

SHARING MEDIA ON SOCIAL NETWORKS: INFRINGEMENT BY LINKING?

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I. INTRODUCTION

Social networking sites such as Facebook, MySpace, and Twitter have become so popular that they are now used as verb tenses in the same way Google is used to describe an online search.¹ Facebook, for one, claims over 901 million monthly active users.² One of the most popular features that Facebook has is the “share” feature, which allows users to “post” web content

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¹ As in “I *facebooked* you but I couldn’t find you,” “Did you *twitter* about it?”, etc.

² FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last updated Mar. 2012).

on their profiles.³ By posting web content on their profiles, the user's "friends" (or people whom the user authorizes to see his/her profile) can see the web content that the user posted. Also, they can be invited to access it. Facebook boasts that over 30 billion pieces of content are shared every month.⁴ This content includes, but is not limited to, Internet links, videos, web pages, photos, and any other content that a user can find on the Internet. To take a single act as the basis for the question posed here, and to serve also as an illustrative example; a user can go to YouTube, select a video, which the user knows (or should know) that is infringing of the artist's rights, and "shares" it on his⁵ profile.⁶ In a simple sequence of acts that can take less than ten seconds, the user has now made the link available to possibly hundreds (or even thousands) of his or her "friends."⁷ Assuming now that the content being shared is infringing, is the user who "shares" it guilty of contributory infringement?

This paper will analyze a situation in which millions of users find themselves doing each day: sharing web content on their social networking profiles. Part II of this paper will discuss the exclusive rights that the Copyright Act affords authors and the remedies those authors have to protect their rights, including but not limited to the two prevailing theories of secondary infringement, namely (1) contributory infringement and (2) vicarious infringement, as well as a more recent development known as infringement by inducement. Part III will discuss the *Perfect 10 v. Google*⁸ decision by the Ninth Circuit and its relevance to the situation before us, since said case deals with "in-frame linking," a feature which is crucial to the Facebook "share" feature. Part IV will analyze the "sharing" feature in light of the doctrines discussed and determine if sharing content on a profile is akin

³ This article will not discuss the "video" feature found on Facebook. The "video" feature allows users to upload (onto the Facebook servers) their own videos, thereby embedding them onto their profiles. This feature is different than the "sharing" feature in regards to the possible liability the user might incur since, if the video were to be infringing, the user would be liable for direct infringement. This paper focuses on the possible contributory infringement liability that the user might incur when he "shares" preexisting content that is uploaded/hosted by an unrelated third party.

⁴FACEBOOK, http://www.facebook.com/applications/Posted_Items/2309869772#/press/info.php?statistics (last updated Dec. 2011).

⁵ Throughout the article I will refer to the user as a "he" since a gender neutral term results in confusing language given the many references I make to an individual user's actions.

⁶ YouTube is a user-generated video portal that is owned by Google, Inc. Users can upload their own videos onto YouTube and they are available for anyone to see.

⁷ Facebook has since lifted the limit it used to impose on the maximum number of "friends" a user could have. It was previously set to 5,000 users but has since been lifted. See Michael Arrington, *Facebook To Lift 5,000 Friends Limit*, TECHCRUNCH (Friday, May 9th, 2008) <http://techcrunch.com/2008/05/09/facebook-to-lift-5000-friends-limit/> (last accessed on April 14th, 2012).

⁸ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

to distributing or making available, and if the user's actions fall under one of the secondary liability doctrines developed by the courts. Part V will conclude that, in some cases, when a user shares content that is visibly infringing to a large number of "friends," he could be liable under the doctrine of secondary liability.

II. RIGHTS AND REMEDIES

A. Exclusive Rights in Copyright

Congress, pursuant to Article I Section 8 of the Constitution, affords copyright owners a set of exclusive rights to exploit in regards to their works.⁹ The Copyright Act of 1976¹⁰ (hereinafter "the Act") lists those six exclusive rights and the scope of their extent.¹¹ The Act gives the owner of a copyright the right to: (1) reproduce copies; (2) prepare derivative works; (3) distribute copies; (4) publicly perform; (5) display the work; and (6) the right to the digital public performance of the underlying sound recording.¹² The mentioned rights are the key for this analysis given that infringement can only be found when any of the said rights are violated and secondary liability can only be determined if direct infringement is found. This article will be limited to discussing only those rights that are primarily (and possibly) affected by the "sharing" feature found in Facebook.

1. *Reproduction*

Section 106(1) of the Copyright Act affords the owner of the work the exclusive right to reproduce the copyrighted work in copies or phonorecords. Copies and phonorecords, as used in the Act, consist of material objects in which the work is fixed and it is only the reproduction of those material objects that is included in the reproduction right.¹³ The copy in question must be one that can be perceived, reproduced or otherwise communicated for a period of more than a transitory duration.¹⁴ Furthermore, it is not required to distribute or sell the copy in order to violate the exclusive right. The mere unauthorized (and presumably not protected under the fair use doctrine) reproduction of the work is enough ground for infringement of the reproduction right.¹⁵

⁹ U.S. CONST. art. I, § 8.

¹⁰ Copyright Act of 1976, 17 U.S.C. §§ 101-810.

¹¹ 17 U.S.C. § 106 (2009).

¹² *Id.*

¹³ NIMMER, NIMMER ON COPYRIGHT 8-31, (2010).

¹⁴ 17 U.S.C. § 101 (2009); NIMMER, *supra* note 13 at 8-32.

¹⁵ NIMMER, *supra* note 13 at 8-35.

