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Copyright and Social Media: A Tale of Legislative Abdication

Diane Leenheer Zimmerman*

Social media platforms, their users and commercial content providers are like the Hatfields and the McCoys: it is war out there, and new arenas of combat keep popping up with all the vigor of noxious weeds in the vegetable garden. Just looking at copyright (trademarks are another subject of dispute, one this brief paper will not address), we see social media sites laying expansive claim to the copyrights of their users;¹ the content industry trying, through force or persuasion, to shift onto social media platforms (and Internet service providers (ISPs) generally) significant, indeed primary, responsibility for copyright enforcement; and commercial players, who have come to see social networks as valuable platforms for their own content, eying citizen participants not only as potential copyright thieves, but as competitors for

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1. *Statement of Rights and Responsibilities*, FACEBOOK (Nov. 15, 2013), <https://www.facebook.com/legal/terms> (Similarly, the terms of service for Facebook provide that “[f]or content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.”); *Myspace Services Terms of Use Agreement*, MYSPACE (May 15, 2014), <https://myspace.com/pages/terms> (Myspace’s terms of service states the following: “You grant us broad rights to use and exploit Content you post or make available via the Myspace Services, your profile and activity information, and your name, persona and likeness, as more fully explained below. You will not be entitled to compensation or attribution even if we or others profit from such use. However, you remain the owner and fully responsible for your Content and for ensuring that its use in connection with the Myspace Services do not violate any third party rights or any law. Your right to use Myspace Content, User Content and Third Party Content is very limited and revocable.”).

valuable viewer eyeballs. You will not be surprised to learn that the fiercest fights are duked out on behalf of big content providers in legislatures, courts and during trade negotiations.

For that reason, the focus of this article will be on what I call DMCA 2.0. It will begin by discussing the Digital Millennium Copyright Act (DMCA)² and why that statute, passed in 1998 to shore up the enforceability of copyright online by protecting content providers' ability to engage in forms of technological self-help against online copyright infringers, has been problematic. Part II describes largely unsuccessful efforts in the form of statutes and trade agreements to shore up the DMCA. Part III turns to the latest salvo, the adoption of "voluntary agreements" whereby content owners and ISPs, in particular social media platforms, join forces to stem infringement. The final section lays out the difficulties with the voluntary solution and suggests that legislators have abdicated their responsibility to maintain a fair balance between rights of social network users and commercial content providers.

I. The DMCA

Copyright has traditionally depended largely on voluntary compliance and civil litigation to maintain relative stability between owners and users. This system worked well in the era of hard copy, where infringement tended to require considerable and expensive infrastructure and where the end product had somehow to be brought, fairly transparently, into the marketplace. Once personal copying technologies such as photocopiers and videocassette recorders became widely available, infringement was harder to detect and pursue. The advent of the Internet was perceived by the copyright industries as having put the problem of infringement beyond the capacity of existing copyright law to control. The industries decided that they themselves needed to use technology proactively to limit access to protected works in electronic form and to control the ability of users with a computer to copy and

2. Digital Millennium Copyright Act, 17 U.S.C. § 512, §§ 1201-1204 (2012).

distribute the works at will.³ By making it illegal for users to hack around access controls,⁴ or to make and market technologies that would enable the public to defeat methods used by owners to protect their content,⁵ the DCMA was intended to make it possible for owners to prevent infringement without the continual intervention of the courts.

Although the United States is still trying to convince its trading partners to introduce their own versions of the DMCA into their legal systems,⁶ on the home front, wide agreement exists that the legislation has been less than successful. First of all, digital rights management technologies have been unpopular with the public⁷ and sometimes quite problematic in their consequences.⁸ They are also like caviar to hackers.⁹

A further source of difficulty from the perspective of the content industries resides in the fact that, as a part of the same legislation, Congress created a number of so-called “safe harbor” provisions to protect ISPs against damages arising from content transmitted or posted on websites by other

3. The self-help strategy is discussed in Diane L. Zimmerman, *Living Without Copyright in a Digital World*, 70 ALB. L. REV. 1375, 1378-81 (2007).

4. See 17 U.S.C. § 1201(a).

5. 17 U.S.C. § 1201(b) (these technologies are commonly known as digital rights management tools or DRMs).

6. See Secret Trans-Pacific Partnership Agreement, Aug. 30, 2013, available at <http://wikileaks.org/tpp/> [hereinafter TPP] (exploring the controversy over the IP provisions in the TPP, a secretly negotiated trade pact, the contents of which we learned thanks to Wikileaks).

7. See Macworld Staff, *iTunes Store and DRM-Free Music: What You Need to Know*, MACWORLD (May 15, 2014), http://www.macworld.com/article/1138000/drm_faq.html (a major breakthrough occurred when all the major record labels agreed to allow songs to be sold without DRMs).

8. See Bob Brown, *Sony BMG Rootkit Scandal: 5 Years Later*, NETWORKWORLD (Nov. 2, 2010), <http://www.networkworld.com/news/2010/110110-sonybm-g-rootkit-fsecure-drm.html> (a DRM used by Sony to protect its music against copying opened a window in purchaser's computers that allowed malware to infiltrate them. It caused a major scandal).

9. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 303 (S.D.N.Y. 2000), *aff'd sub. nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (see the lower court's decision for the facts). (One of the first challenges to the DMCA, the case involved a hack to the DRM used to restrict access to digital video recordings. The defendants in the case argued that they needed to get around the DRM to enable them to watch movies on computers using Linux operating systems.)

parties.¹⁰ The terms for eligibility vary with the kind of ISP, but all must have a publicly stated policy that allows them to terminate account holders and subscribers for repeated instances of illicit content – or as I like to think of it, copyright recidivism.¹¹ All ISPs must also agree to “accommodate” something called standard technology measures (ones that allow copyright owners “to identify or protect” their intellectual property).¹²

ISPs that do not host content, but merely transmit it, receive the broadest protection.¹³ Because peer-to-peer file sharing occurs on these networks, the burden of tracking down participants, identifying them, and suing them has fallen almost entirely on the content owners. Pursuing remedies has proven expensive and has also resulted in truly dreadful public relations. Law suits against individuals – who are likely to be the industry’s customer base as well – have not won friends for large content owners.¹⁴

10. See S. REP. NO. 105-190, at 8 (1998). (The purpose was to avoid underinvestment in Internet infrastructure by removing the spectre of secondary liability for ISPs based on the activities of their users).

11. 17 U.S.C. § 512(i)(1)(A).

12. *Id.* § 512(i)(1)(B).

13. *Id.* § 512(j) (they have to find the infringer, get a subpoena to require the ISP to identify him or her, prove that infringement has occurred, and only then might a court enjoin the ISP from providing service to the individual or entity under).

