

# LIMITING INNOVATION THROUGH WILLFUL BLINDNESS

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## I. INTRODUCTION

All of copyright law exists primarily to benefit the public; compensation and rewards to the creators and authors who drive culture and knowledge forward are significant, but secondary goals.<sup>1</sup> These purposes of copyright create tensions within the policy of the law.<sup>2</sup> Increasing the protections provided by copyright law can lead to greater incentives for artists to create and for copyright owners to continue to build on their intellectual property, which is clearly good for both the creators and the public at large.<sup>3</sup> But such protections restrict the way others can use those creations and can limit members of the public and subsequent creators who may want to use those pieces of culture in new works or to create new technologies and services, which may interact with copyrighted works.<sup>4</sup>

The 1998 Digital Millennium Copyright Act (“DMCA”) reflects this tension between the need to provide authors and creators with compensation and some control over their creations while protecting technological innovators and Internet service providers from potentially crushing liability exposure due to the actions of their users.<sup>5</sup> One way Congress struck this balance was by providing safe harbors that shielded service providers from liability for content posted by their users, but requiring the service providers to meet several conditions in order to keep that protection.<sup>6</sup> One of those conditions was that the service provider must remove any content that it knew to be infringing, or that it knew had red flags making infringement obvious, or where the service provider was properly notified by the rights-holder of infringement.<sup>7</sup> In its dispute with YouTube, Viacom urged that the equitable doctrine of willful blindness should be applied to impute knowledge of infringement or knowledge of red flags of infringement to YouTube and to strip YouTube of its safe harbor protections.<sup>8</sup>

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<sup>1</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954); U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> See JAMES BOYLE, *THE PUBLIC DOMAIN* 48–49 (2008).

<sup>3</sup> *Id.* at 48.

<sup>4</sup> *Id.* at 48–49.

<sup>5</sup> See H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.).

<sup>6</sup> See 17 U.S.C. § 512(c) (2012).

<sup>7</sup> 17 U.S.C. § 512(c)(1).

<sup>8</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34–35 (2d Cir. 2012).

Permitting willful blindness to substitute for notice or actual knowledge would weaken the safe harbors and undo the careful balance struck in the DMCA.<sup>9</sup> Applying the willful blindness doctrine would reduce clarity for the service providers as to when they have protection and when they do not, which will make them substantially more hesitant to allow user supplied content.<sup>10</sup> Further, it would be likely to lead to additional litigation and may encourage service providers to settle cases that they would otherwise defend in court.<sup>11</sup> Applying the equitable doctrine of willful blindness here could discourage innovation in the still developing field of Internet services and particularly for Internet services that permit user interaction.<sup>12</sup>

This Note will argue that it is never appropriate to apply the equitable willful blindness doctrine to remove the safe harbors provided by the DMCA. Part II will look at the purpose and the history behind the safe harbors provided by the DMCA. Part II will also examine how it has protected innovation on the Internet. Part III will examine the way courts have construed the red flag provision in DMCA interpretations of similar matters. In particular, it will look at the nuanced view of the red flag provision and the willful blindness doctrine that the Second Circuit articulated. Part IV will examine how willful blindness could lead to uncertainty for companies in the business arena and have a potentially chilling effect on innovation, investment, and the development of new services. Part V will compare safe harbors to the laws in other countries and see how those other laws have affected business in those countries. Finally, Part VI will argue that it is in the best interest of the public to preserve the balance created by Congress by utterly rejecting the application of willful blindness as a substitute for actual knowledge within the context of the DMCA.

## II. INNOVATION, COPYRIGHT, AND THE DMCA SAFE HARBORS

### A. *The Evolution of the DMCA Safe Harbors*

Advances in technology have long driven changes in copyright law and often lead to challenges by copyright holders.<sup>13</sup> This played out recently in the reaction of the movie industry to videocassette recorders (VCRs) in general and Betamax in particular.<sup>14</sup> When VCRs first developed, the movie industry petitioned Congress to pass new laws to tax the sale of VCRs to compensate for possible copyright infringement.<sup>15</sup> When that effort failed, the movie industry

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> See David Kravets, *10 Years Later, Misunderstood DMCA is the Law That Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <http://www.wired.com/threatlevel/2008/10/ten-years-later/>.

<sup>11</sup> See Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 4–5 (1990) (discussing how increased uncertainty as to the merits of a case place pressure upon defendants to settle even if they believe the claims may not be meritorious).

<sup>12</sup> See Kravets, *supra* note 10; see also *infra* Part IV.

<sup>13</sup> See BOYLE, *supra* note 2, at 63–64; see also *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 8–9 (1908) (discussing a claim that piano rolls for self-playing pianos violated the copyright on sheet music).

<sup>14</sup> BOYLE, *supra* note 2, at 63–64.

<sup>15</sup> *Id.* at 63.

instead sued, attempting to have the technology itself declared illegal.<sup>16</sup> This led to a landmark decision by the Supreme Court that found the VCR legal and thus encouraged others in the technology sector to continue innovating in ways that could possibly make infringement even easier.<sup>17</sup> Similarly, when faced with the introduction of digital audio tape technology, the music industry, like the movie industry, filed suit.<sup>18</sup> This time, however, Congress stepped in and developed a regulatory scheme that attempted to balance the benefits of the new technology with the possible effects on copyright holders and thus, advanced all policies of copyright.<sup>19</sup>

These and similar changes to copyright law, spurred on by changes in technology, set the stage for the introduction of a compromise between Internet service providers and content producers that was codified in the DMCA.<sup>20</sup> The DMCA Title II, also called the Online Copyright Infringement Liability Limitation Act, attempts to strike an appropriate balance between the technology and copyright industries.<sup>21</sup> Congress found the proper balance by examining the precedent that had arisen through the court system thus far,<sup>22</sup> as well as by overseeing negotiations between the technology and content industries.<sup>23</sup> The DMCA is an expansive bill that regulates many interactions between technology and copyright, but this Note focuses on the implications of safe harbors provided to service providers for information stored by a service provider at the request of a user and for information location tools.<sup>24</sup>

<sup>16</sup> *Id.* at 63–64; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 419–20 (1984).

<sup>17</sup> There the court adopted a view that the technology had “substantial noninfringing uses” and saved the VCR as a legal technology. *Sony*, 464 U.S. at 456.

<sup>18</sup> Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 116 (2004).

<sup>19</sup> *See id.* at 116–17 (stating that Congress passed the Audio Home Recording Act of 1992 which immunized against most liability, but provided for a levy on the sale of the devices and blank media which would be distributed to the copyright holders).

<sup>20</sup> *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Take-down Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 631, 635 (2006).

<sup>21</sup> *See id.* at 621; H.R. REP. NO. 105-551, pt. 2, at 25 (1998).

<sup>22</sup> The safe harbor provisions and the protections from direct liability for service providers were heavily influenced by the decision in *Netcom*, “the leading and most thoughtful judicial decision” on the topic up to that point. H.R. REP. NO. 105-551, pt. 1, at 11 (1998). In *Netcom*, the court considered the copyright implications of the works of L. Ron Hubbard being posted on a Usenet newsgroup, which was accessed through Netcom. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1365–66 (N.D. Cal. 1995). The court concluded that the service provider couldn’t be held directly liable for the actions of its users because the servicer lacked control of its users’ actions and thus such liability was unnecessary. *Id.* at 1372–73. The court further found that Netcom could not be held liable for vicarious infringement, but left open the possibility of Netcom being liable under contributory copyright infringement if certain factors were met. *Id.* at 1373–77.

<sup>23</sup> “Title II, for example, reflects 3 months of negotiations supervised by Chairman Hatch and assisted by Senator Ashcroft among the major copyright owners and the major OSP’s and ISP’s.” S. REP. NO. 105-190, at 9 (1998).

<sup>24</sup> Information location tools are dealt with in 17 U.S.C. § 512(d) and would include tools like search engines. The safe harbor for content stored at the direction of a user and for information location tools is codified in 17 U.S.C. § 512(c)–(d) (2012). Other related safe harbors are provided for transitory communications and for system caching, but those are not involved in the notice and takedown scheme. 17 U.S.C. § 512(a)–(b). Other sections of the

The safe harbors of the DMCA provide some protection from liability for service providers, but require the service provider to meet several conditions in order to receive the protection of these safe harbors.<sup>25</sup> The service provider would need to participate in a notice-and-takedown arrangement in which they would remove any infringing content when presented with a valid notice from the copyright holder.<sup>26</sup> They would also have to remove any material they knew was infringing or for which there were circumstances that made the infringement obvious.<sup>27</sup> In other words, they would have to remove any content for which there were red flags indicating infringement.<sup>28</sup> In order to facilitate the protection of the intellectual property, the service providers are required to refrain from interfering with standard technical measures to locate or protect intellectual property.<sup>29</sup> The service providers also need to establish a designated agent who would receive and process the notifications sent to them.<sup>30</sup> To help limit repeated infringement, providers need to develop and enforce a policy to terminate the accounts of those who repeatedly violate copyright and to warn their users about this policy.<sup>31</sup>

In order to reduce mistakes or abuse of the system and avoid striking down legitimate speech, the notice-and-takedown scheme includes provisions for counter-notices.<sup>32</sup> When a service provider receives a takedown notice, the service provider would be required to attempt to contact the user who had posted the allegedly infringing material.<sup>33</sup> The user would then have an opportunity to submit a counter-notice, which would allege that the original notice was in error and provide sufficient information for the content owner to file suit along with an agreement that the user would accept service of process and jurisdiction of the court if a suit was filed.<sup>34</sup> After receiving the counter-notice, the service provider would repost or re-enable access to the material unless it was notified that the content owner had actually filed suit.<sup>35</sup>

In creating the safe harbor provisions of the DMCA, Congress expressly attempted to encourage the technology service providers to work with the copyright industry to ensure that the law safeguarded copyrights, while addressing the concerns of the technology industry regarding secondary liability and pro-

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DMCA deal with matters such as circumventing digital rights management technologies, which was codified in 17 U.S.C. § 1201 (2012).