In the computer world, courts have found that the copying of computer software to the random access memory ("RAM") constitutes "copying" for the purpose of the reproduction right in Section 106 of the Act.¹⁶ In *Mai Systems Corps. v. Peak Computers*, the court, recognizing its own limitations, held:

However, it is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act. . . . We recognize that these authorities are somewhat troubling since they do not specify that a copy is created regardless of whether the software is loaded into the RAM, the hard disk or the read only memory ("ROM"). However, since we find that the copy created in the RAM can be "perceived, reproduced, or otherwise communicated," we hold that the loading of software into the RAM creates a copy under the Copyright Act.¹⁷

RAM copying is the more traditional form in which a work can be copied into a computer, be it by the user's specific command or by the operation of a computer program. In the context of Internet browsing, "caching" is the most common form of reproducing or copying objects or data that is later used by the Internet browser.¹⁸ The Digital Millennium Copyright Act (DMCA) recognizes the reproduction (and hence, violation) caused by "caching" by exempting Internet Service Providers from infringing under the "System Caching Safe Harbor."¹⁹ Websites such as Youtube and most online streaming media work on the user's computer by caching the media in an unknown folder (to the user), and storing it there until the browser deletes the "cache". However, armed with a little technical knowledge and a quick search on Google, users can easily access the cache folder and the media stored in it, therefore making the copies accessible and perceivable to the user. Moreover, many users nowadays are "permanently" connected to the

¹⁶ See *MAI Systems. Corp. v. Peak Computer, Inc.* 991 F.2d 511, 518 (9th Cir. 1993).

¹⁷ *Id.* at 519 (internal citations omitted); see NIMMER, *supra* note 13 at 8-131 (Nimmer agrees with the ruling, and points out that the U.S. Copyright Office is also in agreement with the ruling).

¹⁸ Matthew Fagan, *Can you do a Wayback on that? "The Legal communities use of cached web pages in and out of trial,"* 13 B.U. J. Sci & Tech. L. 46, 50 (2007) (stating "In the Internet context, caching similarly means "the storing of copies of content [that subscribers wish to see most often] at locations in the network closer to subscribers than their original sources . . . in order to provide more rapid retrieval of information." Web browsers like Firefox and Internet Explorer store cached web pages at the location closest to the user (the local computer itself), while Internet service providers ("ISPs") cache web pages on proxy servers in order to provide streamlined access to the most popular pages among a large group of users. In this way, users get their copies from the proxy server instead of the site owner's server, which is likely to be slower and more congested than the proxy server.").

¹⁹ 17 U.S.C. § 512(b) (2009).

Internet through their home networks, high speed cellular networks, and office networks, thus, the “streaming copy” needs to be viewed under today’s use and how accessible it is to the user. This last point will be discussed in greater detail in Part V.

2. *The Right to Distribute*

Section 106(3) of the Act affords copyright owners the exclusive right to “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”²⁰ The right does not apply to any distribution of copies but only such distributions that are made to the public.²¹ In order to have a valid claim under a violation of Section 106(3), the owner must prove ownership of the right and prove an actual dissemination of either copies or phonorecords.²² The term “dissemination” has not been without controversy, and there seems to be a disagreement over its reach between two Circuit Courts.

The Ninth Circuit affirmed the holding of the district court in *Perfect 10 v. Google*; it held that public distribution in the Internet context requires the actual transfer of the file from one user to the other.²³ However, the Fourth Circuit held in *Hotaling v. Church of Jesus Christ* that a violation to the right to distribute is found when the alleged infringer makes the work available to the public, regardless of the public’s acceptance of that offer.²⁴ In that same case, the court distinguished the right of the owner of a legally acquired copy of a work to lend or lease said copy without violating the author’s 106(3) right from the distribution of unlawful copies, the latter being a violation of the right to distribute.²⁵ The difference between the two circuits seems to lie in what constitutes distribution. The Fourth Circuit holds that *making available is enough to constitute distribution* while the Ninth Circuit requires the *actual dissemination* of the work (in the context of the Internet).²⁶ Although the “black letter law” might be unclear, what is clear, though, is that it remains the sole right of the copyright owner to control the distribution of his work to the public.

²⁰ 17 U.S.C. §106(3) (2002).

²¹ NIMMER, *supra* note 13 at 8-148.

²² *Id.*, citing National Car Rental Sys. Inc. v. Computer Assoc., 991 F.2d 426, 434 (8th Cir. 1993).

²³ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006).

²⁴ *Ahern v. County of Nassau*, 118 F. 3d 119 (4th Cir. 1997).

²⁵ *Id.* at 203.

²⁶ Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1145,1153-1154 (2008).

3. *The Right to Display and Perform*

Sections 106(4) and 106(5) grant the owner the exclusive right to publicly perform and/or display his work, so long as it is within the scope of the right. Sections 106(4) and (5) state that:

(4) [I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) [I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.²⁷

Therefore, it is only in the enumerated works that the above-mentioned rights will apply. The display and performance rights only protect the public performance/display of such. In contrast, the Act defines a public performance or display as:

(1) [T]o perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁸

The phrase “open to the public” has not been without debate, but a clear expression was found in *Columbia v. Aveco*.²⁹ The court held, and so far it has not been overruled, that a public space need not be crowded with people for a public performance (or display) to take place just as long as the space is, in fact, open to the public.³⁰ Whereas this provided a clear guidance in traditional settings, it is less clear on how it applies to the Internet and social networking sites, which are, in essence, *de facto* public spaces.

²⁷ 17 U.S.C. § 106 (4)-(5)

²⁸ *Id.* at § 101.

²⁹ *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3rd Cir. 1986).

³⁰ *Id.*

The Act defines displaying as “to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.”³¹ The right, similar to the right of distribution, affords the owner of a lawfully made copy the right to display it publicly, yet the same privilege is not conferred to those who obtain unlawfully made copies.³² A Congressional House Report, published soon after the enactment of the 1976 Act, stated that the privilege is also limited when the work is performed or displayed by transmissions. This Report elaborated that the owner cannot transmit the display to members of the public who are located in a different place where the work is held, whereas he can display it (via transmission) to the public as long as they are in the same place where the work is held.³³ In other words, the owner of a work cannot transmit the display (and presumably, the performance) of the work through the Internet to users who are located outside the physical location of where the work is being held.