14. This of course does not mean owners will not sue consumers. Makers of the award-winning film, *The Hurt Locker*, sued more than 24,500 individuals in 2011 for downloading the movie. See Sarah Jacobsson Purewal, ‘Hurt Locker’ Lawsuit Targets 24,583 BitTorrent Users, PC WORLD (May 24, 2011, 8:07 AM), http://www.pcworld.com/article/228519/Hurt_Locker_Lawsuit_Targets_24583_BitTorrent_Users.html. The action was terminated after an unknown number of settlements, only to have the plaintiffs file suit in Florida against 2,512 more people. See Sarah Jacobsson Purewal, ‘Hurt Locker’ Studio Sues 2,514 Over Copyright Infringement, PC WORLD (Apr. 24, 2012, 7:41 AM), http://www.pcworld.com/article/254381/hurt_locker_sue_2_514_over_copyright_infringement.html. More recently, the makers have sued individuals who allegedly downloaded the film *Dallas Buyers Club*. See Ernesto Van Der Sar, *Dallas Buyers Club Sues BitTorrent Pirates Citing Oscar Wins*, TORRENTFREAK (Mar. 12, 2014), <https://torrentfreak.com/dallas-buyers-club-sues-bittorrent-pirates-citing-oscar-wins-140312/>. ISPs that make peer-to-peer file sharing possible have agreed to participate in something called the Copyright Alert program. See *What is a Copyright Alert?*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert->

For those ISPs that host user content – and that includes social media sites – and for search engines, the system works somewhat differently. Such ISPs, upon receipt of a proper notice from the content owners of a specific instance of infringing content posted on the site, must act promptly to take it down.¹⁵ The notice and takedown process has turned out to be expensive for both sides: just to give one example, Google receives, and must act on, in excess of 6 million take-down notices a week.¹⁶ Also, material taken down in one place frequently pops up in another, creating what is generally referred to as the “Whack-a-Mole” problem – a need to send notices over and over about the same content.¹⁷

Absent a properly drafted takedown notice, ISPs subject to that scheme pretty much have to be hit over the head with evidence that a user has posted a specific infringing work for the ISP to have any independent duty to take down infringing content. The statute does contain what is called a “red flag” provision that says the ISP must act on its own if it has actual knowledge of the presence of infringing content, or is aware of “facts or circumstances from which infringing activity is apparent.”¹⁸ Plaintiffs, including most notably Viacom, spent years trying to convince courts to adopt theories that would deprive ISPs of their statutory immunity, including the argument that an ISP with general awareness of the presence (indeed prevalence) of infringing content on its site has met the “red flag” test and must proactively remove it. The push by Viacom finally faltered, and its suit against YouTube settled,

system/what-is-a-copyright-alert/http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/ (last visited Mar. 17, 2015). For more information about Copyright Alert, see *infra* notes 45-47 and accompanying text.

15. 17 U.S.C. § 512(d)(3) (search engines are required to disable access to infringing content upon receipt of notice).

16. Since 2011, Google has received almost 24 million takedown requests. *Google Transparency Report*, GOOGLE (Mar. 25, 2014), <https://www.google.com/transparencyreport/removals/copyright>.

17. See *Whac-a-Mole*, WIKIPEDIA (Jan 8, 2015), <http://en.wikipedia.org/wiki/Whac-a-Mole>. Whac-a-mole is a popular game. But in colloquial use, the term Whack-a-Mole refers to “a repetitious and futile task . . . [I]n computing and networking . . . , it refers to the process of fending off recurring spammers, vandals or miscreants.” *Id.*

18. 17 U.S.C. § 512(c)(1)(A)(ii).

after the district court granted summary judgment to the defendant for a second time.¹⁹ Given the structure and purpose of Section 512, judges have been – correctly, I would assert – reluctant to force ISPs, including social network platforms, to take over a greater part of the burden of enforcing copyright.

On the other hand, as already noted, if an ISP receives repeated notices that the same user has posted infringing material, it is obligated under the statute at some point to terminate the subscriber.²⁰ This provision is increasingly seen as problematic. Obviously, ISPs are not anxious to cut off their paying customers. But more importantly, because so much of our communicatory lives now take place on the Internet, disabling the ability of individuals to use e-mail, conduct searches, and post or access content raises serious free speech concerns. Anyone who has experienced a loss of Internet service as a result of storm damage or technical difficulties knows well how difficult both work and social communication can be for the subscriber and for the people who expect to be able to reach him or her at an e-mail address. The experience in France offers an example that makes this point. The French legislature passed a statute, called the HADOPI law, after the entity created to administer it, that required ISPs to cut users who infringed for the third time off of the Internet.²¹ The law

19. *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013). On remand from the Second Circuit, the district court was asked to determine, among other things, whether the evidence showed that YouTube had knowledge of specific infringing materials, had “willfully blinded” itself to specific infringements, or had a “right and ability to control” infringing activity within the meaning of section 512. *Id.* The court concluded that Viacom could not prove knowledge, and that failure to search for infringing material based on a general awareness of its existence did not constitute “willful blindness.” *Id.* at 115-17. As for the “right and ability to control,” the court concluded that mere “knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit, the provider must influence or participate in the infringement.” *Id.* at 118.

20. 17 U.S.C. § 512(i)(1)(A).

21. HADOPI stands for the Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet. See *Hadopi*, HADOPI (2012), <http://www.hadopi.fr/en>. For original title and text of law, see Lois 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet [Law 2009-1311 of October 28, 2009 Relating to Penal Protection of Literary and Artistic Property on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Oct. 29, 2009, at 183.

cost millions to administer²² and reportedly resulted in one court ordering one 15 day suspension of service.²³ After a year of this, the cut-off provision was repealed.²⁴

II. More Statutes? More Treaties?

What to do? The United States, which has been particularly concerned about protecting its major content providers, especially the music and motion picture industries, tried two approaches: first, to pass more domestic statutes that add even more stringent enforcement tools; second, to champion trade agreements which, once ratified, would mandate Congress to make the desired statutory changes (and would bring other countries into closer conformity with U.S. law).

Neither approach turned out to be easy. Congress first tried to pass a statute that would have required ISPs to cut off access to sites that harbored infringing content.²⁵ After

22. Siraj Dato, *France Drops Controversial 'Hadopi Law' After Spending Millions*, GUARDIAN (July 9, 2013, 11:09 EDT), <http://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy>. One source said that the actual figure was €12 million. See *Hadopi "Failure" a Warning for the UK?*, 1709 BLOG (Aug. 8, 2012), <http://the1709blog.blogspot.com/2012/08/hadopi-failure-warning-for-uk.html>. See also Enigmax, *Three Strikes Anti-Piracy Budget "Too Expensive to Justify" Says Minister* (Aug. 3, 2012), <http://torrentfreak.com/three-strikes-anti-piracy-budget-too-expensive-to-justify-says-minister-120603/> (attributing that figure to The French Minister of Culture and Communication Aurélie Filippetti). See generally Christophe Geiger, *Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach* (Max Planck Inst. for Innovation and Competition Research Paper No. 14-01, 2014) forthcoming EDWARD ELGAR, RESEARCH HANDBOOK ON THE CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY (P. Torremans eds.) (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382603 (discussing the graduated response approach and HADOPI in particular).