<sup>25</sup> 17 U.S.C. § 512(c)–(d), (i) (2012).

<sup>26</sup> 17 U.S.C. § 512(c)–(d).

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

<sup>28</sup> *Id.*; see also Urban & Quilter, *supra* note 20, at 624–26. Significantly, service providers were only required to deal with infringing material they became aware of; they were explicitly not required to monitor or look for such material. 17 U.S.C. § 512(m) (2012).

<sup>29</sup> 17 U.S.C. § 512(i) (2012).

<sup>30</sup> 17 U.S.C. § 512(c)(2).

<sup>31</sup> 17 U.S.C. § 512(i)(1)(A). Google provides one example of a company that has actually terminated accounts in response to repeated allegations of infringement. Nate Anderson, *The Day the Music Blogs Died: Behind Google's Musicblogocide*, ARS TECHNICA (Feb. 15, 2010, 4:24 AM), <http://arstechnica.com/tech-policy/2010/02/the-day-the-music-blogs-died-behind-googles-musicblogocide/>.

<sup>32</sup> 17 U.S.C. § 512(g) (2012).

<sup>33</sup> 17 U.S.C. § 512(g)(2)(B).

<sup>34</sup> 17 U.S.C. § 512(g)(3).

<sup>35</sup> 17 U.S.C. § 512(g)(2)(C).

viding clarity for the service providers to know how to operate legally.<sup>36</sup> This law helped to clarify the steps service providers needed to take to avoid liability for infringing material posted by their users, thus reducing uncertainty for innovators and investors.<sup>37</sup> It provided this certainty and this protection specifically to encourage innovation because, as Senator Ashcroft said, providing some protection for liability in the copyright arena “is a key notion for the future growth and development of digital communications and most importantly the Internet.”<sup>38</sup> At the same time, the DMCA provided the content industry with a simple tool to arrange for their content to be removed without going through the court system.<sup>39</sup> Being able to swiftly have infringing content removed permitted content owners to limit the damage from unauthorized distribution of that infringing content, which is significant since those damages can grow as time passes.<sup>40</sup> Although this notice-and-takedown system was subject to counter-notices, these counter-notices required the user to reveal information that would make it easier for the copyright holder to sue them.<sup>41</sup>

#### B. *Shielding Innovation with the DMCA*

The safe harbor provisions of the DMCA provided much needed clarity to service providers that let them move forward with innovative new services fearlessly.<sup>42</sup> The DMCA was so significant that some commentators described it as saving the web.<sup>43</sup> Valuable services such as WordPress, which provides a blogging platform, and MySpace, an early social network, would likely not exist without the protections provided by the safe harbors.<sup>44</sup> Later, more innovative services such as Dropbox may not have been developed at all without the certainty provided by these early examples.<sup>45</sup>

By providing a legislatively approved mode of cooperation between online service providers and content creators, Congress helped streamline the process

<sup>36</sup> See H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.).

<sup>37</sup> Urban & Quilter, *supra* note 20, at 631–32; H.R. REP. NO.105-551, pt. 1, at 11 (1998).

<sup>38</sup> 144 CONG. REC. S4,889 (daily ed. May 14, 1998) (statement of Sen. Ashcroft), available at <http://www.gpo.gov/fdsys/pkg/CREC-1998-05-14/pdf/CREC-1998-05-14-senate.pdf>.

<sup>39</sup> Urban & Quilter, *supra* note 20, at 636; see also 17 U.S.C. § 512(d)(3).

<sup>40</sup> Marketa Trimble, *Setting Foot on Enemy Ground: Cease-and-Desist Letters, DMCA Notifications, and Personal Jurisdiction in Declaratory Judgment Actions*, 50 IDEA 777, 781–82 (2010), available at <http://ssrn.com/abstract=1653965>.

<sup>41</sup> 17 U.S.C. § 512(g)(3); see also *supra* text accompanying notes 33–34. Even if the user sends a counter-notice promptly, the law requires that the allegedly infringing material be unavailable for at least ten days. 17 U.S.C. § 512(g)(2)(C). If the copyright holder who filed the initial notice does file with a court to request an injunction, then the service provider does not need to re-enable access to the content. *Id.* Interestingly, this can be asymmetrical as the service provider is not required to provide all such information for the copyright holder to the alleged infringer. Trimble, *supra* note 40, at 805.

<sup>42</sup> Kravets, *supra* note 10.

<sup>43</sup> *Id.*; Ashkan Karbasfrooshan, *Why Big Media Is Going Nuclear Against the DMCA*, TECH-CRUNCH (Nov. 6, 2011), <http://techerunch.com/2011/11/06/big-media-nuclear-dmca/>.

<sup>44</sup> Kravets, *supra* note 10.

<sup>45</sup> Brian Leary, Note, *Safe Harbor Startups: Liability Rulemaking Under the DMCA*, 87 N.Y.U. L. REV. 1135, 1140–41 (2012). That note argues that some protection is essential for innovative services like Dropbox, but that the DMCA provides too much protection and a regulatory body should be available to fine-tune those protections as new services arise and change. *Id.* at 1135, 1140–41.

of the two industries working together to protect copyright while still permitting innovation.<sup>46</sup> Moreover, by providing clarity, Congress emboldened service providers and technological innovators.<sup>47</sup> Small, young companies often cannot afford the cost of litigation even when they are confident, due to precedent, that they would emerge from such litigation victorious.<sup>48</sup> By codifying and clarifying the details of what a service provider needs to do to avoid secondary liability, Congress helped to prevent a great deal of expensive and wasteful litigation. Codified protections also encouraged investments in many of these innovative, small startups that likely would never have been funded and therefore never given a chance to exist without the explicit protection of the DMCA's safe harbors.<sup>49</sup>

It was likely no overstatement to say that the DMCA, and in particular its safe harbor provisions, saved the web as we know it today.<sup>50</sup> Without the safe harbor provisions, social networking would likely not exist, and blogging would probably be confined to those who could host their own servers rather than being readily accessible to the masses at virtually no cost.<sup>51</sup> Without the safe harbor provisions, the nascent field of cloud computing would likely have been strangled in the crib, or at least stunted and twisted to carefully fit the confines of the most recent court case.<sup>52</sup> Without the safe harbor provisions being codified, Google most likely would have refused to purchase YouTube due to the obvious concerns about secondary liability that such a service model provides.<sup>53</sup>

### III. RED FLAGS AND WILLFUL BLINDNESS

The DMCA places several restrictions upon service providers that wish to receive the protection provided by its safe harbors.<sup>54</sup> Among other requirements, it insists that service providers remove any infringing material which the

<sup>46</sup> H.R. REP. NO. 105-551, pt. 2, at 49 (1998); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing H.R. REP. NO. 105-551, pt. 2, at 49 (1998)).

<sup>47</sup> Certainty and clarity regarding liability were explicit goals of the DMCA. H.R. REP. NO. 105-551, pt. 2, at 49–50.

<sup>48</sup> According to a survey by the American Intellectual Property Law Association, the median cost to see a copyright infringement suit through to trial with more than twenty-five million dollars at stake was approximately \$1,375,000. STEVEN M. AUVIL & DAVID A. DIVINE, REPORT OF THE ECONOMIC SURVEY 2011 35 (2011). The mean or average cost for the same suit was approximately two million dollars. *Id.* at 37.

<sup>49</sup> Encouraging investment was an explicit goal of the Senate. S. REP. NO. 105-190, at 8–9 (1998). There is evidence that this worked and encouraged companies to innovate and investors to invest. *See, e.g., Karbasfrooshan, supra* note 43.

<sup>50</sup> Kravets, *supra* note 10.

<sup>51</sup> *Digital Millennium Copyright Act*, Elec. Frontier Found., <https://www.eff.org/issues/dmca> (last visited Oct. 6, 2013) [hereinafter EFF]; *see* Kravets, *supra* note 10.

<sup>52</sup> Although not dealing with a claim regarding the DMCA's safe harbors, Aereo has chosen to use numerous antennas instead of a single efficient antenna specifically in an attempt to fall within the confines of previous court rulings on copyright matters. *See* Rip Empson, *Aereo Actually Has a Shot at Beating the Broadcast Networks*, TECHCRUNCH (Mar. 5, 2012), <http://techcrunch.com/2012/03/05/aereo-for-the-win/>.

<sup>53</sup> Scott Cleland, *Google's Piracy Liability*, FORBES (Nov. 9, 2011, 8:49AM), <http://www.forbes.com/sites/scottcleland/2011/11/09/googles-piracy-liability/>.

<sup>54</sup> 17 U.S.C. § 512(c)(1) (2012).

service provider knows about or any material where the service provider is “aware of facts or circumstances from which infringing activity is apparent.”<sup>55</sup> This requires the service provider to remove the content when they are aware of red flags that would make it obvious to a reasonable person that the content is infringing.<sup>56</sup> Courts have generally interpreted the red flag provision narrowly and in a way that continues to provide service providers with certainty in what is required to retain the safe harbor protections.<sup>57</sup> However, in its dispute with YouTube, Viacom urged the court to adopt the equitable doctrine of willful blindness to imply knowledge when the service providers are aware that infringement is highly likely and decide not to investigate.<sup>58</sup> Adopting that doctrine would make it less clear when a service provider could be liable and thus have a chilling effect on the development of certain types of Internet services.<sup>59</sup>

#### A. *The Narrow Reading of the Red Flags Provision*

The red flag provision of the DMCA requires a service provider that wants the protection of the safe harbors to act “expeditiously to remove, or disable access to” infringing material if they become aware of material that is surrounded by “facts or circumstances from which infringing activity is apparent.”<sup>60</sup> This means that the service provider must remove any material surrounded by red flags of infringement.<sup>61</sup> This provision has been litigated several times, and the courts generally take a narrow view of it.<sup>62</sup> In the recent dispute between Viacom and YouTube in the Second Circuit, the court said that the red flag provision required the service provider to act to remove content only when it was aware of circumstances that “would have made the specific infringement ‘objectively’ obvious.”<sup>63</sup> In that dispute, the court examined the distinction between the actual knowledge requirement and red flag knowledge that would trigger the red flag provision.<sup>64</sup> The court found that actual knowledge in this context was a subjective standard that required the service provider to know that specific material was infringing.<sup>65</sup> Red flag knowledge, in contrast, was an objective standard that required the service provider to have knowledge of circumstances that made it clear that specific material was infringing.<sup>66</sup> The court emphasized that either standard required the knowledge to involve specific content and found that any reading that would have required

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

<sup>56</sup> 17 U.S.C. § 512(c)(1)(A)(ii); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31–32 (2d Cir. 2012).