The Act defines a performance as “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”³⁴ Although similar, the rights apply to different means of communicating the work. In the matter that concerns this article, users are “performing” the work when they open audiovisual media clips that are usually scenes (if not the entire work) of movies, television shows or music videos, and are usually “displaying” the work when they open images or display a literary piece on their computer monitors.

Although the rights so far discussed are not all the rights that appear under the Act, they are, however, the rights that seem to be in play as far as the rights which are affected the most in “in-frame” linking posts on social networking sites. Having thus constructed a clear frame of which rights are in play and their scope, we now turn to the remedies that are afforded to copyright owners to protect said rights.

B. Remedies

Section 501 of the Act states that copyright owners have the power to enforce their rights against those who directly infringe on their exclusive rights.³⁵ Generally, the Act allows the owner to recover actual damages

³¹ 17 U.S.C. § 101.

³² NIMMER, *supra* note 13 at 8-285.

³³ H. R. . No. 94-1476, at 79-80 (1976).

³⁴ 17 U.S.C. § 101.

³⁵ 17 U.S.C. § 501.

and/or statutory damages as defined in sections 504(b) and 504(c).³⁶ Moreover, what is important is that copyright owners can enforce their right on two distinct groups, those who directly infringe on their rights, and those who contribute or are vicariously responsible to the direct infringement of another person.

Direct infringement is aimed at the person who directly infringes on the exclusive rights afforded by the Act whereas secondary infringement is aimed not at the principal culprits, but at those who facilitate said infringement. On one hand, in order to prevail on direct infringement, the plaintiff must prove ownership of the alleged infringed material and must demonstrate that the alleged infringer has violated at least one exclusive right of the plaintiff's copyright.³⁷ On the other hand, the courts have developed the doctrine of secondary liability in two strands: (1) vicarious infringement (liability); and (2) contributory infringement.

1. Vicarious Liability

Vicarious liability for copyright infringement, like contributory infringement, was developed by jurisprudence rather than by statute. Vicarious liability was the result of a series of decisions of the Second Circuit as "an outgrowth of the agency principles of *respondent superior*."³⁸ In *Gershwin Publishing v. Columbia Artists Management, Inc.*,³⁹ the Second Circuit created the test that would become the "standard test" for vicarious liability. The court held, "even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."⁴⁰ Given the requisite of "direct financial interest" for the finding of vicarious liability, one may conclude that most Facebook users would not be liable under this doctrine since there is no financial interest in "sharing" web content with their friends on the social network. However, the same cannot be said for contributory infringement, since this doctrine does not require a direct financial interest.

2. Contributory Infringement

In *Gershwin Publishing v. Columbia*, the Court of Appeals for the Second Circuit summed the concept of contributory infringement, stating that "[s]imilarly, one who, with knowledge of the infringing activity, induces,

³⁶ 17 U.S.C. § 504(b)-(c).

³⁷ *Perfect 10 v. Google*, 508 F.3d 1146, 1159 (9th Cir. 2007).

³⁸ *Fonovisa v. Cherry Auctions, Inc.*, 76 F.3d 259, 261-262 (9th Cir. 1996).

³⁹ *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971).

⁴⁰ *Id.* at 1162.

causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."⁴¹ The Supreme Court addressed this issue in the *Sony-Universal City* case, holding that copyright law had to "strike a balance between a copyright holder's legitimate demand for effective-not merely symbolic-protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."⁴² Contributory infringement, unlike vicarious, can occur in settings in which no financial benefit is being transferred between the parties, but where a party is directly infringing at the inducement or encouragement of another. The development of this doctrine, beginning with the Supreme Court's decision in *Kalem v. Harper Brothers* up to their most recent decision in *Metro-Goldwyn v. Grokster*,⁴³ is worth tracing in order to understand not only what is held to be contributory liable, but also what defenses can a party bring against it.

In *Kalem v. Harper Brothers*,⁴⁴ Harper Brothers brought suit against Kalem for the alleged infringement of the copyright in General Lew Wallace's *Ben Hur* by the exhibition of moving pictures of the incidents told in the book. Kalem was in the business of producing moving-picture films, one of them being the object of litigation in the suit. Although the Court found Kalem liable for copyright infringement, it did express what would later become the "staples of commerce" doctrine. The Court distinguished between the merchant who sells his product, capable of being used in illegal activities, without knowing it would be used for said activities against the seller who sells it with a view to the illegal resale. In this case, Kalem not only produced the machines, but also advertised the use of his film for dramatic reproduction. It was not until 1984, in the *Sony-Universal City* case, that the Court elaborated on this holding.

In *Sony Corporation v. Universal City*, the Court debated whether Sony could be held liable for any infringement done by consumers with their Betamax video recorders. The Court distinguished this case from *Kalem*, holding that whereas in *Kalem* the producers "did not merely provide the 'means' to accomplish an infringing activity, the producers supplied the work itself", Sony did not supply Betamax consumers with the "respondents' works".⁴⁵ The Court, in seeking to determine what responsibility, if any rested on Sony, turned to patent law. More specifically, they turned to the "staples of commerce" doctrine. This doctrine holds that "[u]nless a commodity 'has no use except through practice of the patented method' . . . the patentee has no right to claim that its distribution constitutes

⁴¹ *Id.*

⁴² *Sony Corp. v. Universal City*, 464 U.S. 417, 442 (1984).

⁴³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁴ *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911).

⁴⁵ *Sony Corp.* 464 U.S., at 446.

contributory infringement.”⁴⁶ The Court, mindful of the differences between patent and copyright law, sought to strike a balance between the copyright holder’s legitimate demand for effective, not merely symbolic, protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.”⁴⁷

As such, the Court held that the sale of articles of commerce will not constitute contributory infringement if the product is “widely used for legitimate, unobjectionable purposes. Indeed, it may merely be capable of substantial non-infringing uses.”⁴⁸ The “Sony Rule” would not be revisited by the Supreme Court until 2005, and even then, the Court made it clear that it was not changing said Rule.