23. Dato, *supra* note 22.

24. *Publication of the Decree Removing the Additional Penalty of Suspension of Access to the Internet*, CULTURE COMM'N (Sept. 7, 2013, 11:30), http://translate.google.com.au/translate?sl=fr&tl=en&prev=_t&hl=en&ie=UTF&u=http://www.culturecommunication.gouv.fr/Espace-Presse/Communiqués/Publication-du-decret-supprimant-la-peine-complémentaire-de-la-suspension-d-acces-a-Internet.

25. The bills were entitled the Stop Online Piracy Act and Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011. H.R. 3621, 112th Cong. (2011) [hereinafter Stop Online

massive protests by the public and by the Internet community,²⁶ Congress dropped the attempt to enact the Stop Online Piracy Act or SOPA and its Senate analog, the Protect IP Act or PIPA.²⁷ There have also been efforts to export the DMCA or substantially similar legislation (whatever its drawbacks), and those have not fared well either. As already noted, France's three strikes notice-and-take-down scheme has been scaled back decisively.²⁸ The Trans-pacific Partnership Agreement (TPP),²⁹ a secretly negotiated document that would require its participants to adopt DMCA-like legislation, has failed thus far to reach completion, partly because of resistance by several countries to the intellectual property provisions,³⁰ and a growing public outcry.³¹

A second, secretly negotiated, treaty that would require expanded enforcement powers, including provisions similar to those in the defeated SOPA and PIPA, has failed thus far to gain traction as well.³² The Anti-Counterfeiting Trade

Piracy Act]; S. 968, 112th Cong. (2011).

26. David A. Fahrenthold, *SOPA Protests Shut Down Websites*, WASH. POST (Jan. 18, 2012), http://www.washingtonpost.com/politics/sopa-protests-to-shut-down-web-sites/2012/01/17/gIQA4WYl6P_story.html.

27. See Timothy B. Lee, *Internet Wins: SOPA and PIPA Both Shelved*, ARS TECHNICA (Jan. 20, 2012, 11:21 AM), <http://arstechnica.com/tech-policy/2012/01/internet-wins-sopa-and-pipa-both-shelved/>.

28. See *supra* notes 21-24 and accompanying text. A recent study found that HADOPI actually was not an effective deterrent to illegal downloading. Michael A. Arnold et al., *Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law*, (Univ. of DE, Alfred Lerner Coll. of Bus. & Econ., Dep't of Econ., Working Paper No. 2014-07, 2014).

29. The text of the intellectual property part of the draft was made available by Wikileaks in November 2013. See TPP, *supra* note 6.

30. The line-up on various provisions of the draft is indicated in the copy released by Wikileaks. *Id.*; see also Maira Sutton, *Obama Nominates Former SOPA Lobbyist to Help Lead TPP Negotiations*, ELEC. FRONTIER FOUND. (Mar. 3, 2014), <https://www.eff.org/deeplinks/2014/03/obama-nominates-former-sopa-lobbyist-help-lead-tpp-negotiations> (discussing the problems dogging the treaty).

31. Public Citizen's Global Trade Watch, *176 Million Workers Call to Stop TPP Negotiations*, EYES ON TRADE (Nov. 12, 2014), <http://citizen.typepad.com/eyesontrade/2014/11/176-million-workers-stop-the-TPP.html>.

32. *Anti-Counterfeiting Trade Agreement*, ELEC. FRONTIER FOUND. (Aug. 5, 2013), <https://www.eff.org/issues/acta> (describing the negotiating process).

Agreement, or ACTA,³³ goes well beyond the TPP to require enforcement measures that would provide “expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringement,”³⁴ as well as criminal sanctions for infringement on “a commercial scale.”³⁵ Onerous civil damage provisions would also be required.³⁶ Although what is meant by “expeditious remedies” has not been spelled out, the provision has been widely interpreted as an invitation to its signatories to require ISPs to engage in both website blocking and deep packet filtering. And because “commercial scale” is not defined, criminal sanctions could well apply to informal peer-to-peer networks involving no profit-making activity. Furthermore, the treaty calls for a committee to be formed of members appointed from signatory countries to oversee implementation of the treaty.³⁷

ACTA stalled out when the European Parliament refused to ratify it by a vote of 478 against to 39 in favor.³⁸ Objections included interference with data privacy and with freedom of speech and communication. As with SOPA and PIPA, extensive public protests seem to have played a role in the result.³⁹

But content owners do not give up easily. If legislation and

33. The Anti-Counterfeiting Trade Agreement, Oct. 1, 2011, 50 I.L.M. 243-57 [hereinafter ACTA], available at http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

34. *Id.* art. 27, ¶ 1.

35. *Id.* art. 23, ¶ 1.

36. A plaintiff is allowed to collect “the value of the infringed goods or services measured by the market price, or the suggested retail price.” *Id.* art. 9, ¶ 1. A similar provision can be found in the draft of the TPP. See TPP, *supra* note 6, at QQ.H.4(2ter); see also Lee, *supra* note 27.

37. ACTA, *supra* note 33, ch. V.

38. David Meyer, *ACTA Rejected by Europe, Leaving Copyright Treaty Near Dead*, ZDNET (July 4, 2011), <http://www.zdnet.com/acta-rejected-by-europe-leaving-copyright-treaty-near-dead-7000000255/>. The treaty could nevertheless become effective in other signatory countries if ratified by six of them. *Anti-Counterfeiting Trade Agreement (ACTA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, <http://www.ustr.gov/acta> (last visited Mar. 19, 2015).

39. Eric Kirschbaum & Inna Ivanova, *Protests Erupt Across Europe Against Web Piracy Treaty*, REUTERS (Feb. 11, 2012), <http://www.reuters.com/article/2012/02/11/us-europe-protest-acta-idUSTRE81A0I120120211>.

treaties are a tough sell, why not try to achieve the same ends by means of private agreements? But why, you might ask, would ISPs agree to take on responsibilities that the law seems unwilling or unable to impose on them? One can only guess at the reasons, but an obvious suspect is the prospect of costly litigation – particularly when platforms like Facebook and Twitter operate across borders and are subject to a variety of potentially inconsistent national laws.⁴⁰ And then there is that oldie but goodie, the governmental “raised eyebrow.” By that, I mean explicit official encouragement of private agreements, backed by an implicit threat to enact more legislation if “voluntary” efforts do not satisfy the content owners’ needs.