<sup>57</sup> See discussion *infra* Part III.A.

<sup>58</sup> *Viacom*, 676 F.3d at 34.

<sup>59</sup> See discussion *infra* Part IV.

<sup>60</sup> 17 U.S.C. § 512(c)(1)(A).

<sup>61</sup> See *id.*

<sup>62</sup> See, e.g., *Viacom*, 676 F.3d at 31; *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1111–14 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009).

<sup>63</sup> *Viacom*, 676 F.3d at 31.

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

<sup>65</sup> *Id.*

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

the service provider to act on general knowledge that there was some infringing content was contrary to the language of the DMCA.<sup>67</sup>

The trend whereby most courts read the red flag provision narrowly, thus placing most of the burden for identifying infringing content on the content owner,<sup>68</sup> seems to be consistent with congressional intent. Although Congress intended for copyright holders to work together with online service providers, it deliberately ensured that most of that burden had to be met by the content owner.<sup>69</sup> Some courts have been generally reluctant to even impose knowledge of copyright infringement upon a service provider when they receive defective notices from a copyright holder.<sup>70</sup> The Ninth Circuit considered a dispute between Perfect 10, which is a creator and distributor of adult content, and several Internet service providers.<sup>71</sup> Perfect 10 had sent letters informing the Internet service providers, including CCBill, that their clients were infringing on Perfect 10's copyright and demanded removal; however, these letters did not conform to the requirements laid out in the DMCA.<sup>72</sup> The court, in an oft-cited decision, found that these imperfect notices were not sufficient to provide effective notice to require removal or to require the service provider to look further into the matter.<sup>73</sup> The court noted that the notice-and-takedown schema places "the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright."<sup>74</sup> The court further stated that names for providers that included the words "illegal" and "stolen" did not necessarily create a red flag, since those names may be intended to "increase their salacious appeal" and may not actually indicate infringement.<sup>75</sup> The court wanted to avoid a policy that unduly burdened service providers and expressly "decline[d] to shift a substantial burden from the copyright owner to the provider."<sup>76</sup>

The courts in that jurisdiction have continued to uphold and support the precedent set in that significant case.<sup>77</sup> In 2009, a California district court in the copyright dispute between UMG and Veoh said that the case "teaches that if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'"<sup>78</sup> The court noted that this deliberately created a high bar for finding the existence of red flags and that this "is yet another illustration of the principle underlying the DMCA safe harbors, that the burden is on the copyright holder, not the service provider, to identify copyright violations."<sup>79</sup>

<sup>67</sup> *Id.* (citing 17 U.S.C. § 512(c)(1)(A)(ii)).

<sup>68</sup> *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1113 (9th Cir. 2007).

<sup>69</sup> *See id.* at 1112–13; *see Urban & Quilter, supra* note 20, at 631, 635.

<sup>70</sup> *Perfect 10*, 488 F.3d at 1113.

<sup>71</sup> *Id.* at 1108.

<sup>72</sup> *Id.* at 1111–12.

<sup>73</sup> *Id.* at 1112–13.

<sup>74</sup> *Id.* at 1113.

<sup>75</sup> *Id.* at 1114.

<sup>76</sup> *Id.* at 1113.

<sup>77</sup> *See, e.g., UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1107–08 (C.D. Cal. 2009).

<sup>78</sup> *Id.* at 1108.

<sup>79</sup> *Id.* at 1111.

In 2013, the Ninth Circuit considered an appeal regarding the principles of the DMCA in a case between Universal Music Group and Veoh.<sup>80</sup> After the trial court granted summary judgment in Veoh's favor, Universal Music Group asserted on appeal that Veoh, a video sharing site similar to YouTube, should be liable for vicarious and contributory infringement.<sup>81</sup> As part of its defense, Veoh argued that the safe harbor provisions of the DMCA protected it, and the court considered what level of knowledge would be required for Veoh to be compelled to remove the infringing material or lose its safe harbor protections.<sup>82</sup> The Ninth Circuit found that "Veoh's general knowledge that it hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag."<sup>83</sup> The court further reiterated that the burden is generally on the copyright holder to identify infringing material since the copyright holder was best positioned to determine what was infringing and noted that Congress intended to create a system in which the copyright holders and service providers would cooperate to help minimize infringement.<sup>84</sup>

Courts have also adamantly insisted that the knowledge of infringement must be specific rather than general to trigger any risk of it being a red flag. The district court in *Viacom v. YouTube* stated that "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search."<sup>85</sup> In reaching this conclusion, the district court looked at previous cases that dealt directly with the DMCA and the knowledge requirements that kept to a narrow reading of the requirements.<sup>86</sup> The court also looked at analogous requirements in trademark law that required specific rather than general knowledge, even when the possibly infringing material was being made available "ubiquitously" and a generalized notice had been provided.<sup>87</sup>

This narrow reading of the red flag requirements has generally helped forward the policy of providing online service providers with certainty as to what they need to do to shelter themselves from liability for their users' actions.<sup>88</sup> But it has not prevented service providers from working with the content industry to help limit infringement through measures such as YouTube's Content ID system.<sup>89</sup> Content ID is a system created by YouTube to scan user-uploaded

<sup>80</sup> *UMG Recordings, Inc. v. Shelter Capital Partners L.L.C.*, 718 F.3d 1006, 1014 (9th Cir. 2013).

<sup>81</sup> *Id.* at 1013–14.

<sup>82</sup> *Id.* at 1013–15.

<sup>83</sup> *Id.* at 1023. Later, the court distinguished such general knowledge from actual inducement and held that a service provider would still be liable if it induced infringement, but also found that the test for inducement was not met in this case. *Id.* at 1031–33.

<sup>84</sup> *See id.* at 1021–22; *accord Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1113 (9th Cir. 2007).

<sup>85</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 525 (S.D.N.Y. 2010).

<sup>86</sup> *See id.* at 524–25 (citing *Perfect 10*, 488 F.3d at 1114, the district court's decision in *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009), and *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004)).

<sup>87</sup> *Id.* (citing *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 106–07 (2d Cir. 2010) (dealing with trademark infringement and trademark dilution when counterfeit Tiffany products were being sold on eBay)).

<sup>88</sup> This was one of the explicit goals of the DMCA. *See* H.R. Rep. No. 105-551, pt. 2, at 49–50 (1998); *see also* Kravets, *supra* note 10.

<sup>89</sup> *Content ID*, YouTube, <http://www.youtube.com/t/contentid> (last visited Oct. 6, 2013).

videos to find those that match with previously identified copyright material.<sup>90</sup> Depending on the options selected by the rights-holder, YouTube can then either help the rights-holder monetize those videos through advertisement or block those videos from the network to help minimize infringement.<sup>91</sup> According to statistics provided by YouTube, over one-third of the monetized views on YouTube come from videos identified by their Content ID system.<sup>92</sup>

### *B. Other Interpretations Favor Broad Safe Harbors*

In addition to reading the safe harbors narrowly, courts have been reluctant to impose other possible exceptions to the DMCA and have tended to read analogous safe harbors broadly. In a lawsuit against Veoh Networks, the district court stated that Veoh would not lose the protections of the safe harbor by using software to process and automatically create new files derived from the files submitted by its users.<sup>93</sup> Veoh Networks ran a website that permitted users to submit video content alongside videos provided by some of Veoh's corporate partners and Veoh itself.<sup>94</sup> Veoh described itself as an "Internet Television Network."<sup>95</sup> When a user uploaded a video to Veoh, Veoh would convert that video into the flash format and extract several images from the video, which were used for displaying results on searches and to give potential viewers an idea of the contents of the video.<sup>96</sup> Veoh's employees might also review certain videos to ensure that the descriptions were accurate and that the video was appropriately tagged, and would make changes they felt necessary to ensure this accuracy.<sup>97</sup>

Io Group, Inc., filed a lawsuit regarding clips from its copyrighted productions that had been uploaded by users to the Veoh website, despite the fact that it did not file takedown notices or otherwise inform Veoh of the possible copyright infringement prior to filing the suit.<sup>98</sup> As part of the lawsuit, Io contended that Veoh could not be protected by the safe harbors of the DMCA because it did more than store the material provided by the user.<sup>99</sup> Veoh processed the files, created new versions of the files in a different format, took still images from the files, and had employees review the files.<sup>100</sup> Io contended that this went beyond storage "at the direction of a user."<sup>101</sup> In response, the court stated clearly that companies looking for shelter under the safe harbor of 17 U.S.C.

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

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

<sup>92</sup> Jeff Bullas, *35 Mind Numbing YouTube Facts, Figures and Statistics – Infographic*, JEFFBULLAS.COM (May 23, 2012), <http://www.jeffbullas.com/2012/05/23/35-mind-numbing-youtube-facts-figures-and-statistics-infographic/>.

<sup>93</sup> *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008). This ruling is consistent with other case law. Phong Dinh, *Click Here To Share! The Impact of the Veoh Litigations on Viacom v. Youtube*, 10 N.C. J.L. & TECH. 447, 459 (2009).

<sup>94</sup> *Io Grp.*, 586 F. Supp. 2d at 1136.

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

<sup>96</sup> *Id.* at 1139–40.

<sup>97</sup> *Id.* at 1140.