In 2005, the Supreme Court held, by unanimous vote, that Grokster was to be liable for copyright infringement by using a doctrine known as “inducement” which, just like the Sony rule, had its origins in patent law. In *Metro-Goldwyn-Mayer Studios v. Grokster*,⁴⁹ the Court faced a *de facto* successor to the popular file-sharing program called Napster. Grokster was a similar file sharing program but, unlike Napster, it did not hold a centralized server. It did, however, rely on a technology called “Peer to Peer” which uses the users’ computers as “mini routers” to connect to other users.⁵⁰ The Ninth Circuit had affirmed the District Court’s finding in that Grokster was not liable for secondary liability for its users direct infringement under the “Sony Betamax” doctrine, holding that Grokster was a commercial product capable of substantial non-infringing use.⁵¹ In reversing the Ninth Circuit’s decision, the Supreme Court refused to discuss Grokster’s responsibility under the staples of commerce doctrine, choosing instead to hold Grokster responsible under the “inducement doctrine.”

The Court, citing *Oak Industries Inc. v. Zenith Electronics*,⁵² described the “inducement doctrine,” as evidence of active steps taken to encourage direct infringement, “such as advertising an infringing use or instructing how to engage in an infringing use . . . overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for

⁴⁶ *Id.* at 441.

⁴⁷ *Id.* at 442.

⁴⁸ *Id.*

⁴⁹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁵⁰ *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001) (holding that Napster, an online file-sharing service that had centralized servers, was liable for vicarious and contributory copyright infringement for the direct infringement that its users were committing. The court recognized that Napster had significant non-infringing use, but the degree of control that Napster had over its servers and the volume of infringing material that passed through its network outweighed the use of the “Betamax” defense).

⁵¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

⁵² *Oak Industries, Inc. v. Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (N.D. Ill. 1988).

some lawful use.”⁵³ Finally, the Court, adopting the doctrine the same way it adopted the staple-article doctrine of patent law in *Sony*, held “that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁵⁴ The Court distinguished between “mere knowledge of infringing potential or of actual uses” (which would not be actionable) and “purposeful, culpable expression and conduct” (which would be actionable).

However, it is not clear if the Court treats infringement by inducement as a separate doctrine of secondary liability or if it is a “type” of contributory liability. Furthermore, there is legitimate concern with the degree to which the courts could take the “inducement rule” in every day scenarios, thus applying it to “almost anyone whose behavior regularly supports infringement by others.”⁵⁵ However, given its distinct requirements when compared to contributory infringement, I would argue that it is a third doctrine of secondary liability which we will treat separately for our analysis.⁵⁶ This brings us to what courts held (prior to *Perfect 10*) on what contributory responsibility might befall on websites that “link” to infringing material.

3. *Infringement By Linking*

Prior to the *Perfect 10* case, one of the cases that best dealt with “infringement by linking”⁵⁷ was an Indiana District Court case, *Batesville Services v. Funeral Depot*.⁵⁸ In *Batesville*, the defendant, Funeral Depot, operated a website through which it sold caskets which included the brand name caskets sold by Batesville. Funeral Depot was not an authorized reseller of Batesville caskets, but they had arrangements with other authorized dealers in order to sell the caskets to the customers. The copyright issue arose from Funeral Depot’s use of Batesville images, which were hosted on third party servers (which were authorized dealers). Funeral Depot would display a thumb-nail sized image on their website of a Batesville casket. The user would click on the thumbnail and a bigger picture would appear. The larger image was hosted on a reseller’s website but it would display Funeral Depot’s phone number. The website would also tell the user that the

⁵³ *Grokster, Ltd.*, 545 U.S. at 915, (citing *Water Technologies Corp. v. Calco*, 850 F.2d 660, 668 (C.A. Fed. 1988)).

⁵⁴ *Id.*

⁵⁵ Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184, 231 (2006).

⁵⁶ This view is also shared by some in academia, such as Professor Alfred Yen, *See id.* at 239.

⁵⁷ By “linking” I refer to hyper linking within a website to a different site or file which is hosted in an independent server from the one hosting the website being viewed.

⁵⁸ *Batesville Services, Inc. v. Funeral Depot, Inc.*, 2004 WL 2750253 (S.D. Ind. 2004).

displayed image was shown through the authorized reseller and not through Funeral Depot. Batesville alleged that Funeral Depot was not authorized to use their copyrighted photographs and that the fact that they were hosted on a different server did not affect the copyright liability that Funeral Depot had accrued.

Although the controversy in the case dealt with various issues, the relevant issue here was the court's discussion on linking. Funeral Depot argued that linking can never amount to a copyright violation.⁵⁹ In support, they cited two district court opinions from California.⁶⁰ The holding in those two cases did not, however, convince the court. The court concluded that the two cases that Funeral Depot cited showed "that it may be difficult to prove copyright infringement or contributory infringement from the use of hyperlinks, indeed, hyperlinks are essential to the operation of the Internet for a host of legitimate purposes."⁶¹ However, the court refused to embrace Funeral's argument, that the district cases embraced a "sweeping per se rule" that linking did not constitute infringement. The court instead referred to a district court opinion from Utah in which the court upheld an injunction against a defendant who was providing addresses of websites containing infringing material he had previously hosted and was ordered to remove.⁶² The court found that Funeral Depot acted more like the defendant in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, than the defendant in *Ticketmaster* or *Bernstein* since Funeral Depot did not "casually" link the images owned by Batesville, but created the pages and links, paid for them and still controlled them.⁶³

Batesville, as well as the cases cited by the court, demonstrate the "gray area" in which the courts in *Perfect 10 v. Google* had to engage and decide. On one hand, the person who "links" the material is not hosting nor creating the material, since it is already there due to the work of a third party. On the other hand, the person who "links" is directing traffic and giving a third party site more publicity than it previously had, therefore increasing the number of people who visit it and contributing to the infringing activity. None of the cases prior to *Perfect 10* engaged in depth this issue, particularly the discussion over the combination of linking and "in-frame linking".

⁵⁹ *Id.* at 11.