The proverbial eyebrow has been raised in the United States by several members of Congress who lauded voluntary agreements during hearings about the problem of piracy.⁴¹ Similar sentiments appear in a report by the Department of Commerce’s Internet Policy Task Force.⁴² ACTA, too, expressly

40. For example, in 2012, a German court found YouTube liable for infringing material posted by its users under circumstances that would likely have not resulted in liability in the United States in light of its expansive safe harbor provisions protecting hosting websites. Landgericht Hamburg [LG Hamburg] [Hamburg Regional Court] Apr. 20, 2012 (Ger.). An English translation of the case is available at <http://gmriccio.wordpress.com/2012/04/29/hamburg-district-court-gema-v-youtube-english-translation/>. As of late 2014, the litigants still had not reached a settlement on the royalties Google, which owns YouTube, now owes to GEMA. Philip Stade. “*This Video Is Not Available in Germany: Online Discourses on the German Collecting Society GEMA and YouTube*,” 19 FIRST MONDAY 10 (2014), available at <http://firstmonday.org/ojs/index.php/fm/article/view/5548/4127>. GEMA has sought review before the Arbitration Board of the German Patent and Trademark Office. *Id.*

41. For example, Rep. Howard Coble, Chair of the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet, is quoted as saying: “[P]rivate sector actions are oftentimes more efficient and effective than some regulations handed down by the federal government.” Tamlin H. Bason, *Copyrights/Hearings: House Subcommittee Examines Role of Industry Agreements in Curbing Online Piracy*, 86 PAT. TRADEMARK & COPYRIGHT J. (BNA) 2130 (2013).

42. A report states: “In the search for appropriate solutions, it is important to note that legislation may not be the sole or the best avenue available. Indeed, no single solution is likely to be enough; a combination of approaches will be needed to create an environment that can sustain a thriving market for legitimate content. Voluntary initiatives and best practices, including those involving cooperation among right holders and intermediaries, offer great promise and continue to be supported as an

encourages the use of “cooperative efforts” within the business community as a way to solve infringement problems.⁴³ All of this praise for private solutions is worth paying attention to because, as it turns out, the voluntary solution approach is the current poster child for digital copyright reform. Forget trying to address the problem through carefully thought-out legislation that attends to and attempts to balance the rights of both owners and of the public; instead, encourage the content industry and the ISPs to create a copyright enforcement system that works for them – and hope the public interest does not get lost in the process. The invitation has been accepted and new extra-legal schemes have emerged quite rapidly.

Two major results of the turn toward private agreements have been the Copyright Alert System and the Content ID system.⁴⁴ The Copyright Alert System is a so-called “graduated response” protocol for dealing with infringements that take place largely on peer-to-peer networks for which the ISP acts as a pipeline rather than as a hosting entity.⁴⁵ It calls for an escalating series of warnings sent to the holders of the relevant IP addresses, culminating by the sixth in some form of “mitigation” measure to be determined, apparently, by the ISP.⁴⁶ Notably absent in the discussion of sanctions is any talk of the unpopular remedy of cutting subscribers off of the Internet.⁴⁷

approach by the Administration.” INTERNET POLICY TASK FORCE, U.S. DEP’T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY AND INNOVATION IN THE DIGITAL ECONOMY 41 (2013), available at <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

43. ACTA, *supra* note 33, art. 27, ¶ 3.

44. Other attempts have aimed at stopping pirate sites from sharing in search engine advertising revenue, and provided for a Payment Processor Program aimed at making it harder for purchasers to pay for counterfeit items. See Stop Online Piracy Act, *supra* note 25, § 102(c)(2)(C) & (D).

45. *What is a Copyright Alert?*, CTR. FOR COPYRIGHT INFO. (2014), <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (the system is operated by the Center for Copyright Information, an industry consortium).

46. Daniel Nazer, *The Copyright Alert System FAQ*, ELEC. FRONTIER FOUND. (Feb. 28, 2013), <https://www.eff.org/deeplinks/2013/02/six-strikes-copyright-alert-system-faq>.

47. *Resources and FAQ*, CTR. FOR COPYRIGHT INFO. (2014), <http://www.copyrightinformation.org/resources-faq/copyright-alert-system->

The agreement that has the most impressive teeth, however, is the one that applies to social network platforms. A substantial number of such platforms are now filtering the content users' attempts to post, looking for copyrighted work and either keeping it from loading or flagging it in some way as illicit.⁴⁸ The best known example is YouTube's Content ID program, and thus it will serve as a model for the present discussion. The Content ID approach can be thought of as the privatized nuclear option.

How do Content ID and its siblings work? First, content owners must assemble their content files and make, or have a third party service create, a database of so-called digital fingerprints from the originals. Whenever a user tries to upload a file, an automated program looks to see if there are matches between the database and the content the user is trying to post.⁴⁹ What happens next depends on the platform and the wishes of the content owner.

If a match is found in a submission to YouTube, its Content ID tool offers the owner three options. It can choose to have the content blocked, and if the block is worldwide, that fact will result in the user's account not being in good standing. This can bar the account holder from using certain standard parts of the system such as YouTube Live or from uploading certain kinds of videos.⁵⁰ While it is clear that three copyright strikes entered as a result of DMCA takedown notices can lead to the termination of the user's account,⁵¹ the effect of multiple worldwide blocks, beyond what has already been mentioned, is left unstated.

faqs/.

48. See *How Do I Remove a Copyright Block?*, MYSPACE, <https://help.myspace.com/hc/en-us/articles/202085854-Remove-A-Copyright-Block> (last visited Dec. 16, 2014) (Myspace uses what it calls a copyright filter).

49. *A Guide to YouTube Removals: So My Video Was Removed from YouTube...What Do I Need to Know?*, ELEC. FRONTIER FOUND. (2014), <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals>.

50. *Keep Your YouTube Account in Good Standing*, YOUTUBE, <https://support.google.com/youtube/answer/2797387?hl=en> (last visited Dec. 16, 2014).

51. *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000?hl=en> (last visited Dec. 16, 2014).

Alternatively, the copyright claimant can allow the content to be posted, and keep track of its viewership.⁵² Or, it can allow the content to upload to the user's account, and "monetize" it. This means that any advertising revenue that might be generated in conjunction with the content would be split between Google and the copyright claimant rather than between Google and the party posting it.⁵³ Recognizing that mistakes will occur with an automated system, Content ID provides YouTube users with a dispute process that can get the blocked material up on the user's page.⁵⁴ And in 2012, an appeals process was added as well.⁵⁵ If the copyright claimant, upon being notified that the user is disputing the block, continues to view the material as infringing, the user can appeal. The "judicial body" that decides the appeal, however, is hardly neutral: it is also the putative content owner. An uploader who loses an appeal can expect to have the content removed pursuant to a DMCA notice and takedown procedure, which can (if several strikes are accrued) lead to suspension of the user's account.⁵⁶ Furthermore, the uploader who unsuccessfully appeals may also find him or herself subject to a copyright infringement suit.⁵⁷

In summary, instead of relying on the notice and takedown system, the ex post remedy stipulated by the DMCA, YouTube now allows content owners to engage in *a priori* control of what can appear on the site. It is a practice that looks awfully much like a prior restraint except that it escapes Constitutional scrutiny because it is engaged in by private parties. Clearly,

52. *How Content ID Works*, YOUTUBE, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Dec. 16, 2014).