<sup>98</sup> *Id.* at 1137.

<sup>99</sup> *Id.* at 1146.

<sup>100</sup> *Id.* at 1139–40.

<sup>101</sup> *Id.* at 1146 (quoting 17 U.S.C. § 512(c)(1)).

§ 512(c) were “not limited to merely storing material.”<sup>102</sup> The court reached its conclusion by examining the structure of the statute and comparing it to 17 U.S.C. § 512(a).<sup>103</sup> In particular, the court determined that employee review of the material was no bar to the protections of the safe harbor.<sup>104</sup> Nor would automatic processing of the files, if processing was “a means of facilitating user access to material on its website,” remove the protections offered by the statute.<sup>105</sup> This paved the way for a district court to find in 2011 that the use of a “standard data compression algorithm” would not endanger the protections of the safe harbor.<sup>106</sup> Some commentators have said that this ruling laid “the ground rules” for other music locker services, such as the one created by Amazon.<sup>107</sup>

That district court ruling was the result of the litigation between MP3Tunes, L.L.C., and EMI, Inc.<sup>108</sup> In this case, EMI argued that the DMCA safe harbors did not apply when dealing with sound recordings created before 1972.<sup>109</sup> EMI argued that sound recordings created prior to 1972 were covered by state copyright and by common law and that federal copyright expressly declined to preempt that protection when it was updated to provide copyright protection to sound recordings.<sup>110</sup> In looking at this as an issue of first impression, the court found that this interpretation of copyright would “eviscerate the purpose of the DMCA,” which was meant to “foster fast and robust development of the internet.”<sup>111</sup> The court thus held that hosting a sound recording created before 1972 would not breach the protections of the DMCA, and continued the line of court decisions that declined to create exceptions to the safe harbor protections.<sup>112</sup>

Courts have also been consistent in reading an analogous law with a similar safe harbor to provide broad protections to Internet service providers while leaving the openings to pierce those protections quite limited and narrow.<sup>113</sup> One part of the Communications Decency Act (“CDA”)<sup>114</sup> provides a safe harbor for Internet service providers by declaring that they are not the publisher of content provided by their users.<sup>115</sup> Courts have traditionally “treated § 230(c)

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<sup>102</sup> *Id.* at 1147.

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

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

<sup>105</sup> *Id.* at 1148.

<sup>106</sup> *Capitol Records, Inc. v. MP3Tunes, L.L.C.*, 821 F. Supp. 2d 627, 649–50 (S.D.N.Y. 2011).

<sup>107</sup> Timothy B. Lee, *Record Labels Get Hollow Victory in MP3tunes Infringement Case*, ARS TECHNICA (Aug. 22, 2011, 3:39 PM), <http://arstechnica.com/tech-policy/2011/08/record-labels-get-hollow-victory-in-mp3tunes-infringement-case/>. See generally Dinh, *supra* note 93 (noting that *Io Group* and *UMG Recordings, Inc. v. Veoh Networks Inc.* were likely to be significant to other video sharing sites and may provide support for YouTube in the ongoing litigation with Viacom).

<sup>108</sup> *Capitol Records*, 821 F. Supp. 2d at 649.

<sup>109</sup> *Id.* at 640. See *infra* Part IV.A. for case discussion.

<sup>110</sup> *Capital Records*, 821 F. Supp. 2d at 640–41.

<sup>111</sup> *Id.* at 641–42.

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

<sup>113</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–23 (9th Cir. 2003).

<sup>114</sup> 47 U.S.C. § 230 (2012).

<sup>115</sup> 47 U.S.C. § 230(c).

immunity as quite robust” in providing protection from responsibility for a wide variety of content, including defamation.<sup>116</sup> Just as one intention of the DMCA was to encourage the development of Internet service providers, Congress enacted this immunity provision in order “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”<sup>117</sup> This immunity had been unchallenged by the equitable doctrine of willful blindness and has few openings to impute liability.<sup>118</sup> The CDA, however, like the DMCA, does not and should not provide protection when the illicit content was either created or solicited by the service provider.<sup>119</sup> While the protections provided by the CDA are not perfectly analogous to those provided by the DMCA,<sup>120</sup> the interpretations of the CDA do add to the line of cases that interpret limitations to protections for service providers narrowly and view the protections themselves broadly. This trend, both for the DMCA and the CDA, helps support the policy “to promote the continued development of the Internet” by letting service providers move forward with innovative services while being able to control their liability for material provided to them.<sup>121</sup>

### C. *Willful Blindness in Viacom v. YouTube*

*Viacom v. YouTube* was the first case that directly addressed the question of whether the equitable doctrine of willful blindness could be applied to substitute for actual knowledge of infringement in order to strip an online service provider of the protections of the DMCA’s safe harbor.<sup>122</sup> In this sprawling case, Viacom and other copyright holders accused YouTube of secondary copyright infringement revolving around the video clips that YouTube hosts as the core part of its service.<sup>123</sup> YouTube is a video sharing and distribution service that was founded in 2005 and purchased by Google in 2006.<sup>124</sup> YouTube permits its users to upload video clips, then hosts the clips, and allows other users of YouTube to view them.<sup>125</sup> Before it permits any user to upload a video, it

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<sup>116</sup> *Carafano*, 339 F.3d at 1123. See also Liisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL REV. INTELL. PROP. L. 500, 501 (2009).

<sup>117</sup> 47 U.S.C. § 230(b)(2).

<sup>118</sup> See Thomas & Newman, *supra* note 116, at 507–08.

<sup>119</sup> *Id.* at 508–10.

<sup>120</sup> See *id.* at 501, 507–510. The immunity provided by the CDA specifically does not apply to intellectual property matters. 47 U.S.C. § 230(e). Since this was excluded by the CDA and the protections in the DMCA contain more limitations than those in the CDA, this could imply that Congress intended courts not to apply interpretations of one Act to the other.

<sup>121</sup> 47 U.S.C. § 230 (b)(1). An analogous policy statement dealing with the safe harbors of the DMCA is found in the statements of Senator Ashcroft. 144 CONG. REC. S4,889 (daily ed. May 14, 1998) (statement of Sen. Ashcroft).

<sup>122</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34 (2d Cir. 2012).

<sup>123</sup> *Id.* at 25–26. Viacom made several other accusations, however this note only discusses the claims of secondary liability and how it is affected by the willful blindness doctrine and the DMCA.

<sup>124</sup> *Id.* at 28.

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

requires the user to register and accept the terms of service, which, amongst other things, requires the user to avoid uploading any infringing content.<sup>126</sup>

Viacom, along with several of its affiliates, filed the original suit alleging a variety of copyright violations in March 2007.<sup>127</sup> The Football Association Premier League Limited, along with Bourne Co. Music Publishers, filed a similar class action suit in May of 2007, which the judge accepted as related.<sup>128</sup> In motions for summary judgment, the district court judge found that YouTube had properly met all of the requirements necessary to qualify for the safe harbor provisions provided by the DMCA and the plaintiffs subsequently appealed.<sup>129</sup>

In their appeal, the plaintiffs argued that the equitable doctrine of willful blindness should be applied to impute knowledge of specific infringement when the service provider “was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”<sup>130</sup> The court considered this as a matter of first impression.<sup>131</sup> Further, the court found that willful blindness could be used “in appropriate circumstances” to show sufficient knowledge under the DMCA to place the service provider’s safe harbor protections at risk.<sup>132</sup> In reaching this conclusion, it relied on the tradition that a common law practice is only overridden by statute if it “speaks directly to the question addressed by the common law.”<sup>133</sup> The court noted that the DMCA explicitly states that receiving safe harbor protection does not depend on the “service provider monitoring its service or affirmatively seeking facts indicating infringing activity.”<sup>134</sup> However, the court found that this only narrows the application of the common law doctrine of willful blindness, rather than abrogating it entirely.<sup>135</sup> The court also analogized the law of copyrights to the law of patents and trademarks, where willful blindness can be used to impute knowledge.<sup>136</sup> Therefore, it concluded that while a service provider does not need to look for infringement, the service provider is not permitted to avoid knowledge of infringement.<sup>137</sup>

In short, the Second Circuit concluded that willful blindness could support a finding that the defendant possessed knowledge of circumstances sufficient to trigger the red flag provision.<sup>138</sup> The Second Circuit remanded the matter to the

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<sup>126</sup> *Terms of Service*, YOUTUBE, <http://www.youtube.com/static?template=terms> (last visited Oct. 6, 2013). The requirement to have the legal authority to own the content is in paragraph 6. *Id.* Related terms discussing account termination and the DMCA are in paragraphs 7 and 8. *Id.*

<sup>127</sup> *Viacom*, 676 F.3d at 28.

<sup>128</sup> *Id.* at 28–29.

<sup>129</sup> *Id.* at 29.

<sup>130</sup> *Id.* at 34–35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (citation omitted)).

<sup>131</sup> *Id.* at 34.

<sup>132</sup> *Id.* at 35. The court does not specify in detail what “appropriate circumstances” means, but indicates that the district court should consider along with other factors whether the defendant made deliberate efforts to avoid knowledge. *See id.*

<sup>133</sup> *Id.* (quoting *Matar v. Dichter* 563 F.3d 9, 14 (2d Cir. 2009)).