⁶⁰ *Ticketmaster v. Tickets.com*, 2000 WL 525390 (C.D. Cal.); *Bernstein v. JC Penney*, 1998 WL 906644 (C.D. Cal.).

⁶¹ *Batesville Services, Inc.*, 2004 WL at 11.

⁶² *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).

⁶³ *Batesville Services, Inc.*, 2004 WL at 12.

III. PERFECT 10 AND IN-FRAME LINKS

A. The Case at the District Court

The plaintiff in this case is a publisher of adult magazines known as “Perfect 10” and the operator of a subscription website under the same name. Plaintiffs owned the copyright on all the images of the models that they used in their publications and websites. Perfect 10 exploited these images and derived profits from the sale of their publications and the subscriptions to their websites. Perfect 10 grew concerned with the distribution and unauthorized reproductions of their images on a variety of websites. Aware of the violation to their exclusive rights under the Act, they naturally proceeded to go against the infringing parties. Their search led them to the defendant, Google. Google operates a well-known search engine (www.google.com), which also includes an “image search” engine. Google’s engine would “crawl” the Internet (thus indexing websites and their content) in order to provide the user with search results. Among those websites indexed were the websites who were infringing on Perfect 10’s copyright over the images. When a user searched for images, he would be shown several thumbnail images, which Google hosted. The user would then click on the thumbnail and would be taken to that party’s website. However, Google would “frame” the third party’s website within their own website, so the user would see Google’s frame in the upper part of their browser, with the third party’s website beneath the frame. This could give the user the impression that he was still navigating within Google’s search engine; when in fact, he was not.⁶⁴

Perfect 10 filed suit against Google in the Central California District Court asserting both copyright and trademark claims.⁶⁵ Among the copyright claims, Perfect 10 alleged direct copyright infringement, vicarious copyright infringement, and contributory copyright infringement. Perfect 10 alleged that Google’s thumbnails of images belonging to Perfect 10 were a direct copyright violation, while Google’s linking to websites containing infringing material were both a vicarious infringement (due to Google’s revenue deriving from advertisements) and a contributory infringement. In their part, Google claimed a fair use defense against the direct copyright claim (and succeeded on those merits) and argued that it bore no responsibility for the infringing content to which it linked.

⁶⁴ See *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 833 (C.D. Cal. 2006). (defining the term “Framing” as “. . . a method of “combin[ing] multiple pages in a single window so that different content can be viewed simultaneously, typically so that one ‘frame’ can be used to annotate the other content or to maintain a link with an earlier web page”).

⁶⁵ *Id.* at 828.

The court discussed several issues that are of particular importance here, namely whether an “in-line link” constituted a display and which test should be applied to make that determination. Perfect 10 alleged that Google was violating their display right by displaying the infringing site framed within Google’s page since the display was the “mere act of incorporating content into a webpage that is then pulled by the browser” under a test called the “Incorporation Test.”⁶⁶ Under this test the entity who hosts the webpage which incorporates the infringing material is the entity who displays said image. Google, however, argued for a “server test” which would define a “display” as “the act of serving content over the web, i.e. physically sending ones and zeroes over the Internet to the user’s browser.”⁶⁷ Under this definition, the party that hosts the data and transmits it is the entity who displays the image. The court then recognized the dangers that an absolute adoption of either test could have. On one hand, the server test would shield a user who created a website with the clear intent to facilitate infringing content without actually hosting any of it, while the incorporation test could cause a chilling effect on a core aspect of the Internet, its capacity to link to other sites.⁶⁸

The court acknowledged the lack of precedents on this matter and highlighted several decisions that had dealt with contributory infringement and linking while, at the same time, dismissing Perfect 10’s reliance on an opinion by the Ninth Circuit in *Kelly v. Arriba*,⁶⁹ which was withdrawn in a subsequent opinion by the same court. However, this court, lacking a binding precedent on which to determine the case, decided to adopt the server test for several reasons. First, it concluded that the test is an accurate reflection of what happens “at the technological level as users browse the web and thus, reflects the reality of how content” travels over the Internet.⁷⁰ Second, the court concluded that the server test did not invite infringement by a search engine nor preclude liability for direct infringement while maintaining a test which website operators can easily understand and the courts can apply with ease. Finally, the court concluded that the server test recognizes the third parties as the direct infringers, and not the search engine while, at the same time, maintaining a delicate balance for which copyright strives to maintain between technology and creativity.⁷¹ Applying the test, the court held that Google did not directly infringe on Perfect 10’s display rights.

⁶⁶ *Perfect 10*, 416 F. Supp. 2d at 839.

⁶⁷ *Id.*

⁶⁸ *Id.* at 840.

⁶⁹ *Kelly v. Arriba Soft Corp.* 280 F.3d 934 (9th Cir. 2002) *withdrawn by Kelly v Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). (First citation is Kelly I and the second citation is Kelly II).

⁷⁰ *Perfect 10*, 416 F. Supp. 2d at 843.

⁷¹ *Id.*

The court then focused on the secondary liability alleged by Perfect 10. It determined that Google lacked the *actual* or *constructive* knowledge necessary for contributory liability to exist. Google could not monitor all the websites it “crawled” and indexed since its operation is controlled by mathematical algorithms and not by direct human input. Google, the court concluded, did not materially contribute to the infringement done by third parties since it only facilitated searches directed by the user, in contrast to Napster, which dedicated itself to helping users locate infringing audio files on their servers. The court distinguished Google from the defendants in *Columbia Pictures v. Redd Horne*,⁷² in that Google did not conduct all the advertising and promotional work for the alleged infringers. Google provides advertisement based on the normal use of their search engines but not on the particular infringing work. As such, the court determined that Perfect 10 did not meet the burden necessary to succeed on their injunctions based on contributory infringement. Finally, the court held there was no merit to Perfect 10’s claim of vicarious infringement since Google lacked the “right and ability to control” the infringing activity of others as required under the doctrine of vicarious liability.⁷³ Predictably, Perfect 10 appealed the decision to the Ninth Circuit Court.

