or the "temporary storage of material on a system or network controlled or operated by or for the service provider," copyright liability is limited to injunctive relief to terminate access, block access to a particular site, or minimally burdensome measures to prevent or restrain infringement.[90]

The last two exemptions involve companies, such as Google or Yahoo!, that provide "information location tools" including indexes, hyperlinks, and directories;[91] and companies such as YouTube that "host" or store material on the Internet at the behest of their users.[92] For these categories of companies, liability is limited to injunctive relief similar to that available against "caching"[93] on the condition that the company doing the hosting or storing of material "does not have actual knowledge that the material or an activity using the material on the system or network is infringing," is not "aware of facts or circumstances from which infringing activity is apparent," or "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material."[94] The company doing the hosting or storing may lose its exemption if it "receive[s] 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."[95] The obligation to remove or disable access to material claimed to be infringing is limited to situations in which the copyright owner provides a notification in a signed writing of the claimed infringement that includes the contact information of the complainant, a list of the works claimed to have been infringed, information reasonably sufficient to permit the company to locate the material that is claimed to

89 *See* 17 U.S.C. § 512(a) (2006); *id.* § 512(j)(1)(B); *see also* Ellison v. Robertson, 357 F.3d 1072, 1076–77 (9th Cir. 2004) (noting that DMCA safe harbors include "transitory digital network communications").

90 *See* 17 U.S.C. § 512(b) (2006); *id.* § 512(j)(1)(A); *see also Ellison*, 357 F.3d at 1077 (noting that DMCA safe harbors include "system caching").

91 *See* 17 U.S.C. § 512(d) (2006).

92 *See Ellison*, 357 F.3d at 1077.

93 17 U.S.C. § 512(c)–(d) (2006); *see also id.* § 512(j)(1)(A) (describing the scope of injunctive relief under DCMA).

94 *Id.* § 512(c)(1)(A); *see also id.* § 512(d)(1) (using similar, but not identical, language to describe the liability of search websites).

95 *Id.* § 512(c)(1)(B); *see also id.* § 512(d)(2) (using identical language to describe liability of search websites).

be infringing, and a "statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[96]

C. *An Emerging Consensus That Copyright Holders Must Opt In to the Internet?*

In 1999, a court issued a ruling that would incur substantial criticism for its secure-an-opt-in-or-suffer-copyright-liability model of the Internet and World Wide Web. In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*,[97] the court stated that browsing a website may reproduce a copyrighted work by sending it to the memory of the browser's computer, and that "in the absence of ownership of the copyright or express permission by licence [sic], such an act constitutes copyright infringement."[98] The court did not actually conclude that copyright infringement had occurred, however, only that the plaintiff had shown a sufficient likelihood of proving it at trial to warrant preliminary relief in its favor.[99] Before concluding that this likelihood of success existed, the court focused on the fact that the defendants had previously been ordered to remove the allegedly infringing content from their site, that they had then "actively encouraged the infringement of plaintiff's copyright," and urged others to engage in "the copying and posting of copies of the allegedly infringing material on other websites."[100]

The decision was problematic in several respects. First, it failed to account for the existing precedents on contributory and vicarious liability from *Sony* to the *Netcom* litigation. Another court cited these precedents in dismissing a copyright infringement claim premised upon hyperlinks to allegedly infringing content, noting that linking does not copy the linked-to site, and that "linking 'is capable of substantial noninfringing uses' and thus cannot support a claim for con-

96 *Id.* § 512(c)(3)(A)(v); *see also id.* § 512(d)(2) (shielding a service provider for liability if it receives no financial benefit attributable to the infringement, subject to other requirements); *id.* § 512(c)(1) (providing that a service provider is not liable by reason of storage of copyrighted material by a user, in certain circumstances); *id.* § 512(d)(1) (providing that a service provider is not liable for linking to copyrighted material if it does not, inter alia, have actual knowledge of the infringement).

97 75 F. Supp. 2d 1290 (D. Utah 1999).

98 *Id.* at 1294 (citing MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993)).

99 *Id.* at 1292–93.

100 *Intellectual Reserve*, 75 F. Supp. 2d at 1294–95.

tributory infringement . . . ."[101] Second, the *Intellectual Reserve* court failed to recognize that a hyperlink to another site does not reproduce or display that site within the context of the linking site, a premise utilized by another court to reject copyright liability for hyperlinks erected without permission.[102] Third, and most importantly, the court threatened to chill the development of the Internet and Web by adopting a rule that linking equals, or contributes to, copyright infringement. It was "frightening" in that "the court gave no consideration to the fair use (and First Amendment) concerns underlying the dispute."[103] These concerns are critical because a "link is merely a reference, like a footnote, and no one (one hopes) would contend that a footnote identifying where an allegedly infringing work may be found makes its author contributorily liable for copyright infringement."[104]

In 2000, two important cases were decided in which courts held websites liable for allowing users to access or distribute copyrighted work whose owners had not authorized its inclusion on the site, or the Internet for that matter. In *Los Angeles Times v. Free Republic*,[105] the defendants established an Internet discussion forum in which users could create webpages where newspaper articles could be posted and criticized or commented upon by the poster or other users.[106] The "Referrer Reports" obtained by the defendants from the websites of the plaintiff newspapers, who sued for copyright infringement, showed that tens or even hundreds of Internet users were "referred" by defendants' hyperlinks to plaintiffs' websites each month.[107] On that basis, and given the "transformative" nature of the criticism and

101 Bernstein v. JC Penney, Inc., No. 98-2958 R EX, 1998 WL 906644, at *1 (C.D. Cal. Sept. 29, 1998) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984)).

102 *See* Ticketmaster Corp. v. Tickets.com, Inc., No. CV997654HLHVBKX, 2003 WL 21406289, at *6–7 (C.D. Cal. Mar. 7, 2003).

103 Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 12 (2000).

104 *Id.*; *see also* Mary Anne Bendotoff, Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*: Fair Use, the First Amendment, and the Freedom to Link*, 35 U.S.F. L. REV. 83, 94 (2000) (urging both reading the decision narrowly and treating it as a "warning" about the threat posed by copyright law to freedom of speech).

105 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000).

106 *Id.* at 1455–56.

107 Defendant's Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Re Fair Use Issues), at *10, L.A. Times v. Free Republic, 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000) (No. CV-98-7840), *available at* http://www.techlawjournal.com/courts/freerep/19991101.html.

commentary on the plaintiffs' articles posted to their site, the defendants claimed that they facilitated fair uses of the articles.[108] The court held that the failure to get permission for the use, the copying of the articles in their entirety, and the "lack of any significant transformation of the articles" at the time of first posting to defendants' site meant that defendants were not engaging in fair use.[109] The court betrayed its indifference to the Internet context and the economics of online content distribution by equating the distribution of news footage on videotape, which does not refer viewers to the footage creators' television station, with quotations of newspaper articles on websites that include hyperlinks to the newspapers' own sites, which does refer readers and expand the newspaper sites' readership.[110] It compounded the poor analogy by concluding that the plaintiffs' declarations, which according to the court established merely that some of plaintiffs' articles were available on defendants' sites, also proved that defendants were not referring visitors to the plaintiffs' sites, a fact that the declarations did not prove.[111] The plaintiffs' own server logs and internal experts, which established an increase in traffic due to referrals from defendants' site and no evidence of "diversion" of traffic, actually refuted their conclusory declarations.[112]

Similarly, in *UMG Recordings v. MP3.com*,[113] the defendant copied the plaintiffs' compact discs (CDs) in order to create a digital "locker" for music. Subscribers to the site could, after verifying that they owned the CD in question, listen to that CD without copying it to their hard drives.[114] The court concluded that MP3.com had infringed the copyrights in the CDs by failing to request permission for the copying of the music onto MP3.com's servers.[115] The court rejected MP3.com's argument that it was merely facilitating a fair use of the CDs by verifying each user's ownership of a particular CD, and allowing them to listen to it on their computer rather than on a stereo, and without having to copy it to the hard drive.[116] It empha-

108 *Id.* at *6–11; *see also Free Republic*, 54 U.S.P.Q.2d (BNA) at 1459–64, 1470–71 (reciting and dismissing the "transformative" argument).

109 *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1472.

110 *Id.* (citing L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 994 (9th Cir. 1998)).

111 *See id.* at 1470–71.

112 *See id.* at 1471.

113 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

114 *See id.* at 350.

115 *See id.*; *see also* Jonathan Band, *The Google Library Project: Both Sides of the Story*, INFO. OUTLOOK, June 1, 2006, at 35, 43 (describing how Google may distinguish its library project from MP3.com in terms of the transformative nature of the project).

116 *See MP3.com*, 92 F. Supp. 2d at 350–53.

sized that "defendant's activities on their face invade plaintiffs' statutory right to license their copyrighted sound recordings to others for reproduction."[117] But the court failed utterly to grapple with the implications of new Internet technologies, or the potential benefit of such a service in making CDs even more useful and valuable.[118] It simply mentioned in passing that plaintiffs had taken unspecified "steps" to license their music for some digital uses, without analyzing at all whether such licenses would enhance the value of CDs to a degree comparable to defendant's digital "locker" service.[119] Instead of coming to terms with how the Internet can improve the marketing and use of traditional media content, it equated MP3.com with the copying and selling of television news on videotapes to paying subscribers, a wholly inapposite comparison.[120] MP3.com ultimately settled by paying over $150 million in statutory damages to the copyright owners,[121] an unconstitutionally large $25,000 per CD.[122]

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117 *Id.* at 352.

118 *See id.* (refusing to analyze the "positive impact of defendant's activities on plaintiffs' prior market" because, whatever it is, it "in no way frees defendant to usurp a . . . market").

119 *Id.*

120 *See id.* at 351 (citing L.A. News Serv. v. Reuters Television Int'l, Ltd. 149 F.3d 987, 993–94 (9th Cir. 1998)).

121 *See* John Borland & Jim Hu, *MP3.com Buy: The Taming of a Generation*, CNET NEWS.COM (May 21, 2001), http://news.cnet.com/MP3.com-buy-The-taming-of-a-generation/2100-1023_3-257993.html.

122 UMG Recordings, Inc. v. MP3.com, Inc., [1999–2000] Copyright L. Dec. (CCH) ¶ 28,141, at 32,845 (S.D.N.Y. Sept. 6, 2000) (considering a range of awards from $500 to $125,000 per CD before settling on a figure of $25,000 after considering balancing factors). The amount assessed was likely unconstitutional under more recent case law because it exceeded plaintiffs' actual damages by a factor greater than ten times, because plaintiffs offered no proof of actual damages or physical injury, *id.* at finding no. 9, and because the average price per CD sold is only $15 or $16. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). The plaintiffs offered no proof of actual damages or physical injury. *See UMG Recordings*, [1999–2000] Copyright L. Dec. (CCH) at 32,845; *see also* Bridgeport Music v. Justin Combs Publ'g, 507 F.3d 470 (6th Cir. 2007) (striking down a disproportionate punitive damages award for common law copyright infringement and unfair competition claims); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 548 (2004) (asserting that noncompensatory damages in this context "heavily outweigh" the compensatory damages, thus implicating substantive due process).

D. The Shift Toward an Opt-Out Copyright System in the Napster *Case*

In the celebrated case *A&M Records, Inc. v. Napster, Inc.*,[123] a federal appellate court ruled that the plaintiffs, all copyright owners, had to provide the defendant, a provider of a music search engine and file-sharing software, with notice of the specific works infringed on the defendants' search engine before the defendant would be obligated to remove those works. The district court had initially addressed a request by several record labels and movie studios for a preliminary injunction restraining a distributor of peer-to-peer file-sharing software from providing the program, search engine, and server-based directory of user's hard drives that people used to connect to one another's computers and transfer song files.[124] Napster had as many as 75 million users who shared up to 10,000 songs per second.[125] Unlike MP3.com or Free Republic, however, Napster was not sued for having copied any works itself, but for incurring secondary or contributory/vicarious liability for alleged infringements by its users.[126]

The district court enjoined Napster, pending trial, from "facilitating" the copying, downloading, distribution, or transmission of the plaintiffs' music absent "express permission of the rights owner."[127] The court stated: "Defendant must insure that no work owned by plaintiffs which neither defendant nor Napster users have permission to use or distribute is uploaded or downloaded on Napster."[128]

The United States Court of Appeals for the Ninth Circuit partially affirmed and partially reversed the terms of the preliminary injunction and remanded for further proceedings to modify the injunction.[129] Unlike the district court, the Ninth Circuit did not dispense with the legal requirement that a company charged with contributing to the infringement of another have "actual knowledge" of the spe-

123 A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

124 *See id.* at 901–02.

125 *See id.* at 902.

126 *Compare* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350–53 (considering a situation where defendant copied CDs onto its servers), *and* L.A. Times v. Free Republic, 54 U.S.P.Q.2d (BNA) 1453, 1461 n.38 (C.D. Cal. 2000) (defendants posted newspaper articles to their website themselves), *with Napster I*, 114 F. Supp. at 897–902 (Napster users established direct connections with one another to share files), *and* JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 34–35 (2003) (emphasizing that Napster did not itself store music on its servers to be downloaded by users).

127 *Napster I*, 114 F. Supp. 2d at 927.

128 *Id.*

129 *See Napster II*, 239 F.3d 1004, 1011 (9th Cir. 2001).

cific act of infringement, rather than there being merely a general climate of infringement.[130]

The Ninth Circuit held that plaintiffs had only established a likelihood of success on their claims because Napster, "'with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'"[131] The court declared that it would be entirely improper to, as the district court suggested, "impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights."[132] It reasoned that "absent 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 information."[133]

Regarding the district court's holding that Napster could be enjoined from benefiting financially from acts of infringement by users that it had the ability to prevent, the Ninth Circuit rejected the district court's decision to place the entire burden on Napster to police its system for infringing files. Even without determining that Napster qualified for the DMCA's safe harbor protections, the court imposed part of "the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content."[134] The court held "that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows

130 *Compare Napster I*, 114 F. Supp. 2d at 918 (rejecting the defendants' argument that because titles in the directory did not distinguish between infringing and noninfringing files, the defendant could not know it was infringing), *with Napster II*, 239 F.3d at 1019–21 ("We . . . will not impute the requisite level of knowledge to Napster merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights.").

131 *Napster II*, 239 F.3d at 1019 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.3d 1159, 1162 (2d Cir. 1971)). The court made this finding despite the fact that "[t]he instant appeal occurs at an early point in the proceedings and 'the fully developed factual record may be materially different from that before the district court. . . .'" *Id.* at 1021 (omission in original) (quoting Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982)).

132 *Id.* at 1020–21. *Compare id.* (refusing to enjoin "simply because a computer network allows for infringing use" without a determination that an operator has sufficient knowledge of the infringing uses), *with Napster I*, 114 F. Supp. 2d at 916–19 (downplaying the potentially noninfringing uses of Napster as unimportant compared to the volume of infringing uses).

133 *Napster II*, 239 F.3d at 1021.

134 *Id.* at 1027.

of and contributes to direct infringement."[135] The court refused to rule on whether Napster could claim the benefit of the DMCA, which, it said, may require copyright owners to give ISPs that host or index infringing material official notice of infringing activity in order to convey "knowledge or awareness of [the] activity," and give the ISPs' copyright compliance procedures a chance to work, before instituting litigation.[136]

After the appeal, the district court entered a modified injunction requiring Napster to remove files from its directory and search engine once the plaintiffs provided the name of an infringing file, a certificate of copyright ownership for the work, and other information.[137] That the district court established an opt-out framework is apparent from the terms of the injunctive relief. It obliged the plaintiffs to use reasonable measures to identify particular works or files by title and artist, placed the burden on some plaintiffs to identify which versions of songs they owned the rights in, and required Napster to compare plaintiffs' lists of works or files against its own search results.[138] The court ordered Napster to remove the files identified by plaintiffs' submissions and its own searches from its search results.[139] The court later expanded the injunction after Napster failed to comply with the modified injunction, and the Ninth Circuit affirmed the expanded injunction because Napster had not done all it could "to maximize the effectiveness of [its] filtering mechanism."[140] Thus, only after the plaintiffs had clearly opted out of the Napster search engine, and the defendant had repeatedly failed to comply, was it found liable for its users' conduct.

Despite the courts' insistence on an opt-out model of copyright enforcement,[141] the decision in *Napster* has been criticized on several

135 *Id.* at 1021.

136 *Id.* at 1025. The court quoted authorities declaring that "'Congress intended to provide some relief from vicarious liability,'" *id.* (quoting Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1031 (2000)), and that the DMCA "'protect[s] qualifying service providers from liability for all monetary relief for direct, vicarious, and contributory infringement.'" *Id.* (quoting S. REP. NO. 105-90, at 40–41 (1998)).

137 *See* A&M Records, Inc. v. Napster, Inc. (*Napster III*), 284 F.3d 1091, 1095–96 (9th Cir. 2002).

138 *See* A&M Records, Inc. v. Napster, Inc., No. C 99-05183, 2001 U.S. Dist. LEXIS 2186, at *3–5 (N.D. Cal. Mar. 5, 2001).

139 *See id.* at *5–6.

140 *Napster III*, 284 F.3d at 1098.