53. *Id.* (users who post videos can join YouTube's Partners Program, which entitles them to share in ad revenue).

54. *Dispute a Content ID Claim*, YOUTUBE, <http://www.youtube.com/yt/copyright/content-id-disputes.html> (last visited Dec. 16, 2014).

55. *Disputing Copyright Notifications*, FAIR USE TUBE.ORG, <http://fairusetube.org/guide-to-youtube-removals/4-disputing-copyright-notifications> (last visited Dec. 16, 2014).

56. *Dispute a Content ID claim*, YOUTUBE, <https://support.google.com/youtube/answer/2770411?hl=enhttps://support.google.com/youtube/answer/2770411?hl=en> (last visited Dec. 16, 2014).

57. *Id.*

the process is advantageous to the content owner because automated prescreening and blocking is less costly than reliance on the DMCA. Content owners do not have to send out thousands of DMCA notices and risk the possibility that a court will find the form of the notice inadequate and hence unenforceable.⁵⁸ And they avoid the Whack-a-Mole problem; prescreening means that repeated efforts to post putatively infringing content on YouTube will simply fail.

Google, the owner of YouTube, likes Content ID because it reduces the threat of suit by content owners⁵⁹ and poses less of a possibility that YouTube will face the need to cut off access to valuable customers. Furthermore, its advertising revenue is protected because, when an owner chooses to monetize uploaded content rather than block it, a percentage of any advertising income the poster was generating continues to flow, unaffected, to YouTube. Finally, as YouTube becomes a platform for more and more commercially produced content, offering protection to content providers in the form of Content ID is likely to increase the willingness of providers to use the platform – clearly an added monetary benefit to YouTube.⁶⁰

Admittedly, the system only works for owners who can afford to participate in creating the necessary digital fingerprints. Furthermore, it lacks transparency and is uninhibited by the notions of due process that a legally imposed system would need to require: which is to say, you are presumed guilty of infringement and your defenses are adjudicated by your opponent. And, of course, because the filtering is automatic, it is prone to significant errors. It regularly identifies as infringing the content that does not belong to the claimant. For one thing, content owners can be

58. See, e.g., *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1109-10 (C.D. Cal. 2009), *aff'd sub. nom.* *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) (presenting a list of artists rather than a list of works does not comply with the statute's notice provisions).

59. See, e.g., *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (suit seeking \$1 billion in damages on the ground that YouTube's general awareness of the presence of infringing material on the site deprived it of the protections of the DMCA's safe harbor provisions).

60. Leslie Kaufman, *Viacom and YouTube Settle Suit Over Copyright Violations*, N.Y. TIMES, Mar. 19, 2014, at B4 (stating that the terms of the settlement were not revealed).

remarkably generous to themselves in claiming ownership of content, and for another, because algorithms are unable to exercise judgment, infringement claims often involve materials that are protected under the doctrine of fair use.⁶¹

This problem has long existed under the DMCA as well. In a submission made several years ago in response to a new provision of New Zealand copyright law⁶² and the draft Code of Practice intended to implement it, Google cited a study of the DMCA takedown notices it received. More than half were filed against businesses by competitors and thirty-seven percent did not state valid copyright claims.⁶³ Google currently claims that at least three percent of the notices it receives each week are facially invalid.⁶⁴ Many takedown notices involve clear instances of fair use. Perhaps the most famous is the *Lenz* case, where a video clip of a baby dancing to a copyrighted recording became the subject of a widely-reported lawsuit.⁶⁵ The trial court ultimately concluded that a copyright claimant should not send a take-down notice without first conducting some investigation into whether the use was fair so that when the notice is sent, the complainant will be acting in good faith.⁶⁶ One of the most prominent opponents of “excessive” copyright protection, Larry Lessig, recently posted one of his lectures on YouTube. Because it contained snippets of copyrighted music –

61. The fair use doctrine permits people to use copyrighted content under certain circumstances without the permission of the owner. The statute sets out a series of tests for determining whether or not an unlicensed use is “fair.” 17 U.S.C. § 107 (2012).

62. New Zealand Copyright Act 1994, § 92A (repealed Sept. 11, 2011), *available at* <http://www.legislation.govt.nz/act/public/1994/0143/latest/DLM3288800.html>.

63. Carolyn Dalton & Antoine Aubert, *Internet Service Provider Copyright Code of Practice - TCF Consultation Draft*, GOOGLE, 9 n.3 (March 6, 2009), <http://www.tcf.org.nz/content/ebc0a1f5-6c04-48e5-9215-ef96d06898c0.cmr>.

64. Parker Higgins & Kurt Opsahl, *Top 10 Takedowns in Google's Copyright Transparency Report*, ELEC. FRONTIER FOUND. (July 5, 2012), <http://www.eff.org/deeplinks/2012/top-10-takedowns-googles-copyright-transparency-report> (this figure does not take into consideration such justified practices as fair use).

65. See *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 U.S. Dist. LEXIS 9799 (N.D. Cal. Jan. 24, 2013).

66. *Id.* at *6 (ultimately applying a subjective standard rather than objective good faith).

pretty clearly fair use – the Internet was abuzz when he was subjected to a takedown notice.⁶⁷ And, as the Google submission shows, for some, the DMCA provides an opportunity to exercise censorship over the speech of competitors and critics.⁶⁸

It is not surprising, then, that similar problems would occur with systems like Content ID. Examples abound. When Michelle Obama addressed the Democratic National Convention in 2012, a notice was posted at the end of the YouTube feed of her speech that the feed was in violation of copyright. Apparently, the automated filtering system read the clip as using music illegally, even though the convention had actually licensed the music and was in violation of no other copyright.⁶⁹

Another embarrassing example of automated overkill occurred that same year. When the Mars Rover landed, NASA fed the footage live to the public via YouTube, or shall we say it tried to do so. Scripps News shut down the feed because the material it used to check for infringing uploads contained standard NASA footage that Scripps had included in its own broadcasts. Hours passed before the feed could be restored.⁷⁰

The problems with filtering have affected commercial content producers as well. Recently, the video maker,

67. Lawrence Lessig *Settles Fair Use Lawsuit Over Phoenix Music Snippets*, ELEC. FRONTIER FOUND. (Feb. 27, 2014), <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets> (the settlement required the music company to pay Lessig for the harm they caused him and to develop new policies that take fair use into account).

68. Tamlin H. Bason, *House IP Subcommittee Turns Attention to DMCA's Notice and Takedown Provisions*, 87 PAT. TRADEMARK & COPYRIGHT J. (BNA) 1140 (2014) (the general counsel for a company that operates an important blogging platform reports that the number of censorship-based copyright notices his company receives has been rising steadily).