<sup>134</sup> *Id.* (quoting 17 U.S.C. § 512(m)(1) (2012)).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

District Court for consideration of the factual question.<sup>139</sup> The district court, on another motion for summary judgment, found, as a factual matter, that Viacom failed to provide evidence that YouTube had willfully blinded itself.<sup>140</sup> However, Viacom has appealed this ruling.<sup>141</sup>

#### IV. WILLFUL BLINDNESS AND UNCERTAINTY

##### A. *The Cost of Litigation and Potential Litigation on Innovation*

Allowing willful blindness to remove the safe harbors would significantly impact the ways in which businesses that rely on safe harbors operate.<sup>142</sup> This impact should be a major concern of those examining the policy considerations surrounding the issue of applying the willful blindness doctrine to the DMCA. Although somewhat limited by the lack of requirement for service providers to monitor their networks, permitting the willful blindness doctrine to be used to impute knowledge weakens the protections provided by the safe harbors of the DMCA.<sup>143</sup> In creating the DMCA, Congress formed a careful balance between the needs of copyright holders and the needs of the technological innovators.<sup>144</sup> Congress was “loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions.”<sup>145</sup>

Yet applying the common law doctrine of willful blindness to limit the safe harbor functions of the DMCA may do precisely that. It creates another avenue for a copyright holder to attack the protections provided by the DMCA, and many copyright holders have proven willing to sue service providers that are offering useful services to the public, which some consumers may also use for copyright infringement.<sup>146</sup> Even a slight reduction in the protections provided by the DMCA introduces uncertainty for the service provider in determining when they would or would not be liable for infringement.<sup>147</sup>

Such uncertainty will make many companies more hesitant to permit users to engage in activities that may expose the service provider to liability.<sup>148</sup>

<sup>139</sup> *Id.*

<sup>140</sup> *Viacom Int’l, Inc., v. YouTube, Inc.*, No. 07-cv-2103, 2013 WL 1689071, at \*8–9 (S.D.N.Y. 2013).

<sup>141</sup> Wendy Davis, *Viacom Asks Appeals Court to Reinstate YouTube Case*, MEDIAPOST (July. 29, 2013, 7:17 PM), available at <http://www.mediapost.com/publications/article/205619/#axzz2fZQDdt68>. See also Timothy B. Lee, *Court Hands Another Defeat to Viacom in Never-Ending YouTube Lawsuit*, ARS TECHNICA (Apr. 18, 2013, 3:00 PM), <http://arstechnica.com/tech-policy/2013/04/court-hands-another-defeat-to-viacom-in-never-ending-youtube-lawsuit/>.

<sup>142</sup> See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1038 (9th Cir. 2011). See also EFF, *supra* note 51.

<sup>143</sup> See discussion *supra* Parts III.A, III.C.

<sup>144</sup> *UMG Recordings*, 667 F.3d at 1030, 1037.

<sup>145</sup> *Id.* at 130.

<sup>146</sup> See *id.* at 1037–38; *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34–35, (2d Cir. 2012); *Perfect 10, Inc. v. CCBill, L.L.C.*, 488 F.3d 1102, 1108 (9th Cir. 2007).

<sup>147</sup> Permitting the doctrine of willful blindness to remove DMCA’s protections makes it less clear when a service provider may be subject to liability by increasing the number of variables it must consider.

<sup>148</sup> See EFF, *supra* note 51; Leary, *supra* note 45, at 1141; H.R. Rep. No 105-551, pt. 2, at 49–50 (1998).

Moreover, it is likely to make many angel investors and venture capitalists, who are essential to the growth of young corporations, hesitant to invest in companies that engage in such activities.<sup>149</sup> Investors have consistently shown a preference for a clear regulatory regime over one clouded by ambiguity, and they are especially shy of regulatory or legal changes that can increase liability.<sup>150</sup> Such a change in the legal landscape would not only noticeably reduce the willingness of early-stage investments, but would also have a significant, detrimental impact on the U.S. economy as a whole.<sup>151</sup>

Investors are naturally leery of investing in small companies with a high likelihood of being sued, since the cost of litigation can drive some small, innovative companies into bankruptcy even if the company is ultimately victorious in the lawsuit.<sup>152</sup> Veoh is one example of a company that, though generally vindicated in court, was forced into bankruptcy by the expenses of litigation.<sup>153</sup> MP3Tunes provides another example.<sup>154</sup>

MP3Tunes was a music site started by Michael Robertson that sold songs from independent artists and provided a music locker service.<sup>155</sup> As a music locker service, MP3Tunes permitted users to upload songs, stored the songs for users, and allowed users to retrieve or play the files stored on their behalf on other devices.<sup>156</sup> MP3Tunes also featured a number of innovations, such as its “sideload” feature that let its users transfer certain music directly from other websites to the user’s storage area on MP3Tunes.<sup>157</sup> In order to make more efficient use of its technological resources, MP3Tunes used deduplication tech-

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<sup>149</sup> In a report funded by Google, the Booz & Company consulting firm found that increased liability and increased uncertainty were both major negative factors when angel investors and venture capitalists considered investing in a young company. MATTHEW LE MERLE ET AL., THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT 5–6 (2011), available at <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

<sup>150</sup> *Id.* One study believes that making the current copyright regulations clearer, rather than more ambiguous as liability for willful blindness might, would increase the number of potential investors for certain types of online service providers by nearly 111 percent. *Id.* at 17.

<sup>151</sup> *Id.* at 11.

Revenue from VC-backed companies accounts for 21 percent of total GDP, and employment at these companies accounts for 11 percent of all U.S. jobs. Given the key role that angels and VCs play, not only in funding new companies but also in working with them to promote their success, their continued willingness to invest is critical to the future creation and growth of new companies.

*Id.* (citation omitted).

<sup>152</sup> See, e.g., Peter Kafka, *Veoh Finally Calls It Quits: Layoffs Yesterday, Bankruptcy Filing Soon*, CNET (Feb. 11, 2010, 1:34 PM), [http://news.cnet.com/8301-1023\\_3-10452152-93.html](http://news.cnet.com/8301-1023_3-10452152-93.html); Mike Masnick, *EMI Kills Off More Innovation: MP3Tunes Declares Bankruptcy Due to “Withering” Legal Costs*, TECHDIRT (May 11, 2012, 1:00 PM), <http://www.techdirt.com/articles/20120511/11203118884/emi-kills-off-more-innovation-mp3tunes-declares-bankruptcy-due-to-withering-legal-costs.shtml>.

<sup>153</sup> See Kafka, *supra* note 152. See also discussion of the Veoh case *supra* Part III.A.

<sup>154</sup> Mike Freeman, *MP3tunes Music Locker Service Files for Bankruptcy*, SAN DIEGO UNION-TRIB., May 11, 2012, at C-1, available at <http://www.utsandiego.com/news/2012/may/11/mp3tunes-music-locker-service-files-bankruptcy/>.

<sup>155</sup> *Capital Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 633–634 (S.D.N.Y. 2011).

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

<sup>157</sup> *Id.* at 634; Lee, *supra* note 107.

niques,<sup>158</sup> which replaced duplicates of a piece of information with a reference to one single copy.<sup>159</sup> EMI sued MP3tunes in 2007 for copyright infringement.<sup>160</sup> On summary judgment, the court declared that MP3Tunes was generally protected by the safe harbors of the DMCA in its normal operations.<sup>161</sup> The court also found that the use of deduplication technology would not remove the protections of the safe harbor.<sup>162</sup> Further, the court noted that this deduplication was essentially a standard software technique that “eliminates redundant digital data” and distinguished it from the idea of a master copy.<sup>163</sup> Despite these significant legal victories, the legal costs that MP3Tunes had accrued were sufficient to force the company to file for bankruptcy.<sup>164</sup>

Permitting the doctrine of willful blindness to weaken the statutory safe harbors would tighten the regulatory grip of copyright over the technology industries. Increasing this grip can reduce both innovation and investment.<sup>165</sup> “Overregulation stifles creativity. It smothers innovation. It gives dinosaurs a veto over the future. It wastes the extraordinary opportunity for a democratic creativity that digital technology enables.”<sup>166</sup> The courts have also considered the impact of tighter regulation and found that “[t]he more artistic protection is favored, the more technological innovation may be discouraged.”<sup>167</sup> In fact, there is evidence that litigation already limits innovation and investment in innovative companies, to the point that it has led to a “venture capital ‘wasteland.’”<sup>168</sup>

<sup>158</sup> *Capital Records*, 821 F. Supp. 2d at 649–50; Peter Kafka, *Why the MP3Tunes Case Is a Big Deal You Won't Notice*, ALLTHINGS D (Aug. 23, 2011, 7:26 AM), <http://allthingsd.com/20110823/why-the-mp3tunes-case-is-a-big-deal-you-wont-notice/>.

<sup>159</sup> *Data Deduplication*, EMC GLOSSARY, <http://www.emc.com/corporate/glossary/data-deduplication.htm> (last visited Oct. 6, 2013).

<sup>160</sup> *Capital Records*, 821 F. Supp. 2d at 635.

<sup>161</sup> *Id.* at 646. Although the service was eligible for the safe harbors of the DMCA for most of the songs it stored, it did not qualify for certain select songs for which it did not properly and fully comply with the necessary takedown procedures. *Id.*

<sup>162</sup> *See id.* at 649–50. *See also* Lee, *supra* note 106.

<sup>163</sup> *Capital Records*, 821 F. Supp. 2d at 649–50 (distinguishing this case, in its exploration of the idea of a master copy, from the situation in *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 138 (2d Cir. 2008)).

<sup>164</sup> Freeman, *supra* note 153. *See also* Greg Sandoval, *MP3tunes.com Locker Service Files for Bankruptcy*, CNET (May 10, 2012, 2:12 PM), [http://news.cnet.com/8301-1023\\_3-57432129-93/mp3tunes.com-locker-service-files-for-bankruptcy-exclusive/](http://news.cnet.com/8301-1023_3-57432129-93/mp3tunes.com-locker-service-files-for-bankruptcy-exclusive/). However, EMI publicly alleged that MP3Tunes.com filed for bankruptcy protection to avoid the liabilities for which it is not fully protected by the DMCA. Greg Sandoval, *EMI Says Bankruptcy Won't Protect MP3tunes from Copyright Suit*, CNET (May 10, 2012, 4:59 PM), [http://news.cnet.com/8301-1023\\_3-57432278-93/emi-says-bankruptcy-wont-protect-mp3tunes-from-copyright-suit/](http://news.cnet.com/8301-1023_3-57432278-93/emi-says-bankruptcy-wont-protect-mp3tunes-from-copyright-suit/).