141 *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197, 1237–39 (C.D. Cal. 2007).

grounds. First, the district court announced a "zero tolerance" standard for infringement of properly noticed works. This standard has no place in high-technology markets where, as Napster correctly pointed out, courts should avoid "second-guessing 'major technological innovations [that] alter the market for copyrighted materials.'"[142] As Professor Lessig explained:

> If 99.4 percent [compliance, which Napster achieved,] is not good enough, then this is a war on file-sharing technologies, not a war on copyright infringement. There is no way to assure that a p2p system is used 100 percent of the time in compliance with the law, any more than there is a way to assure that 100 percent of the VCRs or 100 percent of Xerox machines . . . are used in compliance with the law. . . . The court's ruling means that we as a society must lose the benefits of p2p, even for the totally legal and beneficial uses they serve, simply to assure that there are zero copyright infringements caused by p2p.[143]

Second, the *Napster* decision punished the company for, after obtaining knowledge of specific infringing files, contributing to the infringement of those files by making its software "networked" and "frequently updated," and terminating the accounts of some alleged infringers in a way that demonstrated its right and ability to control infringement by its users.[144] So-called "stand-alone" devices like the videocassette recorder in the *Sony* case, as well as decentralized networks like Kazaa and Grokster that create user-maintained directories and make it more difficult to monitor infringement, would be immune from claims of infringement under the decision, despite an equivalent or greater potential for infringement.[145]

Third, and most importantly, the *Napster* decision facilitated an apparent collusive strategy between music labels to control the distri-

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142 Brief of Defendant/Appellant/Cross-Appellant Napster, Inc. at 63, *Napster III*, 284 F.3d 1091 (Nos. 01-15998, 01-16003, 01-16011 and 01-16308) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984)), *available at* http://news.findlaw.com/hdocs/docs/napster/npstbrf080801.pdf.

143 LESSIG, *supra* note 54, at 74.

144 *See* Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 480 (2002) ("[T]he *Napster* decision suggests that the more free-standing the technology, the more likely it will be to escape under *Sony*; however, in a networked world in which software is frequently updated by providers, and even devices . . . may be part of a network, one is inclined to speculate about how 'free standing' any technology will be—in particular, P2P technology.").

145 *See id.*

bution system for their products.[146] The major record labels rejected a $1 billion offer from Napster to license their music, instead getting together to offer their own service "that lacked just about everything that makes online music downloads appealing."[147] When that failed, they licensed music for online distribution by Roxio (which acquired Napster), Apple, and other firms, but at licensing rates so high that the services lost money despite significant revenues.[148]

E. The Internet Matures: Courts Move to an Opt-Out Copyright System

Since *Napster*, fair use and other defenses are widely available to Internet companies that do not disregard clear opt-outs by copyright holders. Courts have become more sophisticated about the Internet and its high-profile companies' operations. As a result, leading cases decided since *Napster* have required that a search engine must be put on notice of specific instances of infringement before being held liable for its own conduct, or for that of its users. With respect to a search engine's own conduct, the most important case is *Kelly v. Arriba Soft Corp.*[149] In that case, a search engine for photographs and other

146 *See In re* Napster, Inc. Copyright Litig. (*Napster IV*), 191 F. Supp. 2d 1087, 1108–10 (N.D. Cal. 2002) (granting Napster's motion for a continuance on the basis of its plausible charges that record companies were colluding to prevent the entry of other parties into the online music distribution business); *see also* Fagin et al., *supra* note 144, at 464–69, 492–93 (suggesting an anticompetitive potential of recording companies' business and litigation strategies); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 154–57 (2006) (discussing the recording industry's fledgling attempts to set up an online music distribution business, the Justice Department's initial investigation into possible anticompetitive behavior by the recording industry, and the *Napster IV* case).

147 Anna Wilde Mathews et al., *The Music Industry Finally Online, But Few Listen*, WALL ST. J., May 7, 2002, at A1; *see also* Jim Hu, *Record Labels Scoff at Napster's $1 Billion Plan*, CNET NEWS.COM (Feb. 21, 2001), http://news.cnet.com/Record-labels-scoff-at-Napsters-1-billion-plan/2100-1023_3-252921.html (reporting record labels' rejection of Napster's offer).

148 In 2002, Roxio acquired Napster. *See* John Borland, *Roxio Closes Napster Asset Buy*, CNET NEWS.COM (Nov. 27, 2002), http://news.cnet.com/2100-1023-975627.html. Napster incurred over $165 million dollars in losses between 2004 and 2007. Napster, Inc., Annual Report (Form 10-K), at 22 (Jun. 6, 2007) (combining net losses from April 1, 2004, through March 31, 2007, Napster lost $165,960,000). Apple reportedly operated iTunes as a "loss leader for iPod," *see* Jon Newton, *The iTunes Phenomenon, P2P Networks and Music Lite*, E-COMMERCE TIMES (July 7, 2004), http://www.ecommercetimes.com/story/34986.html?wlc=1219702121. The *Financial Times* reported in April 2007 that: "For Apple, music has been a loss leader to promote the sale of its iPod MP3 players . . . ." Emiko Terazono, *EMI's iTunes Copyright Decision Divides the Music Industry*, FIN. TIMES, Apr. 9, 2007, at 22.

149 336 F.3d 811 (9th Cir. 2003).

images reproduced as many images available on the Internet as its software could find and index, and then distributed and displayed the images to users searching for images on the Internet in thumbnail or reduced-scale form.[150] The court held that the search engine was not liable for copying and creating the thumbnail previews of the plaintiff's works where it deleted them as soon as the plaintiff complained, and its search engine was a fair use because it improved access to information on the Internet by making images searchable.[151] The case supports the idea that "providing access to infringing websites" is still "transformative" and "does not amount to an abuse of the good faith and fair dealing underpinnings of the fair use doctrine."[152]

With respect to software providers' liability for their users' conduct, the Supreme Court made it clear in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*[153] that the most important question is whether the provider "acted with a purpose to cause copyright violations,"[154] including by failing to block specific copyrighted files after "it received threatening notice from the copyright holders."[155] The court reaffirmed its conclusion in *Sony* that "mere knowledge of infringing potential or of actual infringing uses would not be enough . . . to subject a distributor to liability," so that "purposeful infringement" is necessary.[156] Indeed, the defendants in *Grokster* declared that most downloads using their software were infringing; the defendants were provided with lists of eight million specific copyrighted files they were accused of infringing by the plaintiffs and distributed advertisements and guidance on how to download and play popular copyrighted music and movies.[157] The plaintiffs and the United States as amicus curiae, speaking through both the acting Solicitor General of the United States and the General Counsel of the U.S. Copyright Office, underlined the defendants' knowledge:

> According to petitioners, moreover, the evidence shows that respondents' networks have been "designed and modified to best enable

150 *See id.* at 815–16 (describing the operation of the Arriba image search engine).

151 *See id.* at 820 ("This first factor [purpose and character of the use] weighs in favor of Arriba due to the public benefit of the search engine and the minimal loss of integrity to Kelly's images.").

152 Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 n.8 (9th Cir. 2007) (citing *Kelly* and distinguishing *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 198–200 (3d Cir. 2003)).

153 545 U.S. 913 (2005).

154 *See id.* at 938.

155 *Id.* at 926–27.

156 *Id.* at 937.

157 *See id.* at 923, 938.

> and facilitate the infringement of copyrighted works," and that respondents have marketed their networks as optimally suited for infringement, such as by emphasizing the anonymity of copying and advertising how many tracks a search for Madonna retrieved on StreamCast as opposed to a legitimate service. Petitioners indicate that respondents "advised their users how to download copyrighted works, including *The Matrix*, *Blair Witch Project*, *Tomb Raider*, *Pearl Harbor*, *Lord of the Rings*, *Resident Evil*, and *Big Fat Liar*," and "included in promotional materials search results featuring *The Eagles Greatest Hits* . . . as well as music by Sting, Puff Daddy, Shania Twain, Bruce Springsteen, Miles Davis, Carlos Santana, and John Lee Hooker."[158]

In the absence of such detailed knowledge and open encouragement of infringement, linking, facilitating access to, and even defending the legality in court of infringing material made available over an ISP's system does not implicate the inducing infringement rule of *Grokster*.[159] As the Ninth Circuit declared in 2007, absent such promotion or advertising of infringement, *Grokster* left unchanged the requirement that a "computer system operator" have "actual knowledge of specific infringing material" on its system, and fail to "take simple measures" to remove it.[160]

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158 *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 29, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2003 WL 22794496, at *10, *19 (citations omitted) (quoting Plaintiffs-Appellants' Opening Brief at 8, 28, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004) (Nos. 03-55894, 03-56236, 03-55901).

159 *See* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 421 (1st Cir. 2007) (finding no ISP liability pursuant to the *Grokster* standard under these circumstances). As the court in *Lycos* stated:

> Even assuming arguendo that active inducement could negate Section 230 immunity, it is clear that UCS has not alleged any acts by Lycos that come even close to constituting the "clear expression or other affirmative steps taken to foster" unlawful activity that would be necessary to find active inducement. UCS relies in part on . . . standard elements of web sites "with [both] lawful and unlawful potential," and [which], without more, cannot form the basis to find inducement. UCS's complaint also cites the fact that Lycos has taken legal action to protect its subscribers, including moving to quash subpoenas and intervening in relevant cases. Actions taken to protect subscribers' legal rights, however, cannot be construed as inducement of unlawful activity, and UCS does not allege that Lycos lacked a reasonable basis for its legal activities.

Id. (citing *Grokster*, 545 U.S. at 919, 937) (citations omitted).

160 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170–72 (9th Cir. 2007) (citing *Grokster*, 545 U.S. at 929–32); *see also Napster II*, 239 F.3d 1004, 1020–22 (9th Cir. 2001) (requiring knowledge of specific infringing activities before imposing liability for contributory infringement on a computer systems operator); *Netcom I*, 907 F.

Courts have applied similar principles of fair use and secondary liability, as well as the DMCA safe harbors, to hold that operators of electronic commerce sites that respond to opt-outs by removing vendors' infringing content are not liable for copyright infringement. When an adult magazine sued Amazon.com and Google for reproducing, indexing, and displaying, in reduced-size files, its copyrighted photographs, the courts refused to hold the Internet companies liable for copyright infringement unless they knew of specific infringing images and failed to take "simple" steps to prevent users from accessing them.[161] The courts reached similar results when the magazine sued ISPs, Web hosting companies, and credit card processing services for facilitating the infringement by websites of the magazine's photographs, holding that as long as they developed reasonable policies for responding to infringement of specific files, they were protected by the DMCA and other copyright defenses and limitations.[162] Thus, Amazon.com is similarly not liable for hosting third parties' products and notifying customers of where to buy infringing items, as long as it is not tolerant of specific instances of infringement.[163] Nor can eBay

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Supp. 1361, 1373–75 (N.D. Cal. 1995) ("Liability for participation in the infringement will be established where the defendant, 'with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'" (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

161 *See Perfect 10*, 508 F.3d at 1172 ("Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps.").

162 *See* Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788 (9th Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1110–17 (9th Cir. 2007). The court held in *Visa* that Perfect 10 could not sue operators of credit card processing services that enabled websites to earn profits from infringing reproduction, distribution, and display of plaintiff's photographs, even though credit card companies "lend their names and logos to the offending websites and continue to allow their cards to be used to purchase infringing images despite actual knowledge of the infringement." *Visa*, 494 F.3d at 802. The defendants did not control the content of infringing sites. *Id.* at 803. "Dance hall" and other precedents cited by the plaintiff "were developed for a brick-and-mortar world, and, as the *Napster* and *Grokster* courts implicitly recognized by paying little attention to them, they do not lend themselves well to application in an electronic commerce context." *Id.* at 798 n.9. In *CCBill*, the court held that, under the DMCA, a service provider qualified as a "safe harbor" 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." *CCBill*, 488 F.3d at 1109.

163 *See* Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1104–05 (W.D. Wash. 2004) (immunizing Amazon from copyright infringement by third party shopkeepers under the DCMA because it did not actually know that specific vendors were

be found liable for infringing auctions that are readily identifiable by simple searches on its site, as long as it did not disregard notifications of specific infringing items.[164]

Other courts have reinforced the principle that ISPs should not be liable for content that they transmit or host absent knowing failures to respond to infringement or a direct financial benefit from the infringement going beyond normal business profits. For example, even if Google becomes aware that its search engine has indexed, and is reproducing and displaying preview text or images from, infringing websites, it does not become liable for infringement by the sites unless it "can take simple measures to prevent further damage to [the] copyrighted works, and failed to take such steps."[165] Absent such a purpose to infringe, Google is engaged in fair use.[166]

Promptly disabling access to works after receipt of a sufficiently particularized opt-out request shows good faith and is consistent with "socially valuable" fair use.[167] Other ISPs never become liable for infringement, because they simply reproduce and transmit files from

selling infringing items); Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 917–18 (C.D. Cal. 2003) (providing a forum for sales of infringing merchandise by third parties and sending notifications to customers regarding the listing and sale of infringing items, or providing credit card processing for infringing items, does not unlawfully contribute to infringement because the defendant did not receive notification and opt-out for specific items alleged to be infringing under the DCMA).

164 *See* Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1090–93 (C.D. Cal. 2001) (ruling that eBay, an online auction company, was entitled to the benefit of DMCA safe harbor where plaintiff's notifications of copyright infringement and demand that defendant cease and desist from infringement did not provide particularized details on infringing items).

165 *Perfect 10*, 508 F.3d at 1172; *see also* Parker v. Google, Inc., 242 F. App'x 833, 837 & n.3 (3d Cir. 2007) (preventing the author of a book or article posted to the Internet, which Google reproduced for archival purposes and allowed others to access via its Internet service without the author's permission, from suing Google in the absence of a showing that it disregarded the author's notifications of specific infringing content, or that it had a much more "direct financial interest in the purported infringing activity").

166 *See Perfect 10*, 508 F.3d at 1165–68 (citing Kelly v. Arriba Soft Corp., 336 F.3d 811, 815–16, 818–22 (9th Cir. 2003)) (describing search engines' reproduction of materials as "fair uses" because they do "transformative" work on the materials that provides a "benefit to the public").

167 *See* Field v. Google Inc., 412 F. Supp. 2d 1106, 1121 (D. Nev. 2006) (citing Kelly v. Arriba Soft, Inc., 336 F.3d 811, 820–21 (9th Cir. 2003)); *see also id.* at 1122–23 (taking Google's good faith in promptly removing websites plaintiff complained about from cache as an additional factor in fair use analysis).

one Internet user to another as a conduit, without retaining copies for more than a transitory life.[168]

The DMCA safe harbors shield online services in the absence of the willful or purposeful disregard of copyrights, which courts define as failure to permit copyright holders to opt out of specific infringing postings.[169] The legislative history of the DMCA makes clear that notifications of specific instances of infringement are necessary so that ISPs do not have to "'make discriminating judgments about *potential* copyright infringement[ ].'"[170]

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168 *See* CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550–51 (4th Cir. 2004) ("When an electronic infrastructure is designed and managed as a conduit of information and data that connects users over the Internet, the owner and manager of the conduit hardly 'copies' the information and data in the sense that it fixes a copy in its system *of more than transitory duration*."); *cf.* Hecke v. Clear Channel Commc'ns., Inc., [2004–2005 Transfer Book] Copyright L. Dec. (CCH) ¶ 29,018, at 38,420 (S.D.N.Y. Apr. 26, 2005) (holding that a radio network was not liable for its own stations' broadcast of an infringing song where the "stations make their own programming decisions" and the radio network did not control those programming decisions).

169 In *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004), the court held that the ISP could only be liable for postings by its users if it "knew or had reason to know of the infringing activity taking place" on its network and "materially contributed to that infringing activity." *Id.* at 1076–79. The court cast doubt on the plaintiff's evidence that the defendant "received a direct financial benefit from the copyright infringement." *Id.* at 1079. It also held that the defendant was entitled to DMCA safe harbor protections under section 512(a), and that a reasonable jury could find it entitled to the benefit of safe harbor protections under section 512(i) as well. *Id.* at 1080–81. *See also* Newborn v. Yahoo!, Inc., 391 F. Supp. 2d 181, 188–89 (D.D.C. 2005) (dismissing plaintiff's copyright claims where plaintiff's correspondence with defendant contained only "vague statements [that were] simply insufficient to put the defendants on notice of the claims against them" or to help them "determine which claims the plaintiff is asserting"); Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203–05 (N.D. Cal. 2004) (recognizing that an ISP enjoyed fair use and safe harbor protections when it hosted a website that republished copyrighted documents in order to expose problems with electronic voting software); *Hendrickson*, 165 F. Supp. 2d at 1089–92 (shielding eBay from copyright liability under the DMCA because plaintiff's notifications of infringing auctions did not identify the infringing items with specificity); Arista Records, Inc. v. MP3Board, Inc., No. 00 CIV. 4660, 2002 WL 1997918, at *13 (S.D.N.Y. Aug. 29, 2002) (finding that a trial was needed on the issue of a website's liability for providing hyperlinks to allegedly infringing music files where plaintiff's notifications of the alleged infringements and opt-outs "named particular artists along with specified songs" and provided defendant "with the pages on MP3Board's own site where the links appeared," and questions remained about whether defendant's knowledge of infringement precluded the application of the DMCA safe harbor).

170 Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 917 (2003) (emphasis added) (quoting H.R. REP. NO. 105-551, pt. 2, at 58).

IV. OPTING OUT OF THE INTERNET IN THE EUROPEAN UNION

Insofar as most European countries lack a broad, general-purpose "fair use" exception, it would be surprising if they developed an opt-out framework for the Internet, as U.S. courts have done for the most part.[171] Nevertheless, several lines of authority exist for the proposition that ISPs should not be liable for Internet content in the absence of a decision to disregard a notification of infringement, opt-out, or other clear warnings.