69. Will Oremus, *Did YouTube Really Block Michelle Obama's DNC Speech for Copyright Infringement?*, SLATE (Sept. 5, 2012, 2:37 PM), http://www.slate.com/blogs/future_tense/2012/09/05/michelle_obama_dnc_speech_why_did_youtube_flag_it_for_copyright_infringement_.html.

70. Alex Pasternack, *NASA's Mars Rover Crashed Into a DMCA Takedown*, MOTHERBOARD (Aug. 6, 2012, 11:49 AM), <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown> (although the title suggests that the shutdown was a result of the notice-and-takedown process, the article is clear that the interruption was a result of a misapplication of Content ID).

WatchMojo, had its YouTube channel shut down for 21 hours when what it claims was a clear fair use was tagged as a copyright violation.⁷¹ WatchMojo claimed that the interruption was not only unwarranted but that it caused the company to lose about \$3,000 in advertising revenue.⁷² Ironically, WatchMojo licenses its content to many of the same companies involved in shutting it down and it also helps publicize those producers' content.⁷³

More recently, the online gaming world has been up in arms because Content ID has begun filtering game-related material for possible infringement.⁷⁴ Because this sort of content may critique the design of computer games or help players better understand the games, use of some copyrighted content is almost inevitable. Those who produce this material often earn a living from the advertising that accompanies their posts, but a decision by a claimant to "monetize" supposedly infringing content means that the poster's share now goes to the game producers.⁷⁵ The creators of the game-related content argue that what they do is just fair use, and furthermore is generally welcomed by game designers.⁷⁶ The frequency with which claimants monetize rather than block this content suggests that some truth exists in the claim that these derivative works are valuable to the games' designers.

The examples I have used thus far come from YouTube, but other social networks, such as MySpace also engage in similar kinds of filtering.⁷⁷ Although some believe that only well-heeled, high-volume sites can afford a version of Content

71. Joshua Cohen, *Top 50 YouTube Channel Terminated, Casualty of Content ID*, TUBEFILTER (Dec. 15, 2013), <http://www.tubefilter.com/2013/12/15/youtube-channel-terminated-copyright-content-id/>.

72. *Id.*

73. *Id.*

74. Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google's Dark Side*, FORBES (Dec. 19, 2013, 10:00 AM), <http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/>.

75. *Id.*

76. *Id.*

77. Nicholas Deleon, *Myspace to Implement Copyrighted Video Filtering*, TECHCRUNCH (Feb. 12, 2007), <http://techcrunch.com/2007/02/12/myspace-to-implement-copyrighted-video-filtering/>.

ID, at least some smaller sites are actually adopting it as well, and with it, the same set of problems. Ustream, a video site, was showing the Hugo Awards for science fiction in 2012 when the feed was halted in midstream.⁷⁸ The apparent problem? Neal Gaiman was receiving an award for the script he wrote for a television show. Prior to giving him the award, some clips from the show were shown. The automated filter registered them as infringing – despite the fact that the studio itself had supplied the clips to the Hugo Award organizers.⁷⁹

What is the proper response to all of this? Clearly an awful lot of infringing activity takes place on the Internet, and content providers claim that the losses they incur are serious enough to act as a disincentive to the creation of new works. From that point of view, one might say, “Okay, the pre-screening process is not perfect but it is the cheapest, most efficient way to solve a serious economic problem.” But I would argue that answer is simply wrong.

Filtering does serve the interests of major players in the copyright industries,⁸⁰ but it does so by running roughshod over the rights and interests of other participants in the social networks involved. In addition to any implications it may have for personal privacy, filtering poses serious challenges to free speech and to one of copyright’s central speech protections, fair use.⁸¹ Frequent statements are made about the need, in

78. Zachary Knight, *Copyright Enforcement Bots Seek and Destroy Hugo Awards*, TECHDIRT (Sept. 4, 2012, 5:11 AM), <http://www.techdirt.com/articles/20120903/18505820259/copyright-enforcement-bots-seek-destroy-hugo-awards.shtml>.

79. *Id.*

80. The system largely serves major content providers because participation is cost effective for them. It is more difficult for small players, especially ones like photographers with numerous works to their credit, to be able to afford to have the necessary digital fingerprints made of their work that would enable them to participate in programs like Content ID.

81. For useful critiques of mandatory filtering, see Lilian Edwards, *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, WIPO (June 22, 2011), http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf; Mehan Jayasuriya et al., *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for U.S. ISPs*, PUB. KNOWLEDGE (July 13, 2009), <http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf>; *Network Filtering: Limiting Cultural Industries, Damaging the Internet*,

searching for solutions to infringement, also to honor copyright norms.⁸² But automated filtering would simply be incapable of maintaining copyright law's carefully-calibrated balance between users' and owners' rights. (And no one, I would bet, is interested in making the investment that would be necessary to have humans check on the validity of an automated match.)

That routine, mandatory filtering is fatally-flawed was certainly the conclusion of the European Parliament when it rejected ACTA.⁸³ During consideration of the treaty, note was made of the fact that, earlier in the same year, the European Union Court of Justice in two cases, *Sabam v. Netlog* (a social network case)⁸⁴ and *Scarlet v. Sabam* (a peer-to-peer file sharing case),⁸⁵ ruled that requiring across-the-board preventative filtering by ISPs neither offered sufficient protection to personal privacy⁸⁶ nor struck a fair balance between the interests of copyright owners and users. The court was concerned that the costs imposed by a filtering requirement for all ISPs could interfere with provision of

ELEC. FRONTIER FOUND. (2007),
<https://www.eff.org/files/filenode/effeurope/NetworkFiltering.pdf>.

82. For example, the draft of the TPP chapter on intellectual property states in its Objectives, Art. QQ.A.1, that one objective of the treaty is to "maintain a balance between the rights of intellectual property holders and the legitimate interests of users and the community in subject matter protected by intellectual property." TPP, *supra* note 6. See also 17 U.S.C. § 1201(c)(1) (2012) ("nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title").

83. The European Parliament was also deeply concerned over the application of criminal sanctions for commercial activity, a term that was so loosely defined that it could well be understood to reach an individual who downloaded a song, rather than buying it. Geiger, *supra* note 22, at 12-13.

84. Case C-360/10, *Sabam v. Netlog NV* (Feb. 16, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=387762>.

85. Case C-70/10, *Scarlet Extended SA v. Sabam* (Nov. 24, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=387828>.

86. Clearly, Europe is more concerned than is the United States with data privacy and the likelihood that data posted on Internet sites by individuals would be routinely harvested played a large role in its refusal to ratify. One cannot say the same on this side of the pond. Humorously, the major Internet players have expressed horror at the spying done by the National Security Agency (NSA) on Internet communications, while moving in the same direction themselves in the interests of copyright.