<sup>165</sup> LAWRENCE LESSIG, *FREE CULTURE* 199 (2004), available at <http://www.free-culture.cc/freeculture.pdf>.

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

<sup>167</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

<sup>168</sup> Timothy B. Lee, *Study: Label Litigation Has Produced an Innovation “Wasteland”*, ARS TECHNICA (July 26, 2012, 12:05 PM), <http://arstechnica.com/tech-policy/2012/07/study-label-litigation-has-produced-an-innovation-wasteland/>.

*B. The Difficulty of Service Providers Determining What Must Be Removed*

The difficulty in determining what is actually infringing further complicates the question of when to apply the doctrine of willful blindness. For instance, any material that is derived from a copyright work, but covered under the fair use exceptions, does not need to be removed.<sup>169</sup> In fact, in limited circumstances, a court has held a company liable for damages when it used the DMCA takedown process to have material removed that was clearly covered by fair use.<sup>170</sup> The determination that a work is actually covered by copyright, but not covered by the fair use exceptions, is a complicated one that most service providers are not equipped to make.<sup>171</sup> Moreover, even if the material is clearly copyrighted, it is not always clear that its posting is not validly authorized.<sup>172</sup>

Content producers may post sections of copyrighted material or even entire copyrighted works to various Internet sites in an effort to promote that material or the artist.<sup>173</sup> Moreover, there have been cases of DMCA takedown notices or other legal action by the legal department or other agent of a copyright holding corporation even when an agent of the marketing department of

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<sup>169</sup> Before filing a DMCA takedown notice, a copyright holder is required to consider fair use. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008). However, a “mere failure to consider fair use would be insufficient to give rise to liability under § 512(f).” *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783, 2013 WL 271673, at \*6 (N.D. Cal. Jan. 24, 2013) (order denying cross-motions for summary judgment).

<sup>170</sup> A court has found liability under section 512(f) of the DMCA for a copyright holder that attempted to use the takedown process of the DMCA primarily “as a sword to suppress publication of embarrassing content” when the copyright holder flagrantly ignored a clear fair use exception. *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004). However, another court has found that using scanning software without any human oversight can be acceptable without necessarily giving rise to liability for failing to consider fair use. *Ouellette v. Viacom Int’l, Inc.*, No. cv-10-133, 2012 WL 850921, at \*5 (D. Mont. Mar. 13, 2012).

<sup>171</sup> Part of the reason fair use can be difficult to determine at times is that there are only factors to be considered rather than a clear criteria. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106–07 (1990). See also David Nimmer, “*Fairest of Them All*” and other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 283–84 (2003); Urban & Quilter, *supra* note 20, at 630; Jonathan McIntosh, “*Buffy vs Edward*” *Remix Unfairly Removed by Lionsgate*, ARS TECHNICA (Jan 9, 2013, 7:40 PM), <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>.

<sup>172</sup> In one example, a music blog was accused of infringement despite having some evidence that its use of the material was authorized by the copyright holders. Timothy B. Lee, *ICE Admits Year-Long Seizure of Music Blog Was a Mistake*, ARS TECHNICA (Dec. 8, 2011, 3:14 PM), <http://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake/>. Similarly, some of the videos that Viacom sued YouTube over seem to have been uploaded to YouTube by marketing agencies authorized by Viacom. Wendy Davis, *YouTube Accuses Viacom of Secretly Uploading Clips*, MEDIAPOST (Mar. 18, 2010, 8:16 PM), <http://www.mediapost.com/publications/article/124549/youtube-accuses-viacom-of-secretly-uploading-clips.html#axzz2cApJzpPu>.

<sup>173</sup> Laura Sydell, *Is YouTube the New MTV?*, NPR (June 03, 2009, 11:13 AM), <http://www.npr.org/templates/story/story.php?storyId=104871526> (discussing how music companies use YouTube for talent acquisition, promotion for talent already signed with the label, and to gather data).

the same company posted the material in question.<sup>174</sup> Thus, even a properly submitted takedown notice cannot be taken as proof that the material was originally unauthorized.<sup>175</sup> There was even an incident of an agent of a company submitting a takedown notice for material posted by the content owner itself to a website owned by the content owner.<sup>176</sup> Similarly, a copyright holder may deliberately choose to overlook infringing content, at least for a time, in order to benefit from the notoriety that such exposure can bring.<sup>177</sup> This strategy of tolerating some infringement and releasing tracks freely can be part of a viral marketing campaign.<sup>178</sup> These factors, which often can only be fully determined by the copyright holder, make it exceptionally difficult for the service provider to investigate whether the material is infringing. They also make it time consuming to determine if the copyright holder may want to deliberately overlook that particular infringing material for a time.<sup>179</sup>

Since it is difficult for service providers to tell what is infringing and what is not, it is difficult for them to determine what actions could be interpreted as being willfully blind and where to draw the line that would cause them to need to investigate further. For instance, a service provider may be aware of content which is explicitly marked as illegal or stolen, but, especially in the case of salacious content, it may have been marked that way to increase its appeal, and

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<sup>174</sup> See, e.g., Anderson, *supra* note 31. Also, EMI filed takedown notices with MP3tunes.com over certain songs where “EMI authorized the free distribution of songs,” though it may have intended for users to visit only specific websites to get those songs. *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 647 (S.D.N.Y. 2011).

<sup>175</sup> The government seized a blog dealing with hip-hop music due to copyright claims; the blog owner asserted in its defense that it complied with the DMCA takedown process and that the music labels released the content in question. Timothy B. Lee, *Waiting on the RIAA, Feds Held Seized Dajaz1 Domain for Months*, ARS TECHNICA (May 4, 2012, 8:41 AM), <http://arstechnica.com/tech-policy/2012/05/waiting-on-the-riaa-feds-held-seized-dajaz1-do-main-for-months/>. Also, some blogs hosted by Google’s Blogger received takedown notices and eventually had their accounts suspended, despite having evidence that authorized marketing agents provided the allegedly infringing files to them. Anderson, *supra* note 31. See also Davis, *supra* note 172.

<sup>176</sup> *DtecNet DMCA (Copyright) Complaint to Google*, CHILLING EFFECTS (Dec. 19, 2012), available at <http://www.chillingeffects.org/notice.cgi?sID=725782#FAQID655847>. Dtec Net, on behalf of HBO, sent a takedown notice for content posted by HBO on HBO.com. *Id.* The notice does this at infringing URLs seventeen to twenty-two for Eastbound and Down. *Id.* See also Mike Masnick, *How Much Does HBO Pay MarkMonitor to Send DMCA Notices Removing Its Official Content From Google?*, TECHDIRT (Feb. 5, 2013, 11:31 AM), <http://www.techdirt.com/articles/20130205/03124421884/how-much-does-hbo-pay-markmonitor-to-send-techdmca-notices-removing-its-official-content-google.shtml>.

<sup>177</sup> Anna Katz, *Copyright in Cyberspace: Why Owners Should Bear the Burden of Identifying Infringing Materials Under the Digital Millennium Copyright Act*, 18 B.U. J. SCI. & TECH. L. 343, 359–60 (2012). Copyright owners may also benefit from certain types of derivative works and choose to ignore them even while they technically violate the copyright. Lawrence Lessig discusses this in context of Japanese doujinshi, a type of comic book, and says that some of the original creators tolerate it intentionally and others turn a blind eye because it is not worth the resources to crack down. LESSIG, *supra* note 165, at 25–27.

<sup>178</sup> See *Capital Records*, 821 F. Supp. 2d at 647; Katz, *supra* note 177, at 371.

<sup>179</sup> The only way to know if the copyright holder is deliberately overlooking it is to contact the copyright holder and ask. See Katz, *supra* note 176, at 359–60 and surrounding discussion.

such labels by themselves do not constitute red flags for infringement.<sup>180</sup> But it is possible that content labeled in that way and then ignored by the service provider may require them to investigate to avoid being declared willfully blind to a specific case of infringement.

Even the possibility that certain content might expose service providers to liability if it appeared they were willfully blind could cause a service provider to begin some basic monitoring and censoring of possibly legitimate speech.<sup>181</sup> Before the specter of willful blindness had arisen as a way to pierce the safe harbor protections, some strategists had advised service providers to reduce monitoring to ensure that they did not cross the “facts and circumstances” standard explicitly laid out in the DMCA.<sup>182</sup> But if an attack on the safe harbors through claims of willful blindness becomes possible, these companies may begin monitoring aggressively.<sup>183</sup>

Moreover, there are some actions that could appear to be willful blindness or a deliberate avoidance of knowledge, which are yet done for a valid business reason. For instance, service providers may deliberately store material encrypted in a way that the service provider itself cannot decrypt. They may do this in order to avoid knowledge of infringement or other illegal material that is stored on their network. Certainly the safe harbors will not and should not provide them protection if they induce infringement by encouraging their users to trade infringing material and structuring their services specifically to deal in infringing material.<sup>184</sup> But they may also encrypt it in that way simply to protect the privacy of more legitimate uses, such as providing services to businesses which need to deal with confidential or privileged information.<sup>185</sup> SpiderOak, for instance, is a file storage service that automatically encrypts the files it stores to protect the privacy and provide security to its clients.<sup>186</sup> A doctrine that permits willful blindness to increase the risk of liability may prevent such a service from ever developing or cause that service to shut down.<sup>187</sup>

<sup>180</sup> Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1114 (9th Cir. 2007).

<sup>181</sup> See Urban & Quilter, *supra* note 20, at 639–40.

<sup>182</sup> *Id.* See also discussion *supra* Part III.A.

<sup>183</sup> Urban & Quilter, *supra* note 20, at 640.

<sup>184</sup> One example of this was provided by Aimster, a file sharing service that used cryptography automatically. *In re Aimster Copyright Litig.*, 334 F.3d 643, 646–47 (7th Cir. 2003). Aimster specifically advertised itself as a way to get songs, which were almost invariably infringing. *Id.* at 651–52. Aimster’s obvious invitation to infringe copyrighted music and intentional actions to avoid even the ability to limit that infringement was sufficient to expose it to the potential of liability. *Id.* at 655. However, even in that opinion the court emphasized that it was not the policy “to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying non-infringing consumers the benefit of the technology.” *Id.* at 649. The court also stated directly that encryption has valid uses and that merely providing an encrypted service is not sufficient to show contributory infringement. *Id.* at 650.