A. The Electronic Commerce Directive: Copyright Exemptions to Promote the Growth of Free Expression and the Internet

The European Community's Electronic Commerce Directive (ECD)[172] erects safe harbors for online intermediaries that are similar to those in the DMCA. The ECD's recitals note that the free development and circulation of information services throughout the European Community is guaranteed by the basic principle of freedom of expression, as set forth in the Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[173] These information services, however, are threatened by legal "obstacles" including "divergences in legislation" and "legal uncertainty as to which national rules apply to such services."[174]

Like the DMCA, the ECD stipulates that providing access to a computer network or transmitting information over it, including

171 *See* Alain Strowel & Jan Corbet, *Belgium*, *in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, at BEL-53 (Paul Edward Geller & Melville B. Nimmer eds., 2007) (distinguishing fair use in the United States from copyright exceptions in Belgium and other continental European countries); Andre Lucas et al., *France*, *in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra*, at FRA-123 (distinguishing fair use in the United States from French exceptions to copyright); *see also* Loi relative au droit d'auteur et aux droits voisins [Law on Copyright and Neighboring Rights of 1994], June 30, 1994, Moniteur belge/Belgisch Staatsblad 27/07/1994, arts. 22–23 (Belg.); Law No. 2006-961 of Aug. 1, 2006, art. L 122–25, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 3, 2006, p. 11,529 (French Intellectual Property Code); Geset über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) [German Law on Copyright and Neighboring Rights] Sept. 9, 1965, as amended 1998, BGBl. I, arts. 48–53; MICHAEL SPENCE, INTELLECTUAL PROPERTY 114 (2007) (distinguishing fair use in the United States from fair dealing in the United Kingdom); Paul Ganley, Google Book Search: Fair Use, Fair Dealing and the Case for Intermediary Copying 7–21 (Jan. 13, 2006) (unpublished working paper) (contrasting fair use and fair dealing), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875384.

172 Council Directive 2000/31, 2000 O.J. (L 178) 1 [hereinafter ECD].

173 *Id.* art. 10, at 12.

174 *Id.* pmbl., at 1.

engaging in the transient storage or reproduction of the information for transmission, shall not give rise to monetary liability irrespective of notice of illegal activity.[175] Injunctive relief to curtail infringement remains available.[176] Similarly, transmitting information provided by users on a temporary and automatic basis shall not create monetary liability if

> [the ISP] acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.[177]

Similarly, an ISP will not be held liable for storing information submitted by a user as long as

> [the provider] does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or . . . upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.[178]

The ECD also provides that: "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."[179] It does not preclude injunctive or administrative relief aimed at preventing or terminating infringement, while stressing that any order or action terminating "the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression."[180]

The ECD's emphasis upon "actual knowledge of illegal activity" was consistent with the existing jurisprudence of E.U. member states on the liability of intermediaries such as book publishers or ISPs for the actions of their authors or users. For example, in 1992, the German Supreme Court held that an intermediary has an interest in freedom of expression that overrides the interest of plaintiffs in holding publishers liable for information they may be presumed to "know" about because they published it. The case involved liability for

175 *See id.* art. 12, at 12.
176 *See id.* at 13.
177 *Id.* art. 13, at 13.
178 *Id.* art. 14, at 13.
179 *Id.* art. 15, at 13.
180 *Id.* pmbl., at 6.

infringing advertisements under the Act on Unfair Competition,[181] but its reasoning applies with equal force to the copyright context.[182] Similarly, the German Multimedia Act of 1997[183] provided that online intermediaries are only liable for third party content on their sites "if they have actual knowledge of the content and if the prevention of further dissemination is technically possible and can reasonably be expected of them."[184] Finally, the Swedish Act on Responsibility for Electronic Bulletin Boards of 1998[185] prohibited holding network providers liable for copyright infringement, and made other ISPs liable only for "obviously" infringing content that they could reasonably be expected to find given the size of their service.[186]

Similar rules applied in online defamation cases prior to the ECD. The United Kingdom's Defamation Act of 1996[187] allowed online intermediaries to enjoy the benefit of the "'innocent dissemination' defense for distributors" of hard copies, if the intermediary could show that it exercised reasonable care in its operations and had no knowledge or reason to know that it was facilitating the dissemination of defamatory material.[188] Given that defamation can inflict even worse damage to an individual's psyche and earning power than copyright infringement, it would be inequitable not to apply similar rules.

B. The European Convention on Human Rights: Establishing Extra-Statutory Exemptions from Copyright to Safeguard Freedom of Expression

Article 10 of the ECHR has been construed to create an exception to copyright needed to protect freedom of expression.[189] Some

181 Gesetz gegen den unlauteren Wettbewerb [Act Against Unfair Competition], June 7, 1909, RGBl. at 499, last amended July 3, 2004, BGBl. I at 1414, § 1 (F.R.G.).

182 *See* Kamiel J. Koelman, *Online Intermediary Liability, in* COPYRIGHT AND ELECTRONIC COMMERCE 7, 41 (P. Bernt Hugenholtz ed., 2000) (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 26, 1990, Gwerblicher Rechtsschutz und Urheberrecht [GRUR] 1012 (F.R.G.) (*Pressehaftung I*); Bundesgerichtshof [BGH] [Federal Court of Justice] May 7, 1992, Gwerblicher Rechtsschutz und Urheberrecht [GRUR] 618 (F.R.G.) (*Pressehaftung II*)).

183 Informations- und Kommunikationsdienste-Gesetz (IuKDG) [Information and Communication Services (Multimedia) Act], Aug. 1, 1997, BGBl. I at 1120 (F.R.G.).

184 Koelman, *supra* note 182, at 26.

185 Lag om ansvar för elektroniska anslagstavlor (Svensk författningssamling [SFS] 1998:112) (Swed.).

186 Koelman, *supra* note 182, at 25.

187 Defamation Act, 1996, c. 31.

188 Koelman, *supra* note 182, at 24.

189 P. Bernt Hugenholtz, *Copyright and Freedom of Expression in Europe, in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 343, 354–58 (Rochelle C. Dreyfuss et al.

of the highest courts in the member states of the European Union have confirmed this interpretation or construction.[190] Case law in France, Germany, and the United Kingdom mandates exceptions to copyright where necessary to safeguard freedom of expression and the public interest in access to information.[191] The legal principles recognized and expounded upon by the courts in these cases are certain to be taken up and extended to resolve disputes regarding efforts by copyright holders to silence Internet criticism or commentary upon their works or practices.

The following represents a brief canvass of these authorities, based on the research of Professor Bernt Hugenholtz, Director of the Institute for Information Law at the University of Amsterdam.

In 1962, the Berlin District Court ruled that freedom of expression, protected by Article 5 of the German Basic Law,[192] supplied an "extra-statutory justification" that could be asserted by a defendant accused of rebroadcasting a news report on television without authorization.[193]

In 1968, the Berlin Court of Appeal allowed the unconsented reproduction and distribution of copyrighted cartoons in a "critical analysis" of press reports.[194]

In 1985, the German Supreme Court endorsed the approaches of the Berlin District Court and the Berlin Court of Appeals by stating

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eds., 2001); *see also* ECD, *supra* note 172, pmbl. at 2 (recognizing the importance of copyright law respecting the ECHR).

190 *See* Michael D. Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, *in* COPYRIGHT AND HUMAN RIGHTS 37, 55–61 (Paul L.C. Torremans ed., 2004).

191 *See id.* at 57–60; Hugenholtz, *supra* note 189, at 354–58; Lucas et al., *supra* note 171, at FRA-123 n.56 (citing Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Toulouse, Sept. 26, 2001, Legipresse 2001, I, 149, which holds that "Article 10 of the Convention of Human Rights [E.C.H.R.] . . . legitimizes the full reproduction of a previously published paper"). *But cf. id.* (citing Paris, 4e ch. A, Dec. 12, 2001, Juris-Data No. 161701, which holds that "freedom of the press need not override intellectual property rights").

192 Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 5.

193 Hugenholtz, *supra* note 189, at 355 (citing Landgericht [LG] [trial court] Dec. 12, 1960, [1962] Gwerblicher Rechtsschutz und Urheberrecht [GRUR] 207 (F.R.G.) (*Maifeiorn*)).

194 *Id.* (citing Kammergericht [KG] [Court of Appeal] Nov. 26, 1968, [1969] 54 Archiv für Urheber- Film-Funk-und Theaterrecht [UFITA] 296 (F.R.G.) (*Bild Zeitung*)).

that an "unusually urgent information need" may create "limits to copyright exceeding the express statutory limitations."[195]

In 1994, the District Court of Amsterdam stated that the freedom of expression and information assured by Article 10 of the ECHR may warrant creating an additional exception to copyright for reproductions and distributions of material that are necessary to engage in news reporting.[196]

In 1995 the Dutch Supreme Court announced a ruling that added a balancing-of-interests defense to trademark lawsuits despite the fact that no statutory exception to trademark rights applied under the facts of the case, which involved gray market goods.[197] The court "confirmed that, in principle, trademarks and copyrights may conflict with Article 10 ECHR."[198]

In 1999, a Paris trial court rejected a copyright claim based on the reproduction and display of twelve copyrighted paintings on the national television network France 2 on the grounds that Article 10 preempted national law to the extent that it restricted television networks from educating the public about "important cultural events."[199]

Professor Hugenholtz summarizes these decisions with the conclusion: "Recent court decisions from Europe seem to suggest that freedom of expression and information, as guaranteed inter alia in the [ECHR], may under specific circumstances limit overbroad [copyright] protection."[200]

Since 2000, some of the highest courts in the European Union have again taken up this theme. As Michael Birnhack, the former co-director of the Haifa Center of Law & Technology has pointed out, the German Federal Constitutional Court has held that the freedom of expression and of artistic license guaranteed by Article 5 of the

195 *Id.* at 356 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 7, 1985, [1987] Gwerblicher Rechtsschutz und Urheberrecht [GRUR] 34 (*Lili Marleen*)).

196 *See id.* at 356–57 (citing Arrondissementsrechtbank [Rb.], Amsterdam [ordinary court of first instance and court of appeal to the Kantongerecht], 19 January 1994, [1994] Informatierechst/Ami 51 (*Boogschutter*)).

197 *Id.* at 353 (citing Dior/Evora, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 20 oktober 1995, NJ 682 (*Dior/Evora*)).

198 *Id.* at 357 (discussing the Dutch Supreme Court confirmation that, in principle, copyrights and trademarks may conflict with Article 10 of the ECHR (citing Dior/Evora, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 20 oktober 1995, NJ 682 (*Dior/Evora*))).

199 *Id.* at 357–58 (citing Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Feb. 23, 1999, 184 Revue Internationale du Droit d'Auteur 374 (2000) (*Utrillo v. France 2*)).

200 *Id.* at 343.

Basic Law trumps the otherwise valid right of a copyright holder to restrain the critical transformation of a script for another author's play into a new script.[201] Similarly, several French professors have also noted that case law now exists in France for the recognition of a non-statutory free speech exception to copyright in France.[202] And the Court of Appeal of the United Kingdom has held that there is a place, beyond the express limitations contained in the U.K. Copyright Act, for "accommodat[ing] the right of freedom of expression" when it comes into conflict with copyright protections to which none of the express exceptions in the Act apply.[203] A British professor has characterized the fair dealing exception in the United Kingdom as protecting "short extracts and long comments"[204] in order to safeguard "expressive autonomy" and the "public interest."[205]

Some more recent decisions of courts within the European Union have declined to recognize an extrastatutory defense to claims of copyright infringement in the interest of freedom of expression or access to information.[206] According to Professors Alain Strowel and François Tulkens, in their survey of cases decided in Europe in 2003 and 2004 as well as Professor Lessig's ideas about the intersection between IP and freedom of expression, civil law IP lawyers may not be taking freedom of expression very seriously, leading to a potential "backlash" against intellectual property.[207] The backlash may come, they believe, because courts in Belgium, France, and Germany, in particular, are not always careful about recognizing the public interest in access to culture.[208]

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201 *See* Birnhack, *supra* note 190, at 57 n.104 (citing Bundesverfassungsgericht [BVerfG] [federal constitutional court] June 29, 2000, BVerfGE 825/98 (*Germania 3*)).

202 *See* Lucas et al., *supra* note 171, at FRA-123 n. 56 (citing conflicting cases on this point, but in support of it, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Toulouse, Sept. 26, 2001, Legipresse 2001, I, 149, as "holding that Article 10 of the Convention of Human Rights [E.C.H.R.] legitimizes the full reproduction of a previously published paper").

203 Ashdown v. Telegraph Group Ltd., [2002] Q.B. 5, ¶ 45 (Court of Appeal); Birnhack, *supra* note 189, at 60.

204 SPENCE, *supra* note 171, at 115 (quoting Hubbard v. Vosper, [1972] 2 Q.B. 84, 94).

205 *Id.*

206 Alain Strowel & François Tulkens, *Freedom of Expression and Copyright Under Civil Law: Of Balance, Adaptation, and Access*, *in* COPYRIGHT AND FREE SPEECH 287, 296–310 (Jonathan Griffiths & Uma Suthersanen eds., 2005).

207 *Id.* at 312–13 (citing LESSIG, *supra* note 54, at 225–27).

208 *See id.* at 298–313.

C. Applying the ECD and the European Convention on Human Rights: Crafting an Opt-Out Copyright System for the Internet in the European Union

Courts within the European Union have applied these principles from the ECD and the ECHR to reach conclusions similar to those arrived at by U.S. courts. Courts in several E.U. countries have ruled that distributors of technologies that may be used to infringe copyrights are not liable for their customers' infringement absent "actual knowledge of a specific infringement at the time when the supplier could take action to prevent it."[209]

Courts in the Netherlands have issued rulings in this area that have attracted interest not simply in Europe, but in the United States as well.[210] In 1996, the President of the District Court in the Hague held that "a hosting service provider does not directly infringe copyrights and may only be held liable if he knows or has a reason to know of the actual wrongful act taking place over its installations."[211] The court explained that

> [ISPs] do nothing more than to give the opportunity [for] publication and . . . in principle, they can exert no influence over, nor have knowledge of, what the person who gain[s] access to Internet through them, will supply.
>
> In principle, therefore, there is no reason to hold them responsible for wrongful acts of users, e.g. copyright infringements by third parties.
>
> A responsibility might be assumed in a situation where it is unequivocally clear that a publication of a user is wrongful and where it can be assumed with reason that such is known to the access provider, for instance because someone has notified the provider of this. In such cases, Internet access providers might be requested to take steps against the user in question.[212]

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209 Brief Amici Curiae of 40 Intellectual Property and Technology Law Professors Supporting Affirmance at 3 n.3, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004) (Nos. 03-55894 and 03-55901), 2003 WL 22753810.

210 *See* Morgan, *supra* note 77; ISPs Are Not 'Publishers' and Cannot Be Held Liable for User's Copyright Infringement, Pike & Fischer Internet Law & Regulation, Sept. 17, 2003, http://internetlaw.pf.com; Dinant T.L. Oosterbaan, *Intellectual Property and the Internet: A Dutch Perspective*, 2 E-COM. L. REP. 21 (2003).

211 Koelman, *supra* note 182, at 20 (citing Church of Spiritual Tech./Dataweb B.V., Arrondissementrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Hague, 12 maart 1996, http://www.spaink.net/cos/verd1eng.html (Neth.) (*Church of Spiritual Tech./Dataweb B.V.*)).

212 Church of Spiritual Tech./Dataweb B.V., Arrondissementrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Hague,

The Hague court sitting in full procedure (*Bodemprocedure*) agreed with the President of the District Court, stating as follows:

> The court first notes that the activities of the Service Providers with regard to this case are limited to providing information from and/or to its users and the storage of this information. The Service Providers do not select the information and do not process it either. . . . [I]n these circumstances the Service Providers do not do the publishing themselves, but only provide the opportunity for publication.
>
> The court further believes that the activities of the Service Providers do not involve a copyright relevant reproduction. . . . The court finds support for this position in that stipulated in art. 5 paragraph 1 of the amended proposal for a Directive of the European Parliament and Council on the harmonisation of certain aspects of copyright and related rights in the information society, submitted by the Commission of the European Communities on 21 May 1999 . . . .
>
> This does not detract from the fact that the Service Provider, who does not reproduce or publish material himself, nevertheless can be bound to assist and take adequate measures, on the grounds of the care that is fitting in the conduct of society, if he is notified that one of the users of his computer system is infringing copyright or otherwise acting unlawfully through the use of his home page . . . .[213]

The article of the Copyright Directive referred to by the court exempts network transmissions and related reproductions such as temporary caching.[214] Only *after* noting its resolution of the case in favor of the defendants did the court find no violation of the "right of the freedom of expression, as laid down in art. 10 of the [Convention]."[215]

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12 maart 1996, http://www.spaink.net/cos/verd1eng.html (Neth.) (*Church of Spiritual Tech./Dataweb B.V.*).

213 Church of Spiritual Tech./Dataweb B.V., Arrondissementrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Hague, 9 juini 1999, http://www.spaink.net/cos/verd2eng.html (Neth.) (*Church of Spiritual Tech./Dataweb B.V.*).

214 Copyright Directive, *supra* note 41, art. 5(1); *see also* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST 258 (2004) (explaining that the Copyright Directive "exempts temporary acts of reproduction, such as caching, for the purpose of enabling network transmissions and lawful uses").