Internet services. But, it also emphasized that the risk of misidentifying material as infringing would interfere impermissibly with the public's right to receive and impart information.⁸⁷ The problem posed by automated filtering is particularly problematic for Europe because, unlike America, several nations have built in considerable latitude for private, noncommercial copying into their copyright laws.⁸⁸

A common response in the United States to the claim that filtering is harmful to freedom of speech (and indeed to the creation of potentially valuable new works) is to say, "The number of mistakes is so small that we don't need to worry about them." In other words, the fuss outstrips reality. As an empirical matter, how many mistakes are made and how "significant" they are is hard to evaluate with any exactitude.⁸⁹

87. However, in *UPC Telekabel Wein GmbH v. Constantin Film Verleih GmbH*, the court modified, or refined if one prefers, its earlier holdings. C-314/12, *UPC Telekabel Wein GmbH v. Constantin Film Verleih GmbH*, (March, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=478368>.

The case involved access through an ISP to a site where pirated movies were available. The decision agreed that an injunction can be issued requiring an ISP to take "all reasonable measures" — which might include filtering — to interfere with subscribers' access to a website that provides illegal content although filtering may not specifically be ordered. *Id.* ¶ 66(2). The court emphasized that any measure adopted "must be strictly targeted" to avoid interfering with access to legal content, *Id.* ¶ 56, and that the reasonableness of the ISP's response is to be measured in relation to the resources available to it and to its other "obligations and challenges." *Id.* ¶ 52.

88. See Edwards, *supra* note 81, at 62.

89. The National Research Council, in a recent report, noted that it is difficult to assess the losses caused by Internet copying because the information about loss comes from stakeholders rather than from the systematic analysis of hard data. See NAT'L RESEARCH COUNCIL, *COPYRIGHT IN THE DIGITAL ERA: BUILDING EVIDENCE FOR POLICY 1-2* (Stephen A. Miller & William J. Raduchel eds. 2013), available at <http://sites.nationalacademies.org/PGA/step/copyrightpolicy/>. Google, which gets vast numbers of DMCA takedown notices each week, estimates that about three percent are unambiguously erroneous or intentionally wrong. Considering the number of such notices it receives, in absolute terms, this is an enormous amount. And it does not take into account things like fair use. See Parker Higgins & Kurt Opsahl *supra* note 64 and figures cited in accompanying text. According to one news report, the makers of the movie *Dallas Buyers Club* asked Google to take down some 388 URLs on its search engine. Among the supposedly infringing sites to which Google was not to link was a page on a video-on-demand service where the movie was legally available. The takedown notice was considered sufficiently inaccurate so that

But, I would argue that a system that suppresses even comparatively small amounts of protected speech is worth worrying about, particularly in light of the fact that avoiding such suppression is a major objective of copyright.⁹⁰ One might also be forgiven for asking whether the costs – to free communications and creativity as well as to the Internet businesses themselves – really bear any rational proportionality to the harm from Internet infringement to the copyright industries. More on that subject in a moment.

But first, a few conclusions. I fear that what we are witnessing is the result of an abdication by governmental and legislative bodies – in particular in the United States – of a core responsibility to maintain a well-balanced copyright system. When private parties are actively encouraged to find their own private solutions to problems, particularly when those solutions are ones that have proven too politically toxic to be enacted into positive law, government is in the position of giving the copyright industries a green light to steer right past (or right through) such tricky issues as fair use, freedom of speech and due process. This state of affairs should give one pause. In effect, the tilt toward private ordering turns copyright law into window dressing, capable of being evaded, along with all of its constitutionally-mandated protections,⁹¹ simply by agreeing to do so. This is not a beneficial, and certainly not a beneficent, solution.

Of course, private agreements are sometimes capable of improving on the law by smoothing out some unnecessary complexities and making the statutory intent easier and cheaper to achieve – the licensing practices of collective rights

Google declined to take down any of the listed sites. Ernesto, “Dallas Buyers Club” Makers Censor Comcast on Demand, by Mistake, TORRENTFREAK, (Mar. 2, 2014), <https://torrentfreak.com/movie-studio-wants-dallas-buyers-club-140302/>.

90. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 313-15 (2004).

91. It is widely agreed that both the fair use doctrine and the rule that limits copyright only to expression and not to facts or ideas are necessary protections that keep copyright from running afoul of the first amendment. See Robert Kasunic, Symposium, *Constitutional Challenges to Copyright: Preserving the Traditional Contours of Copyright*, 30 COLUM. J. L. & ARTS 397, 397 (2007).

societies for music provide some examples of this.⁹² But if there are no clear limits to what can be resolved privately, and if parties are invited to go places that seem to contravene basic standards of traditional copyright, what can result is a power grab in the name of copyright by commercial actors for their own benefit, with little or no thought to the costs arbitrarily imposed on the rest of us.

Perhaps one might justify abdicating intellectual property policy-making to private parties (although I doubt it) if the harm to be avoided were sufficiently grievous and adequate legal remedies were inadequate. Certainly, copyright owners and the negotiators of trade agreements assume that the harm is serious and the need for draconian remedies is obvious. Indeed, the application of statutory damages provisions to individual noncommercial copyists in the United States seems to reinforce that assumption.⁹³

That claim, however, is contestable. Let us start with what seems to be a common sense assumption: that every instance of unconsented copying represents a sale lost to the copyright owner. This may seem logical at first glance but, as it turns out, the reality of the matter is considerably more complex. For example, although courts have shown no willingness to accept the argument that music downloading on peer-to-peer networks can be a fair use because it is often done to “sample” music,⁹⁴ a recent study in Canada found that downloading music from peer-to-peer networks actually was

92. For example, the Harry Fox Agency, which handles the compulsory license royalties for song makers when their music is recorded, allows the accounting for royalties to be made quarterly, instead of monthly. See 17 U.S.C. § 115(5); see also ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, COPYRIGHT CASES AND MATERIALS 641 (8th ed. 2011).

93. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 2431 (2012) (reinstating trial verdict of \$675,000 in statutory damages against individual who uploaded thirty copyrighted songs to share over a peer-to-peer network, but ordering the lower court to consider remittitur). On remand, the district court judge concluded that no ground existed for remittitur and allowed the original damage award to stand. See *Sony BMG Music Entm't v. Tenenbaum*, No. CV-07-11446-(RWZ), 2012 WL 3639053 (D. Mass. Aug 23, 2012), *aff'd*, 719 F.3d 67 (1st Cir. 2013).