<sup>185</sup> Andrew Cunningham, *SpiderOak: Dropbox for the Security Obsessive*, ARS TECHNICA (Apr. 4, 2012, 6:00 AM), <http://arstechnica.com/business/2012/04/spideroak-dropbox-for-the-security-obsessive/>.

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

<sup>187</sup> The risk of liability can cause services to never be developed or to be stripped down to remove those risks of liability. See discussion *supra* Parts II.B, IV.A.

## V. SAFE HARBORS IN FOREIGN LANDS

Examining similar and related legislation used by other countries often provides additional insights into ways to address the problem the law was meant to solve. Other nations have implemented laws to create safe harbors for service providers similar to the ones provided in the DMCA.<sup>188</sup> These laws, like the DMCA,<sup>189</sup> often implement the 1996 WIPO Copyright Treaty and, at the same time, create some form of safe harbor for online service providers.<sup>190</sup> This treaty explicitly recognizes the “need to maintain a balance between the rights of authors and the larger public interest.”<sup>191</sup> Those making and analyzing these laws also often focus on the importance of protecting innovation. For instance, while examining their own safe harbors, the Australian Government released a report titled *Australia’s Digital Economy: Future Directions* that stated “[u]ncertainty about whether newer digital economy platforms are covered by the safe harbour may interfere with the ability [of] providers of these platforms to effectively develop business models in Australia.”<sup>192</sup> This report further noted that many of the more innovative services had been developed in the United States, which had broader safe harbors for online service providers. The report suggested that increasing the safe harbors in Australia would remove barriers on businesses and provider greater certainty, which would attract further investment to Australia.<sup>193</sup>

Although several different countries have tried to address the same problems, conform to the same treaties, and have tried to balance the needs of the different stakeholders, they have attempted to strike this balance in slightly different ways.<sup>194</sup> For instance, safe harbors similar to those in the DMCA are found in the European Union in the form of the 2000 Directive on Electronic Commerce (“ECD”).<sup>195</sup> The European Union took a more horizontal approach, protecting from liability any unlawful content provided to a service provider by the user under the same standards.<sup>196</sup> This contrasts with the approach in the United States, where the DMCA provides limitations on liability only for copy-

<sup>188</sup> YiJun Tian, *WIPO Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law)*, 16 *BOND L. REV.* 186, 186–87 (2004).

<sup>189</sup> See S. REP. NO. 105-190, at 1 (1998).

<sup>190</sup> Tian, *supra* note 188, at 187.

<sup>191</sup> World Intellectual Property Organization, WIPO Copyright Treaty, Preamble, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 *I.L.M.* 65 (1997), available at [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html).

<sup>192</sup> AUSTRAL. GOV’T: DEP’T OF BROADBAND, COMM’NS AND THE DIGITAL ECON., AUSTRALIA’S DIGITAL ECONOMY: FUTURE DIRECTIONS 21 (2009), available at [http://www.archive.dbcde.gov.au/\\_\\_data/assets/pdf\\_file/0006/117681/DIGITAL\\_ECONOMY\\_FUTURE DIRECTIONS\\_FINAL\\_REPORT.pdf](http://www.archive.dbcde.gov.au/__data/assets/pdf_file/0006/117681/DIGITAL_ECONOMY_FUTURE DIRECTIONS_FINAL_REPORT.pdf).

<sup>193</sup> *Id.* at 22.

<sup>194</sup> See generally Vikrant Narayan Vasudeva, *The Notice and Takedown Procedure Under Copyright Law: Developing a Measured Approach*, 13 *U. NOTRE DAME AUSTRAL. L. REV.* 193 (2011) (providing a brief overview and comparison of the different notice and takedown regimes in different parts of the world, with emphasis on Australia).

<sup>195</sup> See generally Miquel Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 *COLUM. J.L. & ARTS* 481 (2009) (providing an overview of the ECD and comparing it with the DMCA).

<sup>196</sup> *Id.* at 482.

right, and service providers are protected against claims of defamation or other causes of action by other sections of the law that may use different standards.<sup>197</sup> While the DMCA prescribes tight limits on the forms of injunctive relief that a court may issue on a copyright matter while the service provider falls under its ambit, the ECD specifically avoids limiting injunctive options.<sup>198</sup> Where the DMCA has a specific and formal takedown process, the ECD rather prescribes a more open-ended process that has relatively few specifics about what the notice requesting a takedown must include.<sup>199</sup>

There have been cases where a court's opinion that a company does not qualify for the safe harbor protections of the ECD resulted in the company shutting down any portions of the website which did not qualify for the liability.<sup>200</sup> For instance, the website Fuzz.fr was closed after it was denied the protections of the safe harbors in France.<sup>201</sup> Fuzz.fr, owned by Bloobox Net, acted as a social news site<sup>202</sup> and hosted links submitted by users which it organized and displayed based on the links' popularity amongst the sites users.<sup>203</sup> The Law on Confidence in the Digital Economy, which is the implementation of the ECD in France, stated that publishers, as opposed to pure hosting service providers, were not eligible for safe harbor protections.<sup>204</sup> Since Fuzz.fr classified the links submitted to it and controlled the way the links were organized and presented on the site, the Paris Court of First Instance ruled that Fuzz.fr was a publisher and therefore could not be immune to liability generated by user-submitted material.<sup>205</sup> In making this ruling, the court seemed to focus on the "general structure of the site and how it ranks and displays links," rather than on any specific decisions or actions the site took regarding any particular link in question.<sup>206</sup> This lack of immunity led to the site's shutdown<sup>207</sup> and provides an example of narrow safe harbors that do not cover a particular service leading directly to the destruction of a business.

## VI. CERTAINTY, BLINDNESS, AND INVESTMENT

Eliminating any consideration of willful blindness under the DMCA and continuing to interpret the red flag provision narrowly would best balance the

<sup>197</sup> *Id.* at 483–84. The limitations on liability for defamation are provided by the Communications Decency Act, which is codified in 47 U.S.C. § 230(c)(2) (2012).

<sup>198</sup> Peguera, *supra* note 194, at 486. However, a member country may choose to limit injunctions when implementing the directive. *Id.* at 487.

<sup>199</sup> *Id.* at 490–91.

<sup>200</sup> Bradley L. Joslove & Vanessa De Spiegeleer-Delort, *Web 2.0: Aggregator Website Held Liable as Publisher*, INT'L LAW OFF. (June 26, 2008), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=4b014ec1-b334-4204-9fbd-00e05bf6db95>.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* Social news sites generally allow users to submit links to news sources and allow other users to vote on their importance and relevance.

<sup>203</sup> Michael Vatis & David Retchless, *User-Generated Content: Website Liability*, 10 E-COM. L. & POL'Y 3, 6 (2008), available at <http://www.stepto.com/assets/attachments/3634.pdf>.

<sup>204</sup> Joslove & De Spiegeleer-Delort, *supra* note 200.

<sup>205</sup> Vatis & Retchless, *supra* note 203, at 6–7.

<sup>206</sup> *Id.* at 7.

<sup>207</sup> Joslove & De Spiegeleer-Delort, *supra* note 200.

relationship between the tech industry and content creators. Copyright law in general is a delicate balance of the interests of all those that are affected by it.<sup>208</sup> The damage that would be done to Internet service providers by the uncertainty, increased liability, and increased litigation that would result from the application of the willful blindness doctrine or from a broad reading of the red flag provision substantially outweighs the small benefit to the copyright holders and the content industries that would result from shifting this balance.<sup>209</sup> Moreover, the harm that would be caused by the willful blindness doctrine to the Internet service provider industry would directly affect consumers by reducing the rate at which new, innovative services could be brought onto the market.<sup>210</sup>

As the courts have wisely noted, Congress placed the burden for protecting material primarily upon the content producers themselves.<sup>211</sup> That arrangement and the certainty that the system currently provides for a service provider operating in good faith that wishes to avoid exposure to liability, has helped new, innovative services to thrive.<sup>212</sup> This does not of course mean that any service provider that actively encourages infringement or goes out of its way to specifically facilitate infringing activity should be sheltered, and service providers that are directly participating in infringement themselves should be shut down.<sup>213</sup>

It is of great importance to ensure that the creators of music, art, film, literature, and other works have a way to exercise some control over their creations and to gain compensation for their work. Copyright is an effective vehicle for managing both. But the main purpose of copyright historically has been and should remain the furtherance of the public good.<sup>214</sup> Copyright law best serves the public good by maintaining appropriate balances.<sup>215</sup> For instance, it grants the protections of copyright to a creator so they can earn compensation for their work, but only for a limited time since many creative works are built on prior creative works. Indeed, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout.”<sup>216</sup>

Similarly, the DMCA does and must grant copyright holders an effective way to limit infringement and help them ensure they can earn remuneration for their creative works. But it must do so in a way that is balanced with protections for companies and institutions that provide valuable services on the

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<sup>208</sup> As just one example, the Supreme Court has stated that copyright “creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.” *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

<sup>209</sup> These damages include difficulties in getting investments as well as the expenses that such litigation or settlements would directly cause. *See* discussion *supra* Parts II.B, IV.A.

<sup>210</sup> *See* Kravets, *supra* note 10. *See also* EFF, *supra* note 51.

<sup>211</sup> *See* discussion *supra* Part III.A.

<sup>212</sup> *See* discussion *supra* Part II.B.

<sup>213</sup> It is fully proper, justified, and perhaps necessary to punish true piracy. LESSIG, *supra* note 164, at 10.

<sup>214</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431–32 (1984).

<sup>215</sup> LESSIG, *supra* note 164, at 10. *See also* *Stewart v. Abend*, 495 U.S. 207, 228 (1990); H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.).