215 Church of Spiritual Tech./Dataweb B.V., Arrondissementrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Hague, 9 juini 1999, http://www.spaink.net/cos/verd2eng.html (Neth.) (*Church of Spiritual Tech./Dataweb B.V.*).

With respect to direct infringement by the Internet user who posts copyrighted material herself, the Dutch courts arrived at strikingly similar conclusions. Even assuming that the user posted infringing extracts of documents to the Internet, the "full procedure" court refused to award any relief to the copyright owner because after receiving notice of the owner's infringement claim, the user removed the documents, basically mooting the owner's claim "with no fear of a repetition."[216]

In 2003, the Court of Appeal for the Hague affirmed the judgment of the lower courts, emphasizing the severe threat to freedom of expression posed by the prospect of ISP liability for users' copyright violations.[217] The court declared at the outset that Article 10 of the ECHR guarantees "the right of freedom of information," and that "[i]n particular cases it is conceivable that assertion of the copyright, such as a ban on infringement, must yield to the freedom of information."[218] Any limitation on the freedom of information must be "necessary in a democratic society," meaning that it has to be directed at a "'pressing social need'" and be "'proportionate'" to that aim.[219] The court then held that the Internet user's quotations from Scientology's copyrighted works were lawful because she intended them to provide information on "the Scientology doctrine and the procedure in the Scientology organisation."[220] The court concluded that the evidence supported a finding that the plaintiffs' objective in preventing their copyrighted works from being quoted on the Internet was "to exercise

216 *Id.* The President of the District Court of the Hague had reached a similar conclusion, stating:

> It is also a matter of fact that defendant, when the plaintiffs—after thereto pressed by the defendants—had given a better basis for their copyright claims, has modified her homepage drastically.
>
> That she now violates the copyright of any of the plaintiffs has not been made plausible. Insofar as she still is quoting literally from protected works, these passages are nothing more than quotes that, considering the context in which they are being used, fall under the exempt ruling of art. 15A of the Copyright Law.

Church of Spiritual Tech./Dataweb B.V., Arrondissementrechtbank [Rb.] [ordinary court of first instance and court of appeal to the Kantongerecht], Hague, 12 maart 1996, http://www.spaink.net/cos/verd1eng.html (Neth.) (*Church of Spiritual Tech./ Dataweb B.V.*).

217 Church of Spiritual Tech./Dataweb B.V., Gerechtshof [Hof] [ordinary court of appeal], Hague, 4 september 2003, [2004] E.C.D.R. 25, § 8.4 (Neth.).

218 *Id.* § 8.2.

219 *Id.* (quoting The Sunday Times Case v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 35–36 (1979).

220 *Id.* § 8.4.

power over Scientology members and to prevent discussions about Scientology's doctrine and practices."[221]

The Court of Appeals' decision was even more significant on the issue of ISP liability. The court rejected the idea of this overextension of copyright liability outright, and without regard to an ISP's actual or constructive knowledge of infringement:

> In the Court's opinion, service providers only provide the technical facilities for others to expose information. Therefore it does not seem right to consider them as being equivalent to publishers, who themselves publish. This view is in accordance with the Agreed Statement with Art. 8 of the WIPO Copyright Treaty:
>
> "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention."
>
> Since the quotations Spaink used did not infringe the copyright, there can not be any infringement of copyright by the providers either.[222]

The Supreme Court of the Netherlands adopted similar principles for the resolution of the case involving a principal heir to Napster's user base, Kazaa.[223] The court found no liability, employing an analysis very similar to that of the U.S. Supreme Court in *Sony* and the lower courts' decisions applying it in *Grokster*.[224] As the Associated Press reported, the music industry wanted the Dutch Supreme Court to rule that Kazaa should be held liable for copyright infringement for failing to police its system for—and filter out—copyrighted works.[225] The court refused, endorsing a 2002 decision by an appeals court that no liability to the copyright owners could be imposed on Kazaa.[226] The appeals court had reversed the decision of the President of the District Court of Amsterdam that forced Kazaa to shut down its web-

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221 *Id.*

222 *Id.*

223 *See* Associated Press, *Dutch Court Throws Out Kazaa Case*, WIRED NEWS, Dec. 19, 2003, http://www.wired.com/entertainment/music/news/2003/12/61672 [hereinafter *Dutch Court*].

224 Eiseressen/Kazaa B.V., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 december 2003, ¶¶ 4.9, 5.36–5.39, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AN7253&u_ljn=AN7253 (*Kazaa B.V.*).

225 *See Dutch Court*, *supra* note 223.

226 *Id.*

based file-sharing software.[227] The court of appeals had reached a conclusion very similar to that of the U.S. Supreme Court in *Sony*:

> Kazaa justly contests the president's consideration that . . . by giving its users the opportunity of downloading music files by means of its computer program without a license, Kazaa acts contrary to copyright. Insofar as there are acts that are relevant to copyright such acts are performed by those who use the computer program and not by Kazaa. Providing the means for publication or reproduction of copyrighted works is not an act of publication or reproduction in its own right. Also, it is not true, that is for the moment it cannot be assumed to be true, that the Kazaa computer program is exclusively used for downloading copyrighted works. In its appeal, Kazaa presented a large number of examples (exhibits 17 and 18) of works that were distributed by means of Kazaa either with the author's permission or that are part of the public domain, or that are not copyrighted or of which the distribution is permitted under a legal limitation to copyright.[228]

The Dutch Supreme Court cited the *Sony* case and the district court decision in *Grokster* (the U.S. Supreme Court had not yet issued its decision) in support of its judgment.[229]

In Germany, a district court for Hamburg rejected a claim brought by a major scientific publisher against Google for its Google Book Search functionality. Google has reached agreements with many libraries and library systems in the United States, Europe, and elsewhere to scan millions of public domain and copyrighted books, and to make them searchable and capable of being read in full or previewed in short fragments, depending on the copyright status of the particular book.[230] Unsatisfied with Google's efforts to limit reading of copyrighted books to a few lines around each search term, the German publisher sought an injunction against Google, with the support of a German publishing trade association. The German court rejected the request, noting that Google removed book previews after

227 Buma & Stemra/Kazaa B.V., Gerechtshof [Hof] [ordinary court of appeal], Amsterdam, 28 maart 2002, ¶¶ 4.7, 5, http://w2.eff.org/IP/P2P/BUMA_v_Kazaa/20020328_kazaa_appeal_judgment.html (Neth.) (*Buma & Stemra/Kazaa B.V.*).

228 *Id.* ¶ 4.9; *see supra* notes 69–70 and accompanying text.

229 Eiseressen/Kazaa B.V., Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 19 december 2003, ¶¶ 5.36–5.39 http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AN7253&u_ljn=AN7253 (*Kazaa B.V.*).

230 George Pike, *Legal Update 2007: Where the Lawsuits Are*, INFO. TODAY, Nov. 2007, at 1; *The Google Six: UC System Joins Google's Scan Plan*, LIBR. J. ACADEMIC NEWSWIRE, Aug. 10, 2006, http://www.libraryjournal.com/info/CA6361500.html.

receiving copyright complaints, and that in any event it only made available very small and fragmentary previews of particular pages.[231]

In the United Kingdom, one of the most notable opinions deals with defamation rather than intellectual property. In addressing defamation claims against several ISPs including AOL, British Telecom (BT), and Tiscali, the court found that the ISPs were entitled to defenses under the regulations implementing the ECD in Britain. The court declared:

> When considering the internet, it is so often necessary to resort to analogies which, in the nature of things, are unlikely to be complete. That is because the internet is a new phenomenon. Nevertheless, an analogy has been drawn in this case with the postal services. That is to say, ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communications without in any way participating in that process.
>
> > "There is . . . a line of authority arising out of intellectual property cases in the United Kingdom to the effect that persons who *procure* the commission of torts are liable jointly and severally with the principle tortfeasor, while persons who merely *facilitate* the commission of such torts are not exposed to liability. It is possible that this line of authority might apply to defamation law. If so, telephone carriers might be mere facilitators of defamatory telephone calls, and so not capable of being held liable as publishers."
> >
> > . . . .
> >
> > . . . I turn first to the Electronic Commerce (EC Directive) Regulations 2002, which came into force in August of that year. They define the circumstances in which internet intermediaries should be held accountable for material which is hosted, cached, or carried by them but which they did not create. The protection which these regulations afford is not confined to the publication of defamatory material. They embrace other illegal material, such as child pornography or the infringement of intellectual property rights.[232]

231 *See* Werner Von Hendrik, *Schnipseljagd Das umstrittene Digitalisierungs-Projekt Google Print erringt vor Gericht einen Teilerfolg*, DIE WELT, June 2006, http://www.welt.de/print-welt/article226266/Schnipseljagd.html.

232 Bunt v. Tilley, [2006] EWHC (QB) 407, ¶¶ 9–10, 38, 2003 All E.R. 336 (QB) (quoting MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET 199, 201 (2d ed. 2005)).

The court acknowledged that ISP liability might exist under the ECD, but not under the particular facts alleged, which involved insufficient "awareness" or "editorial responsibility."[233]

In France, courts have applied Article 6 of the Law for Confidence in the Digital Economy[234] to restrict the liability of online intermediaries to cases of "actual knowledge," "obviously illicit" content, or failure to promptly take down information upon receiving complaints.[235] A Paris court held in 2006 in a case involving alleged privacy violations by a blog hosted on Google France, that

> under the terms of article 6 of the law of June 21, 2004 on confidence in the digital economy, the host is not responsible for the contents of the site it only hosts; [but] it is held to withdraw the stored data or to make their access impossible as from the moment

233 *See id.* ¶¶ 22, 39–74.

234 Law No. 2004-575 of June 21, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004, Art. 22, Law for Confidence in the Digital Economy, p. 11,168, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&dateTexte=.

235 Cour d'appel [CA] [regional court of appeal] Paris, Nov. 9, 2007, http://www.juriscom.net/documents/caparis20071109.pdf (*eBay*) (requiring actual knowledge of illegality and failure to promptly withdraw the information upon notification of illegality) (translation by Juriscom.net with my alterations); Cour d'appel [CA] [regional court of appeal] Versailles, Dec. 12, 2007, http://www.juriscom.net/documents/caversailles20071212.pdf (*Arnaques.com*) (requiring actual knowledge of illegality or its obviousness under the circumstances or a failure to promptly take the information down upon receipt of complaints about it) (translation by Juriscom.net with my alterations); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 29, 2007, http://www.juriscom.net/documents/tgiparis20071029.pdf (*Wikimedia Foundation Inc.*) (requiring "actual knowledge" or clearly apparent illegality) (translation by Juriscom.net with my alterations); Tribunal de grande instance [T.G.I.] [ordinary court of jurisdiction] Paris, Oct. 19, 2006, http://www.juriscom.net/documents/tgiaris20061019.pdf (*Google France SA*) (requiring actual knowledge of illegality or "obviously illicit" content) (translation by Juriscom.net with my alterations); Marc Zaffagni, *Wikipedia Reinforced by Justice*, CNET FRANCE, Nov. 5, 2007, http://www.cnetfrance.fr/news/internet/wikipedia-conforte-par-la-justice-39375110.htm. The law cited in these cases is Law No. 2004-575 of June 21, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 22, 2004, Art. 22, Law for Confidence in the Digital Economy, p. 11,168, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164&dateTexte=. In 2007, the court of first instance of Brussels issued a somewhat more restrictive opinion from the perspective of intermediaries, requiring them to filter out infringing material after receiving warning, but imposing no "general obligation to monitor the network" as per the ECD. Tribunal de première Instance de Bruxelles [court of first instance] Brussels, June 29, 2007, No. 04/8975/A (Belg.) (*La Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. Tiscali*).

> when it is informed of their obviously illicit nature or if a decision of court orders that.[236]

Similarly, in a case involving alleged defamation and invasion of privacy by Wikipedia, another Paris court held that an ISP is not liable for information it hosts in the absence of "actual knowledge" of its illegality.[237] The court declared that under section 6-I.2 of the Act for Confidence in the Digital Economy, hosting providers have no "general obligation to monitor the information stored, or to search for facts or circumstances indicating illegal activity."[238] In November 2007 the Court of Appeal for Paris held that eBay Europe and eBay France, acting as intermediaries for online auctions, are entitled under "article 6-I.2 of the law of the 21 [June] 2004 for confidence in the digital economy," to offer facilities for the storage of "messages . . . provided by recipients of [their] services" without thereby incurring

> civil liability because of the stored activities or information at the request for a recipient for these services if [eBay Europe and eBay France lacked] knowledge of their illicit nature or facts and circumstances revealing this character or if, as of the moment when they were informed of it, they acted promptly to withdraw these data or to make access to them impossible.[239]

Finally, in a December 2007 case involving Arnaques.com, the Court of Appeal for Versailles ruled that under article 6-I.2 of the Act for Confidence in the Digital Economy ISPs could not incur civil liability because of information stored at the request of a user of these services if they did not have knowledge of the illegality or "facts and circumstances revealing this character, or if, as of the moment when they were informed of it, they acted promptly to withdraw these data or to make [access to them] impossible," and that an ISP is entitled to

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236 Tribunal de grande instance [T.G.I.] [ordinary court of jurisdiction] Paris, Oct. 19, 2006, http://www.juriscom.net/documents/tgiaris20061019.pdf (*Google France SA*) (requiring actual knowledge of illegality or "obviously illicit" content) (translation by Juriscom.net with my alterations).

237 *See* Zaffagni, *supra* note 235.

238 Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 29, 2007, http://www.juriscom.net/documents/tgiparis20071029.pdf (*Wikimedia Foundation Inc.*) (translation by Juriscom.net with my alterations). Some language in the court's opinion could be construed as suggesting that liability might exist if the illegality was clearly apparent. *Id.*

239 Cour d'appel [CA] [regional court of appeal] Paris, Nov. 9, 2007, http://www.juriscom.net/documents/caparis20071109.pdf (*eBay*) (translation by Juriscom.net with my alterations).

"precision as for the facts complained of and their site [i.e. location]."[240]

The French counterpart to the U.S. doctrine of fair use also provides a defense to computer-based and online services for their role in aggregating information. In 1985, the French Cour de Cassation held that the inclusion and categorization of excerpts of copyrighted newspaper articles in a computer database fell within the exemption for informative "analyses and brief quotations" because the "bringing together and classifying" of the excerpts was analogous to other forms of commentary on a work.[241] Along with Article 6 of the Act on Confidence in the Digital Economy, the "analyses and brief quotations" exception should help undergird Google's defense of cases in France against its Google Book Search and Google Video information services.[242]

These cases, taken together, could be understood as establishing a framework for resolving copyright cases against Internet companies that is not too far removed from the framework that is evolving in the United States. First, Article 15 of the ECD, as construed by the French and Belgian tribunals, makes clear that ISPs have no obligation to actively monitor their services and proactively seek out infringements.[243] Second, the Dutch Supreme Court has made clear that *Sony*, which focuses on the knowledge of the ISP of infringement and its intention to permit it—and not the fact that its service is capable of facilitating infringement—provides an appropriate set of principles for resolving similar cases within the European Union.[244] Third, the

240 Cour d'appel [CA] [regional court of appeal] Versailles, Dec. 12, 2007, http://www.juriscom.net/documents/caversailles20071212.pdf (*Arnaques.com*) (translation by Juriscom.net with my alterations).

241 Lucas et al., *supra* note 171, at FRA-127 (internal quotation marks omitted). The exemption referred to is Article L. 122-5(3)(a) of the French Intellectual Property Code. *See id.* at FRA-126.

242 *See, e.g.*, Digital Markets, http://blogs.zdnet.com/micro-markets/ (Nov. 23, 2006, 10:47); *Flach Film assigne Google pour contrefaçon et parasitisme*, LE MONDE INFORMATIQUE, Nov. 24, 2006, http://www.lemondeinformatique.fr/actualites/lire-flach-film-assigne-google-pour-contrefacon-et-parasitisme-21453.html; *French Book Publisher Sues Google*, BBC NEWS, June 7, 2006, http://news.bbc.co.uk/1/hi/entertainment/5052912.stm; Keith Regan, *Google Sued in France Over Video*, E-COMMERCE TIMES (Nov. 27, 2006), http://www.ecommercetimes.com/story/54434.html.

243 ECD, *supra* note 172, art. 15, at 13; Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 29, 2007, http://www.juriscom.net/documents/tgiparis20071029.pdf (*Wikimedia Foundation Inc.*); Tribunal de première Instance de Bruxelles [court of first instance] Brussels, June 29, 2007, No. 04/8975/A (Belg.) (*La Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. Tiscali*).

244 *See supra* notes 223–29 and accompanying text. Although *Sony*'s discussion of vicarious liability for infringement (as opposed to contributory liability) did not

Dutch courts in the Scientology and Kazaa matters properly distinguished between an Internet user's acts of publishing material to other users, and an Internet company's role in facilitating or enhancing the reach of such publication, which should give rise to copyright liability, if at all, only upon disregard of an unambiguous user infringement. Finally, the French and Dutch courts have clarified that Internet users or companies maintaining databases have a right to quote from or categorize copyrighted works in their own right without incurring liability, just as the U.S. court in *Kelly v. Arriba Soft Corp.* deemed the indexing and display of information by an Internet company to be a fair use because it improves access to the information, particularly where the company respects clear opt-outs from its index so as to manifest an intention to comply with the law.[245] This also parallels the conclusions of the recent federal decisions in the United States on the potential liability of Google for providing its storage and search engine features.[246]

On the other hand, there is a line of cases in the European Union that could be read to reject the framework established in the *Scientology*, *Kazaa*, and the French database and *Wikipedia* cases. These cases range from the Google News case in Belgium (also known as the *Copiepresse* case) to the *MySpace* and *DailyMotion* cases in France, and the *Paperboy* case in Germany. They establish what could become an alternative framework for resolving Internet copyright disputes. It would hold intermediaries such as MySpace or YouTube liable for

always make knowledge or purpose to infringe a requirement, the Court articulated a standard based on knowledge and intent. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 435 n.17, 439 (1984).