94. See, e.g., *BMG Music v. Gonzalez*, 430 F.3d 888, 889-90 (7th Cir. 2005) (downloading to sample not fair use).

positively correlated with increased purchases of music.⁹⁵ This finding has been echoed by several other commentators.⁹⁶

But, a significant amount of the copyrighted material that is traded or otherwise used online for free causes owners no loss at all for other reasons. If enforcement is directed toward these users, the likely result would be only marginal gains for copyright owners because, given a choice between paying or not using the work, the users would opt for the latter. Purchase of a copy or a license simply would not be worth it to them.⁹⁷ I strongly believe that this is one reason why it has been so difficult to pin down the extent of economic harm from technologies ranging from photocopying to peer-to-peer sharing of music files: our appetite for free fare is a lot bigger than our appetite for the metered kind.⁹⁸ If we can get it for nothing, we will take it, even if we never look at or listen to it again. There is no doubt that it is worthwhile and fair to provide realistic enforcement tools to go after profit-making, large-scale copyists, but that doesn't describe most of the posters whose work currently runs afoul of technologies like Content ID.

Where do I come out on this? Should the burden go back to legislators to solve the infringement problem, or at least to put limits on the kinds of agreements private actors can legitimately enforce? I believe the answer is yes. Copyright is too important to the public to allow interested parties to control the way the system works. One might think it wholly uncontroversial that Congress, rather than social networks and commercial content producers, should set — with open and fair

95. For every download, the authors found that compact disk purchases increased by 0.44%. BIRGITTE ANDERSEN & MARION FRENZ, THE IMPACT OF MUSIC DOWNLOADS AND P-TO-P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA, 33 (2007), available at [https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/\\$FILE/IndustryCanadaPaperMay4_2007_en.pdf](https://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf).

96. See *id.* at 8-9 for references to other studies making a similar point.

97. See John M. Newman, *Copyright Freenomics*, 66 VAND. L. REV. 1409, 1446 (2013) (Newman argues that at \$0.00 price point, people will typically “overconsume,” that is, they will hoard copies they never or rarely use); see also Diane Leenheer Zimmerman, *Modern Technology, Leaky Copyrights, and Claims of Harm: Insights from the Curious History of Photocopying*, 61 J. COPYRIGHT SOC'Y 1, 55-56 (2013).

98. See *supra* note 97 and accompanying text.

input from all interested parties — the terms that govern what is permissible on hosted sites. Since the least controversial arena for action is regulation of commercial infringers, it should be possible to define the term “commercial” infringement in relation to the Internet carefully and then offer remedies, complete with checks and balances, to deal with it. But the case has yet to be made that every website that has some infringing content, and every individual who utilizes that content for personal, artistic, and social reasons, should be swept into the same net.

To the extent that small-scale, random individual uses do pose an economic problem for copyright owners, truth-to-tell it may just be one that cannot be resolved with remedies that are cost-effective, proportionate to the damage caused, and fairly administered. A system that presumes guilt and does not provide neutral arbiters in the case of disputes certainly does not seem to meet the test of fairness. If we are really serious about protecting fair use and free speech, some form of due process ought to be the least we require. Of course, that means that funds would have to be devoted to creating mechanisms to protect the users’ interests adequately, and that is likely to be too expensive for private and public actors. Given the uncertainties about the seriousness of the harm, a system to combat it that costs more than the losses it is meant to prevent is hardly better than simply ignoring the infringement. Even the maligned DMCA notice-and-takedown process might seem more reasonable in comparison.⁹⁹

Personally, I strongly suspect that the problem of noncommercial infringement on the Internet will simply prove too costly to solve by law and implicates interests too serious to be “solved” by universal automated pre-screening of hosting ISPs like YouTube. What is called for is some serious creativity. Perhaps, for example, some sort of surcharge on Internet connections, to be distributed based on an agreed-upon system of sampling, would offer a fair solution to the issue of nonprofit uses. Surcharges are commonly used to compensate for private copying in European copyright

99. This is unlikely, however, since a system providing something resembling due process would be very expensive. *See supra* note 22.

systems,¹⁰⁰ and have been experimented with in the United States as well.¹⁰¹

The main challenge of the Internet, however, is less to copyright as such (and to the authors it aims to protect) than to traditional business models for marketing content. Broadcast television and record album sales are at risk because the Internet allows consumers and downstream creators (who want to repurpose existing materials) to consume and use these kinds of content in new, more congenial ways. Because so much material is already out there, and out there for free (the reasons for this are a subject for another article), intermediaries in the business of distributing content cannot dream of recreating the pre-Internet world; they urgently need to learn to compete with free, either by finding other ways to monetize their content – advertising, for example – or by offering perks and services that make it worthwhile for users to buy the content because it is better than “free.” This is not pie-in-the-sky: if it were, iTunes and Netflix would not have become the successes they are today. And Spotify, which

100. See MARTIN KRETSCHMER, PRIVATE COPYING AND FAIR COMPENSATION: AN EMPIRICAL STUDY OF COPYRIGHT LEVIES IN EUROPE, A REPORT FOR THE UK INTELLECTUAL PROPERTY OFFICE (2011), available at http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_econ_ge_1_12/wipo_ip_econ_ge_1_12_ref_kretschmer; see also Jörg Reinbothe, *The Private Copying, Levies and DRMs Against the Background of the EU Copyright Framework*, ASSOC. OF EUROPEAN PERFORMANCE ORG. (2003), <http://www.artis-aepo.org/usr/docs%20drms/speech%20Reinbothe-private%20copying-levies%20and%20DRM.pdf>. A recent ruling by the European Court of Justice, however, throws doubt on whether, at least in Europe, copyright levies can be used to compensate intellectual property owners for materials copied from illicit sites. Case C-435/12, *ACI Adam BV v. Stichting de ThuisKopie* (Apr. 10, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=491416>. An explanation of the import of the case is also available. Press Release No. 58/14, Court of Justice of the European Union, *The Amount of the Levy Payable for Making Private Copies of a Protected Work May Not Take Unlawful Reproductions into Account* (Apr. 10, 2014), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140058en.pdf>.

101. Chapter 10 of the Copyright Act of 1976 allows consumers to make copies of music for noncommercial purposes using a digital or analog tape recorder without liability. 17 U.S.C. §1008 (2012). But, royalties were attached instead to the sale of digital audio recording devices and the media used by them to make recordings. *Id.* § 1004.

allows unlimited free access to music for people who agree to receiving ads with the content, could not exist.¹⁰² The success of sites that depend on voluntary payments from users show that the public has an interest it is willing to act on in making sure artists can afford to continue to create.¹⁰³

This future can come none too soon. We have seen the present, and it is not pretty.

102. See *Spotify Features Page*, SPOTIFY, <https://www.spotify.com/us/#all-music> (last visited Sept. 11, 2014). The website offers two options, a free one with advertisements and a premium one without advertisements for a fee. Lilian Edwards' report to WIPO similarly points out not merely the need for new business models, but the success of several that have been tried. Edwards, *supra* note 81, at 67-70.

103. See Yochai Benkler, *Voluntary Payment Models*, in *RETHINKING MUSIC: A BRIEFING BOOK* 27 (Berkman Ctr. for Internet and Soc'y at Harv. Univ., 2011), available at https://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Voluntary_Payment_Models.pdf; Zimmerman, *supra* note 3, at 1390-93.