B. Court of Appeals

The Ninth Circuit Court began its opinion by reiterating the working definitions for the two technological features in the case; the “in-line linking” and the “framing” feature as used by Google. “In-line linking” was described as the process by which the webpage directs a user’s browser to incorporate content from different computers into a single window, whereas framing refers to the process by which information from one computer appears to frame and annotate the in-line linked content from another.⁷⁴ The in-line linking allowed Google to display an image search result which could include an infringing copy of a picture owned by Perfect 10, within the “Google search frame” but without Google itself making a copy of it; instead directing the user to the alleged infringer’s website.

The court addressed two issues on appeal: (1) the claim on direct infringement (based on the display right and the distribution right) and (2) the claim on secondary liability. With regards to the direct infringement, the court began with the claim on the display right. The court distinguished the display of the thumb-nail sized pictures that Google hosted and the full size pictures that Google linked to, adding “in sum, based on the plain language of the statute, a person displays a photographic image by using a computer to

⁷² *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.* 749 F.2d 154 (3rd Cir. 1984).

⁷³ *Perfect 10*, 416 F. Supp. 2d at 858.

⁷⁴ *Perfect 10 v. Google*, 508 F.3d 1146, 1156 (9th Cir. 2007).

fill a computer screen with a copy of the photographic image fixed in the computer's memory."⁷⁵ The court, thus, held that Perfect 10 had made a *prima facie* case that Google had directly infringed its display right in regards to the thumbnail images.⁷⁶ The court determined since the full size image was hosted on a different website, direct liability could not be found.

Perfect 10 argued that merely making images available infringed the copyright owner's distribution rights. They relied on *Hotaling v. Church of Jesus Christ*,⁷⁷ holding that an owner of a collection of works who makes them available to the public may be deemed to have distributed copies of the works. The court rejected Perfect 10's argument, and held that the "deemed distribution" rule did not apply to Google since they do not own Perfect 10's copyrighted work and they (Google) do not communicate these images to the users that use Google's search engine. The court distinguished the case against Google from the holding in *Napster* and *Hotaling* in so much as Google did not own the Perfect 10 images nor did they communicate those images to the people using Google's search engine. The court held against Perfect 10 on the likelihood of success in the injunction sought.

Turning then to the issue of contributory infringement, the court began by stating that their test for contributory infringement was consistent with the rule set forth in *Grokster*⁷⁸ and in *Gershwin*.⁷⁹ The court emphasized that the infringer must be found to "induce, cause or materially contribute to the infringing conduct of another" with knowledge of the infringing activity.⁸⁰ The Circuit Court held that "a computer system operator can be held contributorily liable if it 'has actual knowledge that specific infringing materials is available using its system' and can 'take simple measures to prevent further damage' to copyrighted works, yet continues to provide access to infringing works."⁸¹ The Circuit Court determined that the district court did not analyze the facts surrounding the notice or knowledge that Google may have over the existence of infringing pictures in their search engine, adding "[a]pplying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage. . . and failed to take such steps."⁸² The court remanded to the district to resolve the factual disputes over the adequacy of Perfect 10's notices and Google's

⁷⁵ *Id.* at 1160.

⁷⁶ The court would later on determine that Google was not liable due to a fair use defense.

⁷⁷ *Hotaling v. Church of Jesus Christ of Latter-Day Saints* 118 F.3d 199 (4th Cir. 1997).

⁷⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁷⁹ *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971).

⁸⁰ *Perfect 10*, 508 F.3d at 1171 (citing *Gershwin Publishing Corp. v. Columbia Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

⁸¹ *Id.* at 1172 (citing *A&M Records v. Napster*, 239 F.3d 1004, 1022 (9th Cir. 2001) and *Religious Tech Center v. Netcom*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)).

⁸² *Id.*

response to these notices. The court then discussed the vicarious liability, if any, incurred by Google, concluding that Perfect 10 did not show a likelihood of success at establishing Google's ability to stop or limit the content. This showing was necessary to prove vicarious liability. Finally, the court instructed the district court to determine if Google could qualify for immunity under Title II of the Digital Millennium Copyright Act for service providers.⁸³

In sum, *Perfect 10* holds that linking and in-frame displays do not produce an absolute responsibility, nor does it completely shield from responsibility. Incidentally, it must also be pointed out, had the court ruled against Google, search engines as a whole could have been detrimentally affected and with that, the flow of information on the Internet could have been dramatically impacted. Furthermore, Google lacked direct control over how its algorithm produced any given search result in a way similar to the one Napster had under its centralized servers. However, although the court reaffirmed the use of the server test as the more "technologically appropriate" test, its application has yet to be seen to the new wave of user generated websites which actively link to third party infringing content.

IV. FACEBOOK, IN-FRAME LINKING, AND USER INDUCEMENT: SECONDARY LIABILITY?

A. Background on Facebook and the "Share" Feature

1. Facebook: What is it?

Facebook is a social network (arguably the largest) in which users can connect to other users and communicate with each other, share and upload pictures, videos, notes, information, and embed web content, among many other features. Although users can control their levels of privacy, the default settings allow for any update a user makes to their profile to be displayed in the "news feed." The "news feed" is the "home page" that every user sees when they first log in to their account. Users, when logging in to their home page, will then see all their friends' "feeds", or updates, on their "news feed." In other words, every time a user updates his page, Facebook proceeds to "publish" his update to the "news feed." When a user shares web content, said "posting," is then broadcasted to his friends, who will see a thumbnail version of the content posted on their news feed. Although the update does not get directed at any one person in particular (although this is an available option), the fact that said update is shown on the home page of the other users is hard to ignore. Furthermore, users are likely to open the web content posted by their friend, since it is being posted for the sole reason of "sharing it" with said friends. The user who posts the content also has the option of

⁸³ 17 U.S.C. § 512 (2009).

placing a caption or message with the post. Usually the caption will be an invitation to see the content.