245 *See supra* notes 217, 241 and accompanying text; *see also* Tribunal de première Instance de Bruxelles [court of first instance] Brussels, June 29, 2007, No. 04/8975/A (Belg.) (*La Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. Tiscali*); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 29, 2007, http://www.juriscom.net/documents/tgiparis20071029.pdf (*Wikimedia Foundation Inc.*). The French court in Wikimedia Foundation cited Article 6-I-7 of the Law for Confidence in the Digital Economy, which states in French that ISPs are not under "une obligation générale de surveiller les informations qu'elles transmettent ou stockent, ni à une obligation générale de rechercher des faits ou des circonstances révélant des activités illicites." That translates roughly, in English, to say that ISPs "are under no general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity." The Belgian court in *Tiscali* cited Article 15 of the ECD, which uses nearly the same language the French Law for Confidence in the Digital Economy.

246 Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146, 1176–77 (9th Cir. 2007) (image search); Parker v. Google, Inc., 242 F. App'x 833, 836–37 (3d Cir. 2007) (storage and Web search); Field v. Google Inc., 412 F. Supp. 2d 1106, 1119–21 (D. Nev. 2006) (Web search).

facilitating and deriving a benefit from user uploads of infringing content.[247]

First, this framework would be less careful than the Dutch courts have been about not holding an online intermediary liable absent knowledge of specific illegal activity. The Paris Court of First Instance did this in two recent cases in which it acknowledged the absence of any duty by ISPs to monitor their services for illegal activity, but nevertheless held MySpace and DailyMotion (which is like YouTube) liable for facilitating and deriving a benefit from user uploads of infringing content.[248] Similarly, in 2007 the Brussels Court of First Instance issued a somewhat less careful opinion from the perspective of intermediaries. It declared that while ISPs are under no "general obligation to monitor the network" under the ECD, and do not constitute the publisher or editor of content they transmit or store, they may nevertheless be obliged to employ technical measures to block or filter out infringing information.[249]

Second, this framework would regard Article 10(2) of the European Convention on Human Rights as compatible with extensive censorship of the Internet on copyright grounds, as a measure that is necessary to protect the "rights of others."[250] A prior Belgian case, *Index v. Biblio*, provides a precedent for this conclusion, even though the *Copiepresse* decision did not cite that case while arriving at a similar conclusion. In the *Biblio* case, the Belgium Supreme Court (Court of Cassation) found that the publisher of tax journals was entitled to an injunction against the maker of a database summarizing tax judgments and other materials from the plaintiffs' journals.[251] It rejected

247 Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*); Tribunal de grande instance [T.G.I.] [ordinary court of jurisdiction] Paris, Ordonnance de référé, June 22, 2007, http://www.legalis.net/jurisprudence-decision.php3?id_article=1965 (*MySpace*); Tribunal de grande instance [T.G.I.] [ordinary court of jurisdiction] Paris, 3e ch., 2e sec., July 13, 2007, http://www.legalis.net/breves-article.php3?id_article=1977 (*DailyMotion*); Strowel & Tulkens, *supra* note 206, at 308–09 (discussing Bundesgerichtshof [BGH] [Federal Court of Justice] July 17, 2003, 47 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 2003 (3406) (F.R.G.) (*Paperboy*)); Alain Strowel, *Google et les Nouveaux Services en Ligne: Quels Effets sur l'Economie des Contenus, Quels Défispour la Propriété Intellectuelle?*, JOURNAL DES TRIBUNAUX, Sept. 22, 2007, at 589–98 (discussing *Copiepresse* and *DailyMotion* cases).

248 *See* Strowel, *supra* note 247.

249 *See* Tribunal de première Instance de Bruxelles [court of first instance] Brussels, June 29, 2007, No. 04/8975/A (Belg.) (*La Société Belge des Auteurs, Compositeurs et Editeurs (SABAM) v. Tiscali*).

250 *See* Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*).

251 *See* Strowel & Tulkens, *supra* note 206, at 305.

the idea that copyright restricted freedom of expression within the meaning of Article 10 of the ECHR.[252] Similarly, in France, a case that seems relevant to the *MySpace* and *DailyMotion* cases is *Utrillo v. France 2*, where the French Supreme Court rejected a Paris court's ruling that Article 10 gave a television news broadcaster the right to display twelve copyrighted paintings in a story on an art exhibition.[253]

Third, the alternative framework would confine copyright exceptions—such as citations in a review of published work—as restrictively as possible. At least one court has opined that such a construction of copyright exceptions facilitates compliance with the Copyright Directive.[254] For example, this framework would regard categorizing websites for searching purposes as a disfavored exception to copyright, compared to traditional exceptions like that for reviews of a book in the print press. As the *Copiepresse* decision stated, Google was not entitled to an exception to copyright because it "limits itself to listing the articles and classing them and this in an automatic way," and "does not carry out any analysis, comparison or critique of these articles which are not commented on in any way."[255] Google or other online services would be denied the benefit of copyright exceptions for the reproduction of short fragments of works for purposes of news reporting; they would be required to get licenses because they are long-term enterprises.[256] Print newspapers, however, could not be expected to seek licenses because of their publication deadlines.[257] An analogous ruling by a district court in the United States denied XM Satellite Radio the benefit of its users' right to make fair use of songs played over the radio by recording them for later listening, in disregard not only of *Sony* but also of the language of the Audio Home Recording Act of 1992.[258]

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252 *See* Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*).

253 *See* Strowel & Tulkens, *supra* note 206, at 306–07 (citing Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Feb. 23, 1999, 184 Revue Internationale du Droit d'Auteur 374 (2000) (*Utrillo v. France 2*)).

254 Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*) (citing Copyright Directive, *supra* note 41, art. 5.5).

255 *Id.*

256 *Id.*

257 *Id.*

258 *See* Atl. Recording Corp. v. XM Satellite Radio, Inc., 81 U.S.P.Q.2d (BNA) 1407, 1413 (S.D.N.Y. 2007) (confining Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–1008 (2006), as well as *Sony* and fair use defenses, as narrowly as possible by declaring that "'for profit users [may not] stand in the shoes of their customers making nonprofit or noncommercial uses,'" based on "the fundamental tenet of copy-

Fourth, the alternative framework would disregard well-understood Internet standards for preventing the indexing or caching of websites, namely <meta> tags or robots.txt,[259] because "copyright is not a right of opposition but a right for prior authorisation."[260] These standards are vital for the functioning of the Internet, because they establish an opt-out system for indexing websites and making them searchable without imposing an impossibly expensive requirement of prior authorization.[261]

Fifth, it would adopt an expansive view of moral rights whereby any indexing or quotation from works is an illegal "amputation" and any author has the right to prevent any "modification" of her work even for the purpose of providing more information about it. Further, these moral rights do not require any damage to the author at all to be invoked.[262]

Finally, it would impose monetary damages out of proportion to actual losses inflicted by the defendant. For example, Google News was charged 25,000 Euros for each day plaintiff's material was on the site.[263]

As should be clear from merely describing this alternative framework, it is a recipe for outlawing the Internet in the European Union, at least outside of the Netherlands. Litigation of the type instituted by the Belgian newspapers, should it be imitated by other entities desiring to obtain damages from Google or other Internet companies for incidental copying of their works in the course of indexing the Web, could result in nearly unlimited copyright liability and a substantial disincentive to innovation. From a U.S. perspective, perhaps it would be cause for celebration that E.U. courts should go out of their way to ensure that the United States will preserve its leadership in the Internet search and e-commerce markets, as companies based in the

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right law that 'all who derive value from a copyrighted work should pay for that use'" (quoting Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 323 (D.N.J. 2002); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.7.2 (3d ed. 2005 & Supp. 2006))).

259 *See* SAMUEL BLANKSON, META TAGS 57–59 (2007).

260 Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*).

261 *See* Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 832 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 508 F.3d 1146 (9th Cir. 2007); Field v. Google Inc., 412 F. Supp. 2d 1106, 1110–24 (D. Nev. 2006); Bracha, *supra* note 12, at 1814–15; John S. Sieman, Comment, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 N.C. L. REV. 885, 907–30 (2007).

262 Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*).

263 *Id.*

European Union suffer crippling copyright liability and stifling regulation. Such a result, however, would hardly be consistent with the European Union's declared policy of promoting freedom of expression using "information society services," and removing the "legal obstacles" and "legal uncertainty" facing them.[264]

V. Do International Treaties Prohibit an Opt-Out Copyright Regime?

A. The International Law of Copyright Defenses and Safe Harbors

The World Intellectual Property Organization (WIPO) and several scholars have suggested that requiring notice of infringement to be tendered to an Internet company prior to obtaining judicial review of infringement claims may create a tension with international copyright treaties indicating that copyright formalities should not be imposed.[265] They note that the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[266] and the WIPO Copyright Treaty (Copyright Treaty),[267] as well as the Global Agreement on Tariffs and Trade annex on Trade-Related Aspects of Intellectual Property Rights (GATT-TRIPs),[268] limit copyright exceptions and limitations to "certain special cases" that do not conflict with the "normal exploitation" of a work or "unreasonably prejudice" a copyright holder's "legitimate interests."[269] These three criteria make up the "three-step test" for compliance of copyright exemptions and limi-

264 ECD, *supra* note 172, at 1.

265 WIPO, *supra* note 43.

266 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

267 *See* World Intellectual Property Organization Copyright Treaty, April 12, 1997, S. Treaty Doc. No. 105-17, 2186 U.N.T.S. 152 (1997) [hereinafter Copyright Treaty].

268 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1944) [hereinafter GATT-TRIPs].

269 Gregory R. Hagen & Nyall Engfield, *Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test*, 3 U. Ottawa L. & Tech. J. 477, 508 n.175 (2006) (citing Copyright Treaty, *supra* note 267, art. 10(1)); *see also* Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 Eur. Intell. Prop. Rev. 236 (1999); Sam Ricketson, The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions 2–4, 55–78 (2002), http://www.copyright.com.au/reports%20&%20papers/CCS0202Berne.pdf (detailing the three-step test under article 9(2) of the Berne Convention, which "has come to be regarded as providing the international yardstick for exceptions to exclusive rights," and its application to various provisions of Australia's Copyright Act).

tations with the Berne Convention, GATT-TRIPs, and the Copyright Treaty. These treaties also disfavor certain "formalities" imposed as a condition precedent to securing copyright protection.[270]

Despite the apparently sweeping language of the Berne Convention, Copyright Treaty, and GATT-TRIPs, the public interest oriented exemptions and limitations provided for in the DMCA, First Amendment, ECD, and ECHR may prevail for a couple of reasons.

One reason is that restricting Internet copyright liability to cases involving a decision to disregard prior notifications of infringement and requests to opt out may be perfectly consistent with the Berne Convention and other copyright treaties. The Berne Convention itself specifically permits legislative efforts to permit "fair" uses of books and other works in "publications, broadcasts, or sound or visual recordings."[271] Cases such as *Kelly v. Arriba Soft*, *Field v. Google*, and *Parker v. Google* confirm that respecting opt-outs makes otherwise infringing uses "fair."[272] The failure of states party to the Berne Convention and GATT-TRIPs to allege violations or institute proceedings against one another based on the DMCA or ECD is powerful evidence that exemptions for such new technologies do not violate the international copyright treaties.[273] This is also evidenced by the decision of these same states not to challenge exemptions from copyright for other new technologies such as photocopying equipment, telecommunications facilities, audio or video recorders, blank CDs or DVDs, MP3 players, or home computers. In each instance, legislation could have been devised to comply with the Berne Convention and GATT-TRIPs by compensating copyright owners for unauthorized exploitation of their work using these devices, but such legislation has rarely been

270 Paul Edward Geller, *International Copyright: An Introduction*, *in* 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 171, at INT-193 to INT-194 (overstating the import of the Berne Convention by claiming that it "precludes all formalities that might serve as preconditions for exercising rights in a judicial action").

271 Berne Convention, *supra* note 266, art. 10(2); *see also* Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 52 (2007) (discussing the flexibility of the Berne Convention).

272 *See supra* notes 149–52, 161–66 and accompanying text.

273 *See* Vienna Convention on the Law of Treaties art. 31(3)(b), opened for signature May 23, 1969, 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention] (stating as a general rule that treaty interpretation should be guided by "subsequent practice in the application of the treaty"); Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 758 n.111 (2001) ("How states in practice interpret and implement their international obligations may affect the interpretation and content of international laws.").

enacted.[274] Instead, state practice supports the legality of copyright exceptions designed to promote the uses of such new technologies for "research, education, libraries and other public-good uses."[275]

Moreover, the World Trade Organization (WTO) has held that exemptions based on a public policy such as promoting economic growth or innovation may be entirely inconsistent with the Berne Convention and GATT-TRIPs. The WTO concluded that the mere possibility of charging commercial enterprises more money for their exempt uses, and distributing the money to copyright holders, is insufficient evidence to support a finding that the exemption is inconsistent with "normal exploitation" of the work.[276] Simply because one can imagine copyright holders earning extra revenue by exploiting their works by means of lawsuits and threats against Internet companies does not mean that such a scenario represents "normal exploita-

274 The representative of the major movie studios in the United States proposed that the manufacturers of home video recorders (VCRs) sit down with him and negotiate a "reasonable" copyright fee, and that in the absence of a voluntary agreement the U.S. Congress legislate a mandatory copyright fee. *See* JAMES LARDNER, FAST FORWARD 228–62 (1987). His association claimed that unless such legislation were passed, "the audiovisual marketplace [would] become a barren wasteland of programming that does not . . . entertain." *Id.* at 229; *see also* Catherine Yang, *A Rising Chorus of Music Downloaders?*, BUS. WK., Sept. 29, 2003, at 96, *available at* http://www.businessweek.com/magazine/content/03_39/b3851109.htm (discussing the attempts of peer-to-peer file-sharing services to negotiate with the recording industry).

275 J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11, 46 (1997) ("Against this background, the developed countries cannot use Article 13 of the TRIPs Agreement to prevent developing countries from applying limitations and exceptions parallel to those already recognized in state practice, with a view to encouraging price discrimination and other concessions in favor of research, education, libraries and other public-good uses. On the contrary, it is the participation of developing countries in future discussions about these issues that should help to determine the outer limits of the 'fair use' doctrine in international law."), *quoted in* Rogers, *supra* note 271, at 59 n.266.

276 *See* Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, ¶ 6.183, WT/DS160/R (June 15, 2000) (reporting that the U.S. "homestyle" exemption allowing thousands of bars and restaurants to play music for paying customers using televisions and radios without seeking permission or paying compensation to copyright owners did not violate Berne Convention or GATT-TRIPs because use did not "enter into economic competition with the ways that right holders normally extract economic value from that right to the work . . . and thereby deprive them of significant or tangible commercial gains"); *id.* ¶ 6.182 ("[I]n our view, not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with the normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test . . . ."); Dinwoodie, *supra* note 273, at 762 (writing that the WTO panel was influenced by the fact that affected bars and restaurants had not "been a significant source of revenue collection" for copyright holders in the past).

tion" of their works. If that were so, then the absence of liability for manufacturers of photocopying equipment, telephones, audio or video recorders, blank CDs or DVDs, MP3 players, or home computers would constitute violations of GATT-TRIPs and would give rise to WTO claims and counterclaims on a scale that dwarf the current trade war between the United States and China.[277]

B. Reconciling Specific National Limitations on Copyright with Broad Assertions of Exclusive Rights Under International Law

Copyright holders could claim exceedingly broad rights against Internet service providers under international law. Such an argument could be based on the principle that international treaties preempt any domestic copyright defenses that conflict with the "normal exploitation" of a work or "unreasonably prejudice" a copyright holder's "legitimate interests."[278] Internet service providers may emphasize in response that all copyright limitations prejudice a copyright holder's interest to some degree, and that international treaties do not preempt most such limits.

As the source of more specific and focused principles, copyright limitations such as the DMCA and ECD, rather than the vague language of the "three-step test" set forth in the Berne Convention, GATT-TRIPs, and the Copyright Treaty should control the resolution of Internet copyright disputes.[279] The more specific rule takes precedence over the more general one under the maxim *lex specialis derogat*

277 The current trade war is mostly one-sided, with China making strenuous efforts to prevent U.S. automobiles, entertainment media, and search engines from competing effectively with their Chinese counterparts. *See* David Barboza, *Suspicions in U.S. That China Has Put Ban on Hollywood Films*, N.Y. TIMES, Dec. 12, 2007, at C3 (noting that China banned U.S. films from being exhibited in possible retaliation for a U.S. WTO complaint based on infringement in China of copyrights in books, music, movies, and other works); Mark Drajem, *China Must Revamp Auto Component Tax Rules, WTO Says*, BLOOMBERG NEWS, July 18, 2008, http://www.bloomberg.com/apps/news?sid=aaxWbjT_2ylU&pid=20601082 (noting that China required U.S. and European automobile manufacturers to pay twice the tariff rate on imported parts as their Chinese counterparts); *US Search Engines 'Hijacked' in China: Analysts*, AGENCE FRANCE-PRESSE, Oct. 18, 2007, *available at* http://afp.google.com/article/ALeqM5g8nFY8uuEryolKV2iAGgCjr5SpH2Gg (discussing fact that China has redirected traffic intended for U.S. search engines to their Chinese competitors).