<sup>216</sup> *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845).

Internet. Placing a heavy burden for preventing infringement on service providers would have a chilling effect on the market for investing in Internet services.<sup>217</sup> Many useful companies would likely never be formed due to fear of the liability they would have. Others would be brought into existence, but in a stunted and twisted form designed to limit the activities of their users to prevent any possibility of liability for infringement.<sup>218</sup>

In a market where companies were ruled by the fear of crushing copyright liability, YouTube may never have been formed. While YouTube does, by its nature, make certain infringing uses easier, it also provides a platform which has been used by politicians and pundits to help distribute their messages, content producers to help legitimately promote their products, and end-users to simply express themselves.<sup>219</sup> Similarly, a platform like WordPress which makes it simple for anyone to set up a blog to share information, express their opinions, or promote a position may never have come into being.<sup>220</sup> Other websites that exist to distribute their own content would likely exist, but would encourage their users to be simply passive consumers rather than active participants, which join the conversation by posting their own comments that may contain multi-media elements and have the potential to violate someone's copyright.

Even a small increase in the risk of liability may cause service providers to more aggressively filter and preemptively remove content.<sup>221</sup> This could cause legitimate speech to be stifled.<sup>222</sup> There have already been many cases of a service provider incorrectly identifying material as being infringing when it is not and thus silencing, at least temporarily, someone trying to exercise his right to free speech.<sup>223</sup> This has happened in some cases where the speech in question was a political discussion intended to sway voters before an election, and

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<sup>217</sup> One study conducted interviews of venture capitalists and found that nearly all said removing the safe harbors currently in place would have a negative impact on investment. LE MERLE ET AL., *supra* note 149, at 19. While permitting willful blindness to strip a company of its protection is far from entirely removing them, it certainly creates a major exception and weakens the protection afforded by the safe harbors of the DMCA.

<sup>218</sup> Some companies in other countries with different safe harbors have policies of monitoring and preapproving any comments their users may make in their forums in an effort to minimize liability. See Drew Cullen, *It's Bloody Hard to Run a Forum (in Sweden)*, THE REGISTER (Mar. 8, 2002, 11:53 PM), [http://www.theregister.co.uk/2002/03/08/its\\_bloody\\_hard\\_to\\_run/](http://www.theregister.co.uk/2002/03/08/its_bloody_hard_to_run/) (discussing the moderation used by some forum operators in Sweden in order to limit their liability). Aereo, a company that allows users to tune into broadcast television over the internet, chose to use one antenna per customer rather than one more powerful antenna that could record all broadcast television precisely in an attempt to comply with the copyright law as interpreted by previous courts. Empson, *supra* note 52.

<sup>219</sup> See, e.g., Meryl K. Evans, *34 Ways to Use YouTube for Business*, GIGAOM (July 28, 2009, 9:00 AM), <http://gigaom.com/2009/07/28/34-ways-to-use-youtube-for-business/>.

<sup>220</sup> *About Us*, WORDPRESS, <http://en.wordpress.com/about/> (last visited Oct. 6, 2013).

<sup>221</sup> See Cullen, *supra* note 217.

<sup>222</sup> See David Abrams, *More Chilling than the DMCA – Automated Takedowns*, CHILLING EFFECTS CLEARINGHOUSE (Mar. 17, 2010), <http://www.chillingeffects.org/weather.cgi?WeatherID=634>.

<sup>223</sup> See Mike Masnick, *Insanity: Romney's Ad Featuring Obama Singing Al Green Shut Down Via Copyright Claim*, TECHDIRT (July 17, 2012, 8:18 AM), <http://www.techdirt.com/articles/20120717/02364219725/insanity-romneys-ad-featuring-obama-singing-al-green-shut-down-via-copyright-claim.shtml>.

thus time sensitive so that even brief unavailability or reduced availability could have an impact on the usefulness of the material.<sup>224</sup> There have also been many cases of content creators mistakenly identifying innocent content as being infringing,<sup>225</sup> especially when those content creators are given tools to remove content that bypass the formalities in place under the DMCA.<sup>226</sup> Such cases, which can make legitimate content harder to find and silence a voice trying to express itself, would likely be more common if it became easier for a service provider to lose the protections of the DMCA's safe harbor.

It would be a dramatic loss to the public to have a forum like the Internet become less amenable to the average user expressing his or her thoughts, beliefs, and opinions. It would be an even more dramatic loss to the public to have service providers stop providing innovative services, and it would be the small, innovative companies that are pushing the envelope that would suffer the most from a more restrictive environment.<sup>227</sup> Additionally, it would be a major loss to the economy to have the growth of services on the Internet and the growth of Internet companies stunted. The Internet has proven to be a massive driver of the economy and creator of jobs.<sup>228</sup> It also has secondary effects on the market by making other activities, which used to be difficult, much easier than they were before.<sup>229</sup>

Furthermore, advances in technology often create new markets for content that were not available before.<sup>230</sup> It was the development of the printing press that both made the mass production of books possible and the first copyright laws necessary.<sup>231</sup> The development of the records and cassette tapes created the market for recorded music at the same time it made mass piracy of music possible.<sup>232</sup> The development of video cassettes followed by DVDs, Blu-Rays, and legitimate digital film distribution created the market for home videos, which is now a major component of movie studio revenues, even though it made movie piracy possible.<sup>233</sup> Many of these new technologies were greeted

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

<sup>225</sup> One study suggests that as much as thirty-one percent of takedown notices involved material that would have presented "significant questions related to the underlying copyright claim" due to issues such as a fair use defense or the involvement non-copyrightable material. Urban & Quilter, *supra* note 20, at 667.

<sup>226</sup> Abrams, *supra* note 222.

<sup>227</sup> Small, newly formed companies are the most in need of capital, which is harder to find in the face of greater risks of liability and greater uncertainty. *See supra* notes 148–50 and accompanying text.

<sup>228</sup> A study by the McKinsey Global Institute found that the "the Internet accounts for, on average, 3.4 percent of GDP" in certain mature economies, and that in some countries "the Internet accounted for 10 percent of GDP growth over the past 15 years." MATTHIEU PÉLIS-SIÉ DU RAUSAS ET AL., INTERNET MATTERS: THE NET'S SWEEPING IMPACT ON GROWTH, JOBS, AND PROSPERITY 2 (2011), available at [http://www.mckinsey.com/features/sizing\\_the\\_internet\\_economy](http://www.mckinsey.com/features/sizing_the_internet_economy).

<sup>229</sup> *See id.* at 2–3.

<sup>230</sup> BOYLE, *supra* note 2, at 63–64 (discussing the creation of new markets through new technologies for reproduction and distribution, focusing on the example of videocassettes).

<sup>231</sup> *Id.* at 61.

<sup>232</sup> LESSIG, *supra* note 164, at 69.

<sup>233</sup> *See* BOYLE, *supra* note 2, at 64; Mike Snider, *Blu-ray Grows, But DVD Slide Nips Home Video Sales*, USA TODAY (Jan. 9, 2012, 8:33 PM), <http://usatoday30.usatoday.com/tech/news/story/2012-01-10/blu-ray-sales-2011/52473310/1>.

by lawsuits, legislation, or both in order to control them and control their impact on copyright infringement.<sup>234</sup> Such evolutions of the law are necessary and infringement should be minimized. But efforts to control infringement should always be balanced with the need to also protect the nascent technology and should be created with the knowledge that history shows that technology frequently creates new opportunities and new markets for content creators, even as it makes infringement and unauthorized use easier.<sup>235</sup>

Therefore, while the protections the DMCA gives to copyright holders should be strong, the protections given to service providers should also remain strong and should not be weakened by the introduction of common law doctrines or expansive readings of the ways in which such protections can be lost. This balancing would provide reasonable tools to copyright holders while protecting emerging enterprises and ensuring the benefits of the advances in technology to the public at large. This balancing is also the best way to protect the economic benefits that come from an ever more useful Internet filled with innovative service providers willing to try new service models, while still providing a reasonable level of protection for copyright holders and the content industry.

## VII. CONCLUSION

The Digital Millennium Copyright Act was meant as a compromise between the technology industries and copyright industries, and it walks a line attempting to balance the needs of both industries while also respecting the concerns of the public. One crucial way it maintains this equilibrium is by granting copyright holders a swift and expedient way to remove infringing content from online service providers while providing a means by which those online service providers can be assured of a safe harbor from the exposure to legal liability. This balance has benefitted both industries, and has been seen as so crucial that some have credited it with saving the web. Without these safe harbors, many online service providers, which play a vital role both in facilitating public communication and in advancing the digital economy, would likely have withered away, or survived only in a shrunken form evolved specifically to avoid the types of liability that can kill a small startup.

Many companies that were found by courts to fall outside these safe harbors suffered exactly that fate. Some of them indeed should have. There is no room in a law-abiding society for a company that directly and intentionally encourages its users to disregard copyright and that has little or no other purpose than to facilitate infringement. Yet, these safe harbors have allowed many valuable and useful service providers to thrive without fear of liability. Allowing the equitable doctrine of willful blindness to breach safe harbors would reduce these vital protections, and reduce the certainty and confidence with which service providers may act. Creating uncertainty can, in some ways, be worse than the actual liability to which service providers could be exposed. This is because the danger of litigation and liability will cause Internet businesses and their investors to become unnecessarily cautious, which reduces

<sup>234</sup> BOYLE, *supra* note 2, at 63–64.

<sup>235</sup> *See id.* at 64–65.

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experimentation and reduces innovation. Moreover, this would go against the judicial trend of granting the service providers broad protection and could compel service providers to begin censoring their own users to avoid the risk of being declared willfully blind and thus open to liability. That would go against the policies announced by those prior courts granting broad protection to service providers and against the policies announced in the congressional debates leading up to the passing of the DMCA. In order to properly maintain the balance, there should be no circumstances under which the doctrine of willful blindness is applied to limit the protections of the DMCA's safe harbors.