When the other users see this posting, and open it, Facebook directs the user to the source website. Facebook does not make a copy of the content, but merely links to it by using an "in-line linking" within a frame, much like Google uses in its image search. Take for example, the posting of a YouTube video clip. The posting user (the poster) finds the video while browsing YouTube, he clicks on his web browser's toolbar, and selects a button, installed by Facebook, to "share." The browser opens a new window, in which it logs into the user's Facebook account, and asks the user if he wants to "post it to his profile" or "send as a message" to another user. The window also allows the poster to write a caption or message that will be displayed with the posted content. The poster decides that the video is funny and could include a caption such as "Great video, a must see!" Once the poster selects the "post" button, the content is then displayed as a thumbnail on his profile. Later, his friends, when they log on to see his profile page, will immediately see the thumbnail and caption of the content on the profile. Alternatively, they will see the preview of the content on their "news feed" when they log in. Upon seeing it, they could click on the thumbnail, which will direct the web browser to open a new window, displaying the page in which the content originally located. However, Facebook frames the page by maintaining a horizontal bar on top of the page (which the user can remove) in which Facebook allows the user to "comment" on the content or to "share" it, thus allowing the user to "repost" the content on his own profile.

2. Shared Content: How Can It Be Seen and Controlled?

Now assume that the content posted is clearly infringing; it could be a clip from the rock band Metallica, uploaded by an individual user. The poster has taken a video clip, which is infringing, and has made it available to a multitude of users known as "friends." Those users will now have access to an infringing clip that they may have otherwise never found. If the poster has a copious friend list, it could mean that hundreds or thousands of users are now aware of this video clip and could, in theory, access it. The end result is that infringing content is propagated and distributed across the Facebook network by means of linking and embedding. This web content could be displayed on the profiles of hundreds, or dozens of thousands of people as can be the case with popular celebrities or "Internet stars" who can now have unlimited friends. Now, the user can control where his "shared content" is distributed to, since they could alter the privacy settings so that it does not "broadcast" on their friends "news feed", in which case it would only appear on their profile. Under this scenario, their friends would not be alerted of the shared content whereas in the more typical scenarios, all friends are alerted.

Given that the user can customize his Facebook “presence” and “broadcasting” in a variety of ways and degrees, we will focus on the most general type of setting, which is the default setting that all users get when they sign up, and the one that a user who seeks to purposely “reach” many people would have.

B. Where is the Infringement?

For a user to be held contributory liable, there needs to be a direct infringement by another.⁸⁴ Therefore, for the user to be liable, it must be true that the content they are sharing is, by itself, infringing. This question is easily answered with multimedia content such as audiovisual clips hosted on video-sharing sites (such as Youtube), and to an extent, images. Assuming the clip is an unauthorized reproduction or adaptation of a protected work, direct infringement can be rapidly determined. Both audiovisuals and images are reproduced on the site hosting them (to which the site can refute a secondary liability claim if it complies with the requirements of the DMCA) and are perceivable to the public. Upon “playing” the video, display rights and performance rights are infringed since the performance/display is occurring over a transmission to the public which can number anywhere from a dozen to several million viewers at any given time. Furthermore, once the video is uploaded, it is indexed in the respective video-sharing site. It is usually available via a simple Internet search engine since the video is both available by index and is also being “transferred” from the host site to the user every time it is accessed, it violates the distribution right both under the *Hotaling*⁸⁵ holding as well as the *Perfect 10*⁸⁶ holding. The “open” and public manner in which most video hosting sites operate also likens them to a space “open to the public,” thus under *Columbia v. Aveco*,⁸⁷ the performance of these audiovisual clips would be a public performance and display (when appropriate).

Having established the initial direct infringement, the first prerequisite for contributory infringement to exist is met. The question now turns to the end user who views the uploaded media content; who is allegedly infringing. Are the end users who open and view the infringing clip actually infringing? In *A&M Records, Inc. v. Napster*,⁸⁸ the Ninth Circuit acknowledged the district court’s assertion that the Napster users were directly infringing both when they uploaded music files and when they

⁸⁴ *Gershwin*, 443 F.2d at 1159.

⁸⁵ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

⁸⁶ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 833 (C.D. Cal. 2006).

⁸⁷ *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3rd Cir. 1980).

⁸⁸ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (stating “Napster users who download files containing copyrighted music violate plaintiff’s reproduction rights.”).

downloaded said files. It could be argued that Youtube users differ from Napster users in a crucial way. Youtube users do not download a copy on to their computer, which they could easily access at any time.

This argument, although on its face seemingly true, does not conform to the way users access data nowadays. It used to be; now it is not the only way. With the advent of broadband and Wi-Fi networks, including public Wi-Fi and smart phones capable of accessing the Internet, there is less need for users to physically host data when streaming the same data is just as seamless. Users today have the same access to files they had with Napster, only they need not download a physical file since they can stream it from a variety of places at any time. Furthermore, as was explained in Part II, computers do make a copy of the work being streamed even though it is not readably available to the user. However, even if the cached copy is held not to be a reproduction under the Act, the fact is that users now have “virtual copies” they can download on demand anywhere they are. The “copy” thus, need not be on the user’s hard drive, but merely at the user’s fingertips. Therefore, the end users who view an audiovisual clip from Youtube, for example, can be infringing in the same manner that the Napster end users were when they downloaded the copyrighted file. Both users have succeeded in being able to access unauthorized copies of copyrighted works “on demand” and can perform them whenever they wish. With direct infringers at both ends of the line, we now look at the role of the Facebook user who shares the content, facilitating the initial infringement of one to the subsequent infringement of the other.