278 Copyright Treaty, *supra* note 267, art. 10; GATT-TRIPs, *supra* note 268, at 1202; Berne Convention, *supra* note 266, art. 9.

279 *See* SENFTLEBEN, *supra* note 214, at 307 (characterizing the three-step test as "open-ended" and as "inevitably lead[ing] to unsatisfactory results").

legi generali.[280] For example, a German appellate court held that a unique procedure and statutory license covering digital reproductions using CD burners applied, notwithstanding copyright holders' appeal to the vaguely worded "'three-step-test'" of the Berne Convention and TRIPs Agreement.[281]

In the United States, where the DMCA safe harbors are embodied in a federal statute rather than an international directive promulgated by a treaty-based body, treaties and statutes are both the supreme laws of the land,[282] among which the more specific generally controls.[283] The U.S. Supreme Court construes the maxim *lex specialis derogat legi generali* as a "warning against applying a general provision when doing so would undermine limitations created by a more specific provision."[284] Under U.S. law, even a constitutional power may give way to a more specific statute, as when the claim to broad executive powers in the *Steel Seizure* case gave way to a more specific act of Congress.[285]

In the European Union, a conflict between rules of international law would be at stake, and as the International Court of Justice has declared, "it is well understood that, in practice, rules of [general]

280 *See* Int'l Law Comm'n, *Report of the Study Group on the Fragmentation of International Law: Difficulties from the Diversification and Expansion of International Law*, ¶ 59, U.N. Doc. A/CN.4/L.682, (Apr. 13, 2006), *available at* http://untreaty.un.org/ilc/guide/1_9.htm ("The idea that special enjoys priority over general has a long pedigree in international jurisprudence as well. Its rationale is well expressed already by Grotius: . . . 'Among agreements which are equal . . . that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.'" (quoting HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, bk. II, § XXIX, at 428 (James Brown Scott ed., Oxford: Clarendon Press, 1995) (1625))).

281 P. BERNT HUGENHOLTZ ET AL., THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT 26 (2003), http://www.ivir.nl/publications/other/DRM&levies-report.pdf (citing Landgericht Stuttgart [LG] [trial court], June 15, 2001, ZUM 2001, p. 614, *affirmed by* Oberlandesgerichts Stuttgart [OLG] [Stuttgart Regional Court of Appeal], Apr. 9, 2001, 4 U 142/01 (*Zentralstelle für Private Überspielungsrechte v. Hewlett Packard*)).

282 *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. It is, consequently to be regarded in courts of justice, as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.").

283 *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384–85 (1992) (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987)); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492–94 (1987).

284 Varity Corp. v. Howe, 516 U.S. 489, 511 (1996).

285 *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 588–89 (1952); *see also* Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 186–89 (2006) (applying the Court's standard as set forth in *Steel Seizure* to the Foreign Intelligence Surveillance Act (FISA)).

international law can, by agreement, be derogated from particular cases or as between particular parties."[286] Even the right to life may be subject to this principle, for example, as respects the law of armed conflict.[287] The principal exceptions to this rule arise when a treaty provision embodies binding *jus cogens* norms or where a derogation based on a more specific municipal law would be inconsistent with the fundamental purpose of a treaty so as to run afoul of the duty to enact it in good faith.[288] Neither of these exceptions would apply to the DMCA or ECD as derogations from the Berne Convention, GATT-TRIPs, or the Copyright Treaty. The right to an opt-in, as opposed to an opt-out, system of copyright complaints hardly rises to the same level as genocide, torture, or slavery,[289] and is not needed to achieve the purpose of a copyright treaty.

Copyright limitations may also take precedence because they were enacted or re-enacted later in time than an allegedly inconsistent copyright treaty. The DMCA and ECD were ratified after the Berne Convention, GATT-TRIPs, and possibly the Copyright Treaty as well. Both the United States and most E.U. members signed and/or ratified the Berne Convention and GATT-TRIPs prior to enacting the DMCA or ECD, respectively.[290] They did the same with respect to the Copy-

286 North Sea Cont'l Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J 3, 42 (Feb. 20), *cited in* Int'l Law Comm'n, *supra* note 280, ¶ 79 n.94. For more sources on the application of this principle in Europe, see Carsten T. Ebenroth & Thomas J. Dillon, Jr., *Gaining the Competitive Edge: Access to the European Market Through Bilateral Commercial Treaties and Taxation Strategies*, 28 TEX. INT'L L.J. 269, 279 n.34 (1993).

287 *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 239–40 (8 July), *cited in* Int'l Law Comm'n, *supra* note 280, at ¶ 96.

288 A *jus cogens* norm "'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1198 n.2 (9th Cir. 2007) (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992)), *reh'g granted en banc*, 487 F.3d 1193 (9th Cir. 2007). At the risk of being repetitive, the acquiescence of states party to these treaties in broad exemptions for reproduction and telecommunications facilities would belie any contention that allowing an exemption to exist for similar conduct in the Internet context would strike at the fundamental purpose of these treaties. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (28 May) (stating that derogation from a treaty that would undermine its fundamental purpose is invalid).

289 These are perhaps the most often-cited examples of *jus cogens* norms. *See, e.g.*, *Sarei*, 487 F.3d at 1197–1200; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

290 The United States had ratified the Berne Convention by 1989, *see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.), as most European countries had by a

right Treaty if you consider the date of signature and/or ratification (typically 1996 or 1998) rather than of entry into force (2002) to be controlling.[291] Under the maxim *lex posterior derogat legi anteriori*, and the Supremacy Clause of the U.S. Constitution, a federal statute on point (such as the DMCA) or treaty may override a prior inconsistent treaty.[292] As the U.S. Supreme Court has stated, "[A] treaty will be deemed to have been abrogated or modified by a later statute, unless [an inconsistent] purpose on the part of Congress has been clearly expressed."[293] It would be remarkable if either Congress or the European Union intended its specific legislation in the field of Internet copyright to have been rendered moot from the outset by the Berne Convention or TRIPs.[294]

Finally, adopting an absolutist approach to international copyright treaties would lead to incongruous results. It would mean that copyright may not be subjected to modest conditions or exceptions

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much earlier date, *see* Leonard D. DuBoff et al., *Out of Unesco and Into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?*, 4 CARDOZO ARTS & ENT. L.J. 203, 204 & n.9 (1985).

291 The United States signed the WIPO Copyright Treaty in 1996, and ratified it in 1998 in the same legislation that enacted the DMCA. It needed no ratification by many of the European countries that signed it in 1996 because they are civil law countries that adopt a "monist" perspective on treaties that makes them immediately self-executing. *See Copyrighted Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 5 (2000) (statement of Marybeth Peters, Register of Copyright, Copyright Office of the U.S., Library of Congress); WIPO, Parties to the WIPO Copyright Treaty (2006), *available at* http://www.wipo.int/treaties/en/documents/pdf/wct.pdf; Geller, *supra* note 270, at § 3[2][a] (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–34 (6th ed., 2003)); PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 16–23 (1995).

292 Vienna Convention, *supra* note 273, art. 30(3)–(4); MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 321 (2005); SEYED ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 83 (2003); WTO, DISPUTE SETTLEMENT REPORTS 1998, at 2168 (2001); Richard Szawlowski, *The Time Factor in the Law of International Treaties*, 86 AM. J. INT'L L. 204, 204–05 (1992) (book review).

293 Cook v. United States, 288 U.S. 102, 120 (1933).

294 Notably, several U.S. courts have held that the Berne Convention provides no basis for overcoming specific statutory defenses to copyright claims once those defenses have been erected by Congress. *See, e.g.*, Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) ("'No right or interest in a work eligible for protection under this title may be claimed by virtue of . . . the provisions of the Berne Convention. . . . Any rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of . . . the provisions of the Berne Convention.'" (quoting Berne Convention Implementation Act of 1988 § 4(a)(3), 17 U.S.C. § 104(c) (2006)) (alterations in original)).

such as those represented by the fair use or "brief quotations" defenses or safe harbors for online intermediaries, but that the rights of free expression and access to information could be trampled by unreasonably broad copyright liability.[295] Why an economic right should take priority over a right fundamental to democracy in this manner is baffling. Freedom of expression is a "transcendent" right that serves as the basis of all others, even the right to life.[296]

VI. THE FUTURE OF THE INTERNET: WILL DIGITAL LIBRARIES AND ONLINE VIDEOS SURVIVE?

In a spate of recent cases, copyright owners have sued Google for making—or allowing users to make—their texts or videos searchable and retrievable over the Internet. The plaintiffs in each of the cases allege that Google must seek permission from copyright owners prior to including their content in a search engine, rather than including it subject to a right of copyright owners to opt out. Google is responding to each of the cases with the argument that its purpose of improving accessibility of information over the Internet, coupled with the very limited amount of copyrighted material that it displays to its

295 Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*) (adopting this approach by subjecting freedom of expression to "formalities" imposed by copyright legislation); Hugenholtz, *supra* note 189, at 349 (criticizing this approach).

296 The Supreme Court of the United States has consistently maintained that freedom of expression is essential to a functioning democracy. *See* Pennekamp v. Florida, 328 U.S. 331, 353 (1946). Many scholars have noted that suppression of free expression and of the public's access to information often results in massive violations of the right to life, because civil society is then hindered from correcting harmful policies by debating and deciding on reform efforts (Nazi Germany being the most obvious example). *See, e.g.*, PATHS TO PEACE (Miriam Fendius Elman ed., 1997) (presenting numerous case studies suggesting that democracy and domestic policy have a large influence on peace); AMARTYA SEN, DEVELOPMENT AS FREEDOM 186–88 (1999) (describing the role of uncensored media and political dissidents in criticizing and reforming policies that lead to widespread starvation and death); Timothy Besley & Robin Burgess, *Political Economy of Government Responsiveness: Theory and Evidence from India*, 117 Q.J. OF ECON. 1415, 1422–45 (2002) (containing empirical data to similar effect); Amartya Sen, What's the Point of Press Freedom? (May 3, 2004), http://www.wan-press.org/article3881.html?var_recherche=amartya+sen ("It is, thus, not at all astonishing that no substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press."). *But cf.* Myhrvold Hanssen, A Critique of Amartya Sen's Argument on Democracy and Famine of 1966–67 (June 2003), http://www.disasterdiplomacy.org/MyhrvoldHanssenBiharFamine.rtf (describing a famine in post-independence India when the press was probably freer than under British colonial censorship).

users, and the availability of an opt-out process, mean that its activities are protected as fair uses or pursuant to the DMCA safe harbors.

A. Google News: Are Headlines and Story Leads Copyrightable?

The first of these Internet copyright cases filed against Google involved the international newsgathering service Agence France-Presse (AFP), which sought $17.5 million in damages for the alleged "reproduction and display of AFP headlines, story leads, and photographs on an Internet news aggregation service called Google News."[297] Google responded that AFP's headlines and story leads were too short and fact-based to be copyrightable, that AFP had already licensed its content to the news sites linked to by Google in any event, that AFP and its licensees knew how to but failed to opt out of being located and linked to by Google, that any violation of AFP license agreements by news sites could not be attributed to Google given the DMCA safe harbors, and that even assuming that Google reproduced or displayed AFP's content without authorization, it increased the flow of traffic to AFP's licensees—that is, made a fair use.[298] In support of its motion for partial summary judgment, Google cited a number of cases holding that titles, headlines, and single paragraphs of copyrighted works are not protectable in the sense that copying them without more could give rise to an infringement lawsuit.[299] Google's expert witness also pointed out that Google users clicked on links to news articles, and visited the websites of the articles' licensees as a result, about 400% more often when both the headlines and a snippet of text from the article were provided compared to when only a headline was provided.[300] Although the parties settled on

297 Response in Opposition to Google, Inc.'s Motion for Partial Summary Judgment at 1, Agence France Presse v. Google, Inc., No. 1:05CV00546-GK (D.D.C. Jan. 29, 2007); Caroline McCarthy, *Agence France-Presse, Google Settle Copyright Dispute*, CNET NEWS.COM (Apr. 6, 2007), http://news.cnet.com/2100-1030_3-6174008.html.

298 Google's Answer and Counter-Claims at 17–29, Agence France-Presse v. Google, Inc., No. 1:05CV00546-GK (D.D.C. Jan. 29, 2007).

299 Google's Reply to AFP's Opposition to Partial Summary Judgment Dismissing Count II (Headlines) for Lack of Protectable Subject Matter at 4, Agence France-Presse v. Google, Inc., No. 1:05CV00546-GK (D.D.C. Jan. 29, 2007) (citing Nihon Keizai Shimbum, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 71 (2d Cir. 1999); Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480–81 (7th Cir. 1996); Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987); Alberto-Culver Co. v. Dumon, Inc., 466 F.2d 705, 710 n.2 (7th Cir. 1972)).

300 Second Supplement of Report for Wiley Rein & Fielding at 1, Agence France-Presse v. Google, Inc., No. 1:05CV00546-GK (D.D.C. Jan. 29, 2007).

undisclosed financial terms,[301] Google's arguments seemed to hold some promise of success, judging by the authorities it cited.

Within the European Union, a Belgian court has held Google liable for reproducing the headlines and snippets from news articles. The court concluded that indexing articles in Google News is not analogous to linking to or providing a searchable index of them hosted elsewhere in a manner that would likely be exempt from liability under the ECD. In that case, the court distinguished between cases involving an ISP that links users to third party content, and reproduction by the ISP itself.[302] The court did not consider the sort of expert testimony Google prepared for the U.S. case regarding how aggregation in a news search engine enhances readership. Nor did it have to grapple with the U.S. case law on headlines and short paragraphs. One might predict that more sophisticated analyses will be forthcoming as courts within the European Union become more familiar with the statistical evidence and legal arguments against holding Internet service providers liable for copyright infringement based on their role as aggregators and categorizers of information.

B. Google Book Search: Book Previews As Noninfringement and Fair Use

Two cases filed in federal court in New York involve the allegation that Google's efforts to expand its search engine into the domain of the printed word—which it calls Google Book Search—infringes the copyrights of authors and publishers.[303] Google has reached agreements with more than seventeen library systems in the United States and European Union to scan millions of mostly public domain books, along with millions of copyrighted books held by the University

301 *See* McCarthy, *supra* note 297. As the settlement was reported, it allowed Google not only to continue what it was doing but also to "post AFP content . . . on other Google services." *Id.* Google has since created a special subsection of its website for AFP articles, located at http://afp.google.com.

302 *See* Tribunal de première Instance de Bruxelles [court of first instance] Brussels, Feb. 15, 2007, No. 06/10 928/C (Belg.) (*Copiepresse SCRL v. Google Inc.*).

303 For a fairly objective description of the project from the period of its inception, see DAVID A. VISE, THE GOOGLE STORY 229–39 (2005). For a description of the project from the point of view of the publishers, see Complaint at 1–4, McGraw-Hill Cos., Inc. v. Google Inc., No. 05 CV 8881 (S.D.N.Y. filed Oct. 19, 2005). For descriptions of the project from the point of view of Google and its partner libraries, see, for example, Press Release, Google Inc., Google Checks Out Library Books (Dec. 14, 2004), http://www.google.com/press/pressrel/print_library.html; Press Release, Univ. of Michigan, Google/U-M Project Opens the Way to Universal Access to Information (Dec. 14, 2004), http://www.umich.edu/news/index.html?Releases/2004/Dec04/library/index; University of Michigan, Google/U-M Project Questions and Answers, http://www.ur.umich.edu/0405/Dec13_04/lib_qa.shtml (last visited Aug. 27, 2008).

of Michigan and University of California library systems.[304] One case, filed by a number of publishers with the coordination of the Association of American Publishers, seeks an injunction against alleged infringement of copyrights when Google arrives at agreements with university libraries to scan books into digital format, makes the books searchable by keyword or bibliographic information, and displays "snippets" of text—a few lines—in response to users' searches.[305] The other case, filed by the Authors Guild on behalf of a handful of authors of prose and poetry, but requesting certification as a class action covering the authors of millions of books in the University of Michigan libraries, seeks statutory damages of up to $150,000 per book.[306] Google claims to be acting conservatively with respect to copyright[307] and tells authors and publishers: "We're happy to remove your book from our [Library Project] search results at any time, just as we do for website publishers. You'll need to . . . identify[ ] yourself as the owner and let[ ] us know which books to exclude."[308] Authors and publishers object to this procedure, with the president of the Association of American Publishers stating, for example, that it "shifts the responsibility for preventing infringement to the copyright owner

304 George Pike, *Legal Update 2007: Where the Lawsuits Are*, INFO. TODAY, Nov. 2007, at 1; *The Google Six: UC System Joins Google's Scan Plan*, LIBRARY J. ACAD. NEWSWIRE, Aug. 10, 2006, http://www.libraryjournal.com/info/CA6361500.html.

305 Answer, ¶¶ 3–4, 25, 27, The McGraw-Hill Cos. v. Google Inc., Civil Action No. 05 CV 8881 (S.D.N.Y. answer filed Nov. 8, 2005). The libraries involved in the project include the University of Michigan libraries (contributing seven to eight million books), the University of California libraries (contributing "millions" of books), the Bodleian Library at Oxford University (contributing about one million books from the nineteenth century), Stanford University libraries (contributing perhaps millions of books), Harvard University libraries (contributing about 40,000 books), the New York Public Library (contributing tens of thousands of books), the Bavarian state libraries, the Complutense University libraries in Madrid, and others as well. *See* VISE, *supra* note 303, at 238; Band, *supra* note 115, at 36; Jeffrey R. Young, *U. of California System's 100 Libraries Join Google's Controversial Book-Scanning Project*, CHRON. HIGHER ED., Aug. 9, 2006, http://chronicle.com/free/2006/08/2006080901t.htm; Press Release, Harvard Univ. Library, Harvard's Digitization Project with Google (Dec. 14, 2004), http://hul.harvard.edu/news/2004_1214_news.html.

306 Complaint at 13, Author's Guild v. Google, Inc., No. 05-CV-8136 (S.D.N.Y. filed Sept. 20, 2005).

307 *See* Google Inc., *Librarian Center* (2006), http://www.google.com/librariancenter/articles/0606_03.html ("Since whether a book is in the public domain is a tricky legal question, we err on the side of caution and display at most a few snippets until we have determined that the book has entered the public domain. These books may be in the public domain, but until we can be sure, we show them as if they are not.").

308 Google Book Search Publisher Questions, http://books.google.com/googlebooks/publisher_library.html (last visited Sept. 24, 2008).

rather than the user, turning every principle of copyright law on its ear."[309]

Scholars writing about the case have generated a variety of arguments in support of each side's contentions.[310] There are many rea-

309 Press Release, Ass'n of Am. Publishers, Google Library Project Raises Serious Questions for Publishers and Authors (Aug. 12, 2005) (on file with author), *quoted in* Band, *supra* note 115; *see also Fair Use: Its Effects on Commerce and Industry: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. 62–67 (testimony of Paul Aiken, Executive Director, Authors Guild, Inc.) (Nov. 16, 2005), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:27003.pdf [hereinafter Aiken]; Letter from Peter Givler, Executive Director, The Association of American University Presses (AAUP) to Alexander Macgillivray, Senior Intellectual Property and Product Counsel, Google, Inc. (May 20, 2005) (on file with AAUP) [hereinafter AAUP], *available at* http://www.businessweek.com/bwdaily/dnflash/may2005/nf20050523_9039.htm (arguing that the "opt-out" procedure "ignores the fundamental exclusive right of copyright owners to make copies in the first place, and . . . ignores the exclusive right of distribution").

310 *Compare, e.g.*, Band, *supra* note 115 (arguing that based on *Kelly v. Arriba Soft* and other case law, "Google's copying of entire books into its database is reasonable for the purpose of the effective operation of the search engine, . . . will not diminish the market for the books, . . . [and] permit[s] owners to opt out of the Library Project altogether," so that a "court correctly applying the fair use doctrine as an equitable rule of reason should permit Google's Library Project to proceed"), Bracha, *supra* note 12, at 1856–60 (defending Google's opt-out framework for its book search functionality under existing law), Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 187–88 (2007) ("In a series of cases involving software, courts have protected users' rights to make an *intermediate copy* of a work in order to reverse engineer its noncopyrightable elements . . . [and have held that] a software coder is entitled to make a copy of a work in order to discover how it works, and to replicate those elements of it that are not copyrightable. The doctrine appears tailor-made for the Google Library project, which intends not to provide full copies of copyrighted works to searchers, but only small snippets of text deemed relevant to their queries."), *and* Travis, *supra* note 146, at 126–39 (arguing that Google Book Search's "transformative" purpose to categorize and improve users' understanding of and access to the universe of published books, coupled with fact that most books Google makes searchable are already published nonfiction works, absence of evidence of harm to book sales, and actual evidence of increased sales of searchable and preview-enabled books, render the project a fair use of copyrighted books), *with* CONGRESSIONAL RESEARCH SERV., THE GOOGLE BOOK SEARCH PROJECT: IS ONLINE INDEXING A FAIR USE UNDER COPYRIGHT LAW? (2005), http://www.opencrs.com/rpts/RS22356_20051228.pdf (questioning the legality of the project), Elizabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10 (questioning the legality of Google's scanning and display of snippets of library books), Manali Shah, Comment, *Fair Use and the Google Book Search Project: The Case for Creating Digital Libraries*, 15 COMMLAW CONSPECTUS 569, 594–609 (2007) (questioning whether Google Book Search is fair use under existing four-factor test), Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207, 1225–30 (2007) (arguing that "Google cannot win" against publishers and authors on the legality of its book search functionality), *and* Matt Williams, *Recent*

sons to believe, however, that Google Book Search may constitute a lawful use of library books to create an "information age" version of a card catalog.

First, Google is not displaying entire books, nor even entire pages from books, but merely bibliographic information about books along "with a few sentences of [a user-provided] search term in context."[311] This distinguishes Google's case from cases typically cited by publishers and Google's other critics as not finding a fair use, such as *Napster*, *Grokster*, or *MP3.com*, which involved the distribution of entire songs and albums,[312] or *Video Pipeline*,[313] which involved entire frames and scenes from motion pictures.[314] Second, there is a long line of authority in American copyright law to the effect that the reproduction or display of paragraph-length snippets from copyrighted work is not an infringement standing alone and cannot give rise to a copyright lawsuit.[315] Third, a finding of fair use is favored when only a

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Second Circuit Opinions Indicate That Google's Library Project Is Not Transformative, 25 CARDOZO ARTS & ENT. L.J. 303 (2007) (asserting that Google Book Search is not a fair use because it does not add new descriptive commentary to books so as to be "transformative" under an unduly narrow reading of the law (citing Bill Graham Archives v. Dodsley Kinnersley Ltd., 448 F.3d 605 (2d Cir. 2006); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006))).

311 Google, Inc., Google Book Search Common Questions, http://books.google.com/googlebooks/common.html (last visited Sept. 15, 2008).

312 For instances of Google's critics citing or alluding to these cases, see Aiken, *supra* note 309, at 75; Andrew Albanese, *AAP Sues Google over Scan Plan*, LIBR. J., Nov. 15, 2005, at 17; Band, *supra* note 115, at 43; Lewis Smith, *Publishers Wrestle with Digital Era*, TIMES (London), Nov. 5, 2005, at 33; Sarah Lai Stirland, *Google's Book Project Panned by Publishing Official*, 8 TECH. DAILY (2006); Jeffrey R. Young, *Publishing Groups Say Google's Library-Scanning Effort May Violate Copyright Laws*, CHRON. OF HIGHER ED., Feb. 18, 2005, http://chronicle.com/weekly/v51/i24/24a03501.htm.

313 Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 328–29 (D.N.J. 2002).

314 For a publishing industry source's citation of this case to question the legality of Google Book Search, *see* AAUP, *supra* note 309, at 3–4.

315 *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548–49 (1985) (requiring "generous verbatim excerpts" totaling about 300–400 words in all, or about two full pages of a book, in order to reject the fair use defense to a claim of copyright infringement); Nihon Keizai Shimbum, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 71 (2d Cir. 1999) (copying a single paragraph of a news story for competitive purposes did not constitute copyright infringement); Publ'ns Int'l, Ltd. v. Meredith Corp., 88 F.3d 473, 480–81 (7th Cir. 1996) (copying a single recipe out of a collection of recipes did not constitute copyright infringement); Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987) (copying and publishing a single sentence for competitive purposes did not constitute copyright infringement, but copying ten lines might); Alberto-Culver Co. v. Dumon, Inc., 466 F.2d 705, 710 n.2 (7th Cir. 1972) (copying a single paragraph for competitive purposes did not constitute copyright infringement).

small portion or reduced-size version of a copyrighted work is distributed or displayed by the defendant, even though it may have reproduced the work in its entirety to reach that point.[316] Fourth, fair use is more likely to be found where factual and nonfiction works are copied—as most of the library books copied by Google are—than where highly creative fictional or poetic works are.[317] Fifth, the fact that book sales have increased substantially in the period since Google began scanning copyrighted books in July of 2004[318] shows a lack of

316 Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006) (finding that "copying the entirety of a work is sometimes necessary to make a fair use of the [work]" where the author of a book copied plaintiff's work in its entirety in order to reproduce it in reduced-size form as part of a broader, transformative work canvassing not only plaintiff's work but the work of many others as well); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820–24 (9th Cir. 2003) (finding a display of plaintiff's photographs in a miniaturized "thumbnail" form was a fair use in part because such a display was not an adequate substitute for viewing plaintiff's works in their full-sized form); Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 521 (7th Cir. 2002) (holding that defendant's copying of plaintiff's works in their entirety constituted no further use of plaintiff's works than had to be made to "produce a marketable collectors' guide" displaying plaintiff's works in reduced-size form, and that "the cases are clear that a complete copy is not per se an unfair use"); Sega Enters. v. Accolade, 977 F.2d 1510, 1526–27 (9th Cir. 1992) (holding that where defendant engaged in "wholesale copying" of plaintiff's software in order to produce compatible software, "[t]he fact that an entire work was copied does not . . . preclude finding a fair use. . . . In fact, where the ultimate (as opposed to direct) use is as limited as it was here, the factor is of very little weight").

317 L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997) (finding that where defendant reproduces and displays copyrighted material that is "informational and factual and news," this fact "strongly favors" a finding of fair use); Fin. Info. Inc. v. Moody's Investors Serv., Inc., No. 81 Civ. 6001, 1984 WL 2119, at *5 (S.D.N.Y. Jan. 10, 1984), *aff'd*, 808 F.2d 204 (2d Cir. 1986) ("Since copyright protection for compilations of factual material is at odds with the basic thrust of the copyright laws, the scope of permissible fair use is greater . . . ." (citation omitted)); N.Y. Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977) (finding that defendant's decision to reproduce a work that is "more of diligence than of originality or inventiveness" means that it enjoys "greater license to use portions of [it] under the fair use doctrine than . . . if a creative work had been involved").

318 *See* VISE, *supra* note 303, at 235 (indicating that the first Google book scanners were moved into the University of Michigan libraries in July of 2004). The publishing industry in the United States earned $1.5 billion more in 2005 than 2004 (for a 5.9% increase), $1 billion more in 2006 than 2005 (for a 3.2% increase), and $1.5 billion more in 2007 than in 2006 (for a 4.4% increase). *See* Press Release, Book Indus. Study Group, Book Industry TRENDS 2008 (May 31, 2008) (on file with author), http://www.bisg.org/news/press.php?pressid=49; Press Release, Book Indus. Study Group, Book Industry TRENDS 2007 (June 1, 2007) (on file with author), http://www.bisg.org/news/press.php?pressid=42; Press Release, Book Indus. Study Group, Book Industry TRENDS 2006 (May 22, 2006), http://www.bisg.org/news/press.php?pressid=35.

harm to their established markets and therefore a fair use.[319] The book industry's net revenues grew twice as fast as the overall economy in 2007.[320] Although publishers may be able to imagine licensing deals with Google that would transfer huge sums of money to them, these deals should not be utilized to prevent a finding of fair use.[321] Finally, and most importantly, the fact that Google is acting in the public interest by expanding access to information and comparison of books dictates a finding of fair use.[322]

C. Google Video and YouTube: Inadequate Control Over Users' Content

The last category of cases to be discussed here involves online video sites such as YouTube and Google Video. These sites obtain videos for users to watch in one of two ways: they either partner with copyright owners who supply specific clips for viewing with permis-

319 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449–50 & n.33 (1984) ("[W]hen one considers . . . that [taping television programs using a VCR to watch them later] merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, . . . does not have its ordinary effect of militating against a finding of fair use. . . . Moreover, the time-shifter no more steals the program by watching it once than does the live viewer . . . .") (internal citation omitted).

320 *Compare* Book Indus. Study Group, Book Indus. TRENDS 2008, *supra* note 318, *with* Jeannine Aversa, *Economy Skids to a Near Halt*, USA TODAY ONLINE, Feb. 28, 2008, http://www.usatoday.com/money/economy/2008-02-27-1086066499_x.htm.

321 *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 141, 145 n.11 (2d Cir. 1998) ("Copyright owners may not preempt exploitation of transformative markets, which they would not '*in general* develop or license others to develop,' by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets."); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 117 (2d Cir. 1998) (holding that copyright holders are "not entitled to a licensing fee for a work that otherwise qualifies for the fair use defense," because it is not a sufficient "argument for actual market harm . . . that the defendant has deprived [the copyright holder] of a licensing fee"). *But cf.* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930–31 (2d Cir. 1994) (holding that an impact on potential licensing royalties could be considered as weighing against a fair use finding where a workable market already existed for corporate photocopying centers to pay a licensing fee to copyright holders).

322 *See* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 & n.14 (N.D. Cal. 2004) (holding that reproduction and distribution of a copyright owner's works in their entirety was a fair use where done "for the purpose of informing the public about the problems associated with [plaintiff's products]," which was "in the public interest"); Consumers Union of the U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983) ("The scope of the [fair use] doctrine is undoubtedly wider when the interest conveyed relates to matters of high public concern . . . .").

sion, or they allow users to upload videos that may turn out to be copyrighted by a third party.[323] YouTube requires users to affirm and/or "warrant" that they, rather than YouTube, "own, or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use" the videos they submit.[324] YouTube states that: "Anytime we become aware that a video or any part of a video on our site infringes the copyrights of a third party, we will take it down from the site."[325] It instructs copyright owners: "If you believe that a video on the site infringes your copyright, send us a copyright notice and we will take it down."[326]

After YouTube was purchased by Google Inc. for $1.65 billion, the entertainment conglomerate Viacom sued Google and YouTube for $1 billion in damages, alleging that more than 150,000 video clips to which Viacom owned the copyrights had been viewed more than 1.5 billion times on YouTube, without Viacom's permission and without the payment of any compensation.[327] YouTube is facing many other complaints and/or notices of infringement, including those filed by NBC Universal, the photojournalists of the L.A. News Agency, the English Premier League, the National Music Publishers Association, Japanese broadcasters (which alleged that 30,000 infringing clips were on YouTube), etc.[328] Facing so many complaints, YouTube has developed copyright protection "tools" that help owners find allegedly infringing clips and prevent reloading of the same clip.[329]

Whether and to what extent YouTube may avail itself of the DMCA safe harbors and fair use doctrine is disputed. In one of the first judicial opinions to grapple with the issue, a court addressed You-

323 *See, e.g.*, Michael Liedtke, *Google Video Suit Could Signal YouTube Trouble Ahead*, USA TODAY ONLINE, Nov. 8, 2006, http://www.usatoday.com/tech/news/2006-11-08-google-sued_x.htm.

324 YouTube Inc., Terms of Use, http://code.google.com/apis/youtube/terms.html (last visited Oct. 24, 2008).

325 *Id.*

326 *Id.*

327 Complaint at 2, 5, Viacom Int'l, Inc. v. YouTube, Inc., No. 07-CV-2103, 2007 WL 775611 (S.D.N.Y. filed Mar. 13, 2007) [hereinafter Viacom Complaint].

328 *See* First Amended Complaint, The Football Ass'n Premier League Ltd. v. YouTube, Inc., No. 07 CV 3582 (S.D.N.Y. filed Nov. 6, 2007); Complaint, Dawg Music v. YouTube Inc., No. 3:07-cv-02518-SI (N.D. Cal. filed May 7, 2007); Complaint, The Football Ass'n Premier League Ltd. v. YouTube, Inc., No. 07 CV 3582 (S.D.N.Y. filed May 4, 2007), 2007 U.S. Dist. Ct. Pleadings LEXIS 912; Complaint, Tur v. YouTube, Inc., No. CV 06-4436-GAF (C.D. Cal. filed July 14, 2006); Associated Press, *YouTube Deletes 30,000 Files After Japanese Group Complains About Copyright Infringement*, INT'L HERALD TRIB., Oct. 20, 2006, http://www.iht.com/articles/ap/2006/10/20/business/AS_TEC_Japan_YouTube_Copyrights.php.

329 *See* Viacom Complaint, *supra* note 327, ¶ 40.

Tube's motion for summary judgment based on the DMCA safe harbors.[330] The court declined to grant YouTube's motion, ruling that more factual development would be necessary before it could determine whether YouTube was disqualified from invoking the safe harbors because it had the "right and ability to control such activity" or received "a financial benefit directly attributable to the infringing activity."[331] The court declared that these tests required an examination of whether YouTube did more than simply exercise its right and ability to remove or block access to materials posted on its site or stored in its system, for example by detecting and prescreening allegedly infringing videos prior to any notification of infringement.[332] As another online video site, Veoh, has pointed out, the mere fact that YouTube may delete allegedly infringing videos upon receiving notice, and filter them out to avoid resubmission, does not demonstrate the requisite control over postings under the DMCA:

> The mere ability to control a central index does not give rise to the ability to control infringing content. [The Ninth Circuit Court of Appeals has] held that "Google's ability to control its own index, search results, and webpages does not give Google the right to control the infringing acts of third parties even though that ability would allow Google to affect those infringing acts to some degree." Here, Veoh responded to notices of infringement. Veoh's central index and its ability to terminate access to certain files only evidences an ability to control access to videos, not an ability to identify and terminate infringing videos.[333]

Regarding fair use, there is every reason to believe that YouTube's users are making fair use of copyrighted work, and that YouTube's own role constitutes fair use given its decision to respect opt-outs. YouTube and its users are showing videos in greatly reduced size and resolution compared to television or DVD displays, for the distinct purpose of categorizing and making videos searchable, and will probably benefit the copyright owners whose short clips become well-known and popular on YouTube.[334] In addition, many YouTube

330 Tur v. YouTube, Inc., No. CV 06-4436-FMC AJWX, 2007 WL 1893635, at *1 (C.D. Cal. June 20, 2007).

331 *Id.* at *3–4 (citing 17 U.S.C. § 512(c)(1)(B) (2006)).