V. LINKING CONTENT: WHEN SHARING BECOMES INFRINGING AND WHAT CAN BE DONE

A. Secondary Liability by Linking

A person is held to contributory infringe when they induce, cause, or materially contribute to the infringing conduct of another.⁸⁹ In this scenario, it is the “middle man,” the Facebook user who finds the infringing content and “shares” it with his group of friends; which is essentially a distribution list. It is that user who not only finds the content and broadcasts it on his profile page and on the page of the friends he is connected with but the one who can also induce them to view it by adding suggestive comments on the link. It is my conclusion that contributory infringement liability should be found when the users satisfy four requirements: (1) they must share content that a reasonable person would find to be infringing (such as a music video uploaded by someone who is clearly not the artist or label); (2) their “privacy settings” should be such that would “broadcast” the posting of the content to all their “friends”; (3) their “friends” should be a number that reasonably

⁸⁹ *Gershwin*, 443 F.2d at 1159.

exceeds the “normal circle of family and social acquaintances” standard; and (4) the user must include suggestive or enticing comments on the link as to invite their friends to open it.⁹⁰

My conclusion begins with requiring that the content be one that would make a reasonable person believe it is not authorized. Although liability is not waived by the infringing acts of a user who “had no reason to believe that his or her acts constituted an infringement,”⁹¹ contributory infringement requires active knowledge of infringing activity. Second, the user must, upon “posting” the content, broadcast it so that the posting appears on all his “friends” news feed, therefore maximizing the reach of his broadcast and allowing the content to reach his friends without them having to access his profile first. If the user’s privacy settings are set so that it does not “broadcast” his posting, the content will not be accessible to his friends unless they go to his profile and actively seek his posted content. It is important that the content be published on his friend’s pages, so as to maximize the user’s active steps to share and distribute the media. Third, a modest amount of friends could be argued to be the “online equivalent” of a social circle tolerated by the Act. The broadcast should reasonably exceed that of a “normal circle” and approach more of an “indiscriminate circle” of friends. This can be argued for users that have thousands of “friends” and easily held for users whose “friend lists” are less “actual friends” and more “followers” or fans; in which case the user would be a celebrity or person with online following. Finally, the user should include commentary to induce and/or invite his friends to view the content. The stronger the language the user uses, the more he will fall under the inducement doctrine as held in *Grokster*.⁹²

Assuming the above requirements are met, the liability should also be considered under the *Perfect 10* holding. Under the server test, the user who shares the content, and whose name appears within the “in-line frame,” would not be liable since he is not storing the content and transmitting the content to the viewer. However, this case is easily distinguished from the case in *Perfect 10*. There, the court was faced with the “actions” done by Google’s search engine which is controlled by a mathematical algorithm in reaction to the input that users give it; whereas, in this case the user actively seeks the content and shares it. The active steps taken by the user and the inducing conduct should determine infringement by linking not under the

⁹⁰ Since users are not akin to what Sony was in the *Betamax* case (i.e. the producer of the article of commerce), the “Sony Defense” will not be available to them. See *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971)..

⁹¹ 17 U.S.C. § 504(c)(2) (2009).

⁹² *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Perfect 10 holding, but under the holding in *Intellectual Reserve, Inc.*⁹³ Without the benefit of the server test, the user would be liable for contributory infringement either by inducement or by the more general doctrine described in *Gershwin*.⁹⁴

B. Compulsory Licensing: Solution?

Although my argument is that secondary infringement is occurring, as we speak, at a high volume on Facebook, the solution should not be a redub of the failed Motion Picture Association of America/Recording Industry Association of America lawsuits against college students and surprised grandmothers. Rather, copyright owners should accept the fact that this kind of infringement will only become more common and prevalent given the ease with which it can be done and the appearance of legitimacy that it involves in the eyes of the users. Furthermore, as social networks evolve and as our technology and “online status” becomes more and more omnipresent in our lives, I suggest a solution much derided by the Copyright Office: a compulsory license.⁹⁵

Congress can legislate the creation of a collective society that can impose a levy on Internet Service Providers, which can then be distributed among the artists and owners in a way similar to the Audio Home Recording Act and the Alliance of Artists and Recording Companies do with the private copy levy. This would ensure that artists and owners receive compensation they would otherwise not receive. It would also, contrary to what the Copyright Office argues, foment creativity and expression since the rapid spread of web content over social networks leads to more awareness of the artists or the work, and to new expressions in response to said work.⁹⁶ The RIAA lawsuits proved that going after individuals only made a difference to those who get sued, just as well as going after individual Facebook users will not produce positive results. Instead, artists and owners should seek to avoid the deadly mistake they did with Napster, and find a solution that works

⁹³ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (holding that a user who posted the hyperlink addresses of infringing content he was asked to remove on his website was liable for copyright infringement).

⁹⁴ Furthermore, although individual profiles resemble a “web portal” more and more these days, neither them nor the users fit the definition of a service provider under the DMCA since they do not provide transmissions or services for digital online communication. See 17 U.S.C.A. § 512(k)(1); *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971).

⁹⁵ “A compulsory license mechanism is in derogation of the rights of authors and copyright owners.” *Copyright Webcasting Programming on the Internet: Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary House of Representatives* 106th Cong. 66-178 (2000) (statement by Copyright Register, Marybeth Peters).

⁹⁶ This is particularly common in the case of political messages and content.

within the system while, at the same time, flagging and removing copyrighted content on video-sharing sites while continuing to support legal video hosting sites such as Hulu.com.⁹⁷

Web 2.0, as social networks tend to be called by some, will only continue to expand and users will continue to share content regardless of the “flavor of the month” site that is being used. As such, infringing content will continue to be distributed via linking that may or may not be “in-line framed,” but that will be exponentially broadcasted as more users see it, and “share it forward.” This is the direction technology and its users are moving towards. Authors and artists should work with this tide and exploit the free distribution that comes with it, and together, help steer the tide away from unauthorized content and towards sites that provide users with the same content, but sponsored by the artists who produce it.

⁹⁷ Hulu.com is a joint venture, owned by NBC Universal, FOX Entertainment Group, Disney-ABC Television Group and Providence Equity Partners. It is operated by an independent team, and is dedicated to the online streaming of television shows and movies. For more information, visit <http://www.hulu.com/about>.