332 *Id.* at *3.

333 Defendant Veoh Networks, Inc.'s Opposition to Plaintiff's Motion for Summary Judgment at 23, IO Group, Inc. v. Veoh Networks, Inc., No. C. 06-3926, 2007 WL 2888756 (N.D. Cal. filed Aug. 14, 2007) (internal citations omitted).

334 *See* Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605, 608–27 (2d Cir. 2006) (finding a fair use for similar reasons); Kelly v. Arriba Soft, 336 F.3d 811, 818–25 (9th Cir. 2003) (same). Empirical research and evidence in litigated Internet copyright cases have revealed that even the downloading of entire copy-

videos are themselves parodies or are posted in order to permit users to append satirical, informative, or critical commentary about the videos or their stars.[335] Readers doubting this fact are invited to type into YouTube's search box the name of a famous politician or cultural icon in their community or nation.

As other scholars have suggested, Google may have a more difficult time establishing that YouTube is entitled to an exception from copyright under the law of the member states of the European Union. To the extent that those states lack a general-purpose fair use exception, some of the considerations that weigh heavily in Google's favor in the United States may not be as persuasive.[336] The Google News decision suggests that the copyright exceptions of the E.U. member states, to the extent that they focus on reviews, news reporting, and the like—rather than calling for a broad-ranging consideration of a use's purpose and effects as in the United States—may be less likely to shield YouTube. Moreover, it also suggests that courts within the European Union may be less likely to confer a copyright exception based on freedom of exception on ISPs, particularly foreign ones, than on traditional media outlets, particularly those based in E.U. markets. Finally, its articulation of an apparently unlimited moral right to prevent online "amputation" of one's work in the form of quotations or samples leaves little room for the survival of free-wheeling services like YouTube.

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righted works from the Internet does not decrease, but probably helps increase, the sales of such works by promoting sampling and the formation of tastes. *See* Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. OF POL. ECON. 37, 38–40 (2007); Martin Peitz & Patrick Waelbroeck, *Why the Music Industry May Gain from Free Downloading: The Role of Sampling*, 24 INT'L J. OF INDUS. ORG. 907 (2006); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 830 n.428 (2006) (collecting cases); Ramnath Chellappa & Shivendu Shivendu, *Managing Piracy: Pricing and Sampling Strategies for Digital Experience Goods in Vertically Segmented Markets*, 16 INFO. SYS. RES. 400 (2005).

335 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586–88 (1994) (finding that parody is a transformative use of copyrighted work that supports a finding of fair use); Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 628–29 (9th Cir. 2003) (finding that a display of television clips was transformative for fair use purposes where they were accompanied by commentary); Field v. Google Inc., 412 F. Supp. 2d 1106, 1118–23 (D. Nev. 2006) (improving access to information over the Internet is a transformative purpose consistent with fair use); Hofheinz v. A & E Television Networks, Inc., 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) (finding that showing clips was fair use because it was done for "the transformative purpose of enabling the viewer to understand" the clips' underlying subject matter); *Netcom I*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995).

336 Ganley, *supra* note 171, at 17–21 (discussing United Kingdom law).

D. Weighing the Benefits and Harms of an Opt-Out Copyright System for the Internet

American and European courts and policymakers face important choices in the coming years about the future of online services. They may elect to follow the lead of the U.S. courts in the *Netcom*, *Napster*, and search engine cases, and of the European courts in a variety of cases from Scientology through Google France, in recognizing adequate breathing space for innovative new technologies and freedom of expression in the digitally networked environment. Alternatively, they could adhere to the highly restrictive framework adopted by the Belgian court in the *Copiepresse* case. If the latter framework is adopted throughout the European Union, the economic and public policy effects will be manifold. This subpart briefly surveys some of the likely costs and benefits, while leaving more extended consideration of these costs and benefits to later works and other authors.

The costs of an opt-out rule fall into two main areas: those posed to the human rights of authors, and those posed to the economic efficiency of markets for copyrightable works. Human rights law recognizes that sometimes freedom of expression may need to be limited by laws absolutely necessary to protect the rights of others.[337] To the extent that online intermediaries may enable widespread violations of the statutory rights of third parties, an opt-out rule may make it harder for such third parties to vindicate their rights by requiring ISPs to seek their permission prior to hosting their works. Similarly, some economic analyses of IP law contend that overuse of copyrighted or trademarked works without compensation threatens to prevent those creating new works from recouping their investment by charging prices in excess of the cost of reproducing the works.[338] When authors or filmmakers must invest years of labor and thousands of dollars producing a work that is then forwarded around the Internet free of charge, further works may be abandoned as too costly to be made.[339]

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337 *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966); Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, 213 U.N.T.S. 222.

338 *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11, 20–21 (2003); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 266–71 (1987); *see also* James Gibson, *Re-reifying Data*, 80 NOTRE DAME L. REV. 163, 173–74 (2004) (discussing how nonexcludability of databases discourages their development).

339 *See* LANDES & POSNER, *supra* note 338, at 24.

The benefits of an opt-out rule are ripe for further research. They include access to information, freedom of expression, efficiency and innovation, and jurisdictional uniformity.

First, an opt-out rule will allow more people to enjoy the vast new opportunities for broader access to information and to the means of mass communication that are opened up by Internet technologies. Making sites like YouTube or Wikipedia automatically liable for the postings of their users will result in widespread censorship and deletion of user postings, and the potential closure of these services as with Napster and Grokster.[340] Applying the principles from the Belgian *Copiepresse* case to Google Book Search or to search engines will also result in vast quantities of political, historical, cultural, and economic information being cleansed from the Internet and becoming unavailable.[341] In the case of Google Book Search, it would mean that hundreds of thousands of copyrighted books that are out-of-print and may be available in only one or two libraries in the entire world could not be indexed by keyword for discovery on the Internet.[342] With regard to YouTube, the free expression problem posed by a choice between seeking prior permission from every conceivable rights holder or suffering the full force of copyright liability for actions of its users, would shut down most of the site:

> If YouTube, eBay, Yahoo!, Verizon, Comcast, and others face the prospect of tens of millions of dollars in statutory damages for hosting, carrying, or linking to content whose provenance they cannot determine, they will either go out of business or they will impose restrictions on the content they will carry sufficiently onerous that they would effectively lock down the Internet.[343]

340 *See* Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media As a First Amendment Right*, 35 HOFSTRA L. REV. 1509, 1523 n.8 (2007); Jennifer Urban, *Internet Study Finds Questionable Use of Cease-and-Desist Notices*, FACULTY FOOTNOTES, at 2 (Fall 2006), http://law.usc.edu/assets/docs/FINAL-footnotes06.pdf; *see generally* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 681–83 (2005) (considering how these censorship risks are likely to affect availability of expression on the Internet).

341 *See* Travis, *supra* note 146, at 138–51; Travis, *supra* note 340, at 1550–65.

342 *See* Travis, *supra* note 146, at 97–98, 138–39; Brian Lavoie et al., *Anatomy of Aggregate Collections: The Example of Google Print for Libraries*, 11 D-LIB MAG., Sept. 2005, http://www.dlib.org/dlib/september05/lavoie/09lavoie.html; Google Inc., Response from the Editor to Walt Crawford, Libraries and Google/Google Book Search: No Competition! (June 2006), http://www.google.com/librariancenter/articles/0606_03.html (indicating only five percent of books held by libraries are still in print, i.e., on sale to consumers at stores).

343 Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. OF TELECOMM. & HIGH TECH. L. 101, 111 (2007).

The problem with holding online video sites automatically liable for their users' videos is similar to the problem with holding book publishers liable for illegal acts committed by their authors. Specifically, sites like YouTube would be chilled from providing a forum for free-wheeling social and political speech[344] by the threat of injunctive relief[345] or onerous monetary liability.[346]

Second, widespread adoption of the Belgian *Copiepresse* framework will mean that Internet-enabled innovation will be sharply curtailed, and the prospects will be quite bleak—not only for services like Google and YouTube, but also for Web 2.0 and the Internet in general. Europeans may continue to enjoy higher rates of broadband connectivity at lower prices,[347] but they may not be able to participate as actively in starting new Web 2.0 sites as they would be if E.U. members enacted a broader fair use exception and construed online safe harbors more like U.S. courts do.[348] Online services need not even be

344 *See, e.g.*, C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 893–908 (2002); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 299–315 (1979); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 5–7, 53–63 (1987). For similar arguments arising within the European Union, see Hugenholtz, *supra* note 189, at 353–58.

345 *Cf.* Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001), *vacated*, 268 F.3d 1257, 1277 (11th Cir. 2001) (holding that the trial court abused its discretion in finding Houghton Mifflin liable for copyright infringement in a book it published).

346 *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (explaining that minority groups' expression could potentially be chilled if newspapers were held liable for the advertisements they published).

347 *See* Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access As Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1787–94 (2006).

348 A further development of this argument is beyond the scope of this Article, but many other scholars have persuasively argued that overbroad copyrights have an adverse effect on innovation in the software and Internet industries. *See, e.g.*, Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 271–84 (2007); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1386–90 (2004); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 800–05 (2007); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 509–17 (1996); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1353–71 (1987); Robin A. Moore, Note, *Fair Use and Innovation Policy*, 82 N.Y.U. L. REV. 944, 959–65 (2007); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1530–32 (2007); Pasquale, *supra* note 310, at 40–63; C. Riley, *The Need for Software Innovation Policy*, 5 J. OF TELECOMM. & HIGH TECH. L. 589, 595–603 (2007); Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV.

shut down entirely to be degraded and made less attractive to persons seeking to access information and express ideas, as the furor over the invasion of privacy triggered by Viacom's subpoena of YouTube's viewing records, broken down by time of viewing, login identifier, and Internet protocol address shows.[349] Inquiries by courts and officials and investigations into communications made over the Internet threaten to chill users from utilizing the medium, lest their interests become known:

> In this era of public apprehension about the scope of the USAPATRIOT Act, the FBI's (now-retired) "Carnivore" Internet search program, and more recent highly-publicized admissions about political litmus tests at the Department of Justice, rational book buyers would have a non-speculative basis to fear that federal prosecutors and law enforcement agents have a secondary political agenda that could come into play when an opportunity presented itself. . . . [I]f word were to spread over the Net—and it would—that the [government] had demanded and received Amazon's list of customers and their personal purchases, the chilling effect on expressive e-commerce would frost keyboards across America. Fiery rhetoric quickly would follow and the nuances of the subpoena (as actually written and served) would be lost as the cyberdebate roiled itself to a furious boil. One might ask whether this court should concern itself with blogger outrage disproportionate to the government's actual demand of Amazon. The logical answer is yes, it should: well-founded or not, rumors of an Orwellian federal criminal investigation into the reading habits of Amazon's customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever.[350]

This prediction is borne out by the reaction to the court's granting of the Viacom subpoena, which elicited so much fear and outrage that Viacom voluntarily withdrew its request for individualized viewing

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1831, 1832–41 (2006); Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2365–2420 (1994).

349 *See* Viacom Int'l Inc. v. YouTube Inc., 87 U.S.P.Q.2d (BNA) 1170, 1175–78, 1175 n.5 (S.D.N.Y. 2008) (overruling First Amendment and Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.), objections to subpoena of YouTube viewing records, even though similar cases had barred subpoenas of Amazon's Internet book transactions in civil lawsuits, and the ECPA states that providers of "remote computing service[s] to the public shall not knowingly divulge to any person or entity the contents" of any electronic communication stored on subscribers' behalf (first quoting 18 U.S.C. § 2702(a)(2) (2006) and then citing *In re* Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606 (E.D. Va. 2008); *In re* Grand Jury Subpoena to Amazon.com, 246 F.R.D. 570, 572 (W.D. Wis. 2007)).

350 *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. at 570, 572–73.

records, which the court had already granted despite the palpable conflict with the First Amendment.[351] Nor was concern limited to an overheated "cyberdebate"; an Associated Press headline was "Privacy Protections Disappear with a Judge's Order."[352] As a YouTube video watched over 600,000 times asked rhetorically, who would shop at a bookstore, or attend a movie theater, where the guards searched one's pockets, purse, and car?[353]

Finally, the development of diverging principles for resolving Internet copyright disputes which may occur between the European Union, United States, and Asia, for example, if the *Copiepresse* framework becomes recognized as authoritative in the European Union, while the *Arriba Soft* framework persists in the United States, could distort the flow of capital away from the most talented innovators and most promising technologies. Strict opt-in rules would result in the flight of businesses and capital focused on investing in Internet technologies away from jurisdictions adopting them, and into opt-out or "free-for-all" jurisdictions. A substantial percentage of the world's copyright infringement, including over the Internet, already occurs outside the United States or the European Union.[354] Companies developing software and Internet services that implicate copyrights have sprouted up in various jurisdictions that offer differing levels of copyright protection, ranging from the quite strict to the nearly nonexistent, from Norway and Russia to South Africa and South Korea.[355]

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351 *See* Jessica E. Vallascero, *YouTube Suit Sets Protocol to Shield IDs*, WALL ST. J., July 16, 2008, at B6.

352 Associated Press, *Internet Privacy Protections Disappear with a Judge's Order*, INT'L HERALD TRIB., July 10, 2008, *available at* http://www.iht.com/articles/ap/2008/07/15/business/NA-FEA-US-Privacy-Gone.php. Other press coverage of the subpoena seemed disproportionately restricted to newspapers' blogs, which featured such postings as "One Subpoena Is All It Takes to Reveal Your Online Life," "Court Invites Viacom to Violate YouTube Viewers' Privacy," and "Want to Clear Your Viewing History on YouTube? Good Luck." Posting of Saul Hansell to New York Times Bits Blog, http://bits.blogs.nytimes.com/2008/07/07/the-privacy-risk-from-the-courts/ (July 7, 2008, 12:02 EST); Faster Forward, http://blog.washingtonpost.com/fasterforward/2008/07/court_invites_viacom_to_violat_1.html (July 7, 2008, 11:00 EST); Web Scout, http://latimesblogs.latimes.com/webscout/2008/07/viacom-youtube.html (July 16, 2008, 15:15 PT).

353 *See* Viacom vs You = Boycott, YouTube.com (2008), http://www.youtube.com/watch?v=GJbCWJNQUYI (last visited Aug. 27, 2008).

354 Recording Indus. Ass'n of Am., Russia, China Once Again Top USTR List of Piracy Hot Spots (Apr. 30, 2007), http://www.riaa.com/newsitem.php?news_year_filter=&resultpage=2&id=1172D7B2-C23D-8C41-DC5D-8370A6F5B86C.

355 *Id.*; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE, AND DEVELOPMENT 173, 180–81 (Daniel J. Gervais ed., 2007); *Online Pirates Forced to Walk the Plank*, ECONOMIST.COM, June 27, 2005,

Although courts in the European Union may attempt to exercise jurisdiction over content posted to the Internet in the United States or elsewhere,[356] their ability to enforce monetary judgments may be questionable if companies remove their assets from the European Union in fear of its laws.[357] Recognized principles for the enforcements of foreign judgments provide that enforcement will not occur if it violates the public policy of the state in which enforcement is sought, for example by contravening the First Amendment or DMCA.[358]

CONCLUSION

We only have one life on Earth. There are billions of books, links, documents, videos, sounds, and images that might help us maximize it. People are collaborating socially, politically, professionally, and culturally on a constant basis using Internet services. The question confronting us is, will we support laws and policies that connect us to a universe of knowledge and communication in more efficient ways, or will we block search engines and new forms of Internet transmission from achieving their potential? Few of us are likely to make it into Oxford's Bodleian library or onto the front line on Haifa Street anytime soon. Those who have made it there, from eyewitnesses and frustrated professionals with their video and still cameras, to Internet companies with their scanners and algorithms, want to share what they've found with us. With unlimited copyright liability, absent a requirement of knowing infringement of specific items, many or most of these experiences will be harder to find. Some, like suppressed

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http://www.economist.com/agenda/displaystory.cfm?story_id=E1_QTNQSNQ; V. Shannon, *P2P Starts to Mature*, INT'L HERALD TRIB., July 9, 2005, at 16; Jung-a Song, *Korean Court Acquits Music Swap Service*, FIN. TIMES (London), Jan. 13, 2005, at 20; Candice Jones, SA Embraces Social Networking (June 22, 2007), http://www.mydigitallife.co.za/index.php?option=com_content&task=view&id=2499&Itemid=2.

356 Yahoo! Inc. v. Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006); Landgericht Manheim [LG] [trial court] Dec. 12, 2000, http://www.net law.de/urteile/lgma_05.htm (F.R.G.) (*Gerald Fredrick Töben*); David Satola, *Legal Aspects of Internet Governance Reform*, 12 INFO. POLITY 49 (2007).

357 U.S. Dep't of Commerce, Recognition and Enforcement of Foreign Money Judgments (Mar. 2002), http://www.osec.doc.gov/ogc/occic/refmj.htm; U.S. Dep't of State, Judicial Assistance Belgium, http://travel.state.gov/law/info/judicial/judicial_666.html.

358 *See* INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES § 403(1)(e) (Proposed Final Draft 2007).

combat footage and out-of-print books, will be totally lost. The intelligent development of copyright safe harbors in the United States and the European Union can prevent that from happening.