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Jennifer L. Hanley

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## ISP LIABILITY AND SAFE HARBOR PROVISIONS: IMPLICATIONS OF EVOLVING INTERNATIONAL LAW FOR THE APPROACH SET OUT IN VIACOM V. YOUTUBE

Jennifer L. Hanley\*

Around the globe, YouTube has become a metaphor for the democratizing power of the Internet and information. YouTube gives unknown performers, filmmakers, and artists new ways to promote their work to a global audience and rise to worldwide fame; makes it possible for political candidates and elected officials to interact with the public in new ways; enables first-hand reporting from war zones and from inside repressive regimes; and lets students of all ages and backgrounds audit classes at leading universities.<sup>1</sup>

If asked, a substantial number of Internet users would enthusiastically agree with the above description of one of the most influential and celebrated contributions to the development of “Web 2.0,”<sup>2</sup> and to the world at large. YouTube, along with similar Internet Service Providers (“ISPs”)<sup>3</sup> like Facebook and Twitter, has enabled Internet users to communicate effortlessly and instantly with other people around the world.

Yet, the rise in popularity of these ISPs has been accompanied by an influx of litigation brought by those seeking stronger measures for enforcing intellectual property rights (“IPR”).<sup>4</sup> As a result, a contentious debate has begun regarding the proper role for ISPs in the

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\* J.D. Candidate, 2012, Maurice A Deane School of Law at Hofstra University. Many thanks go to the managing staff of the *Journal of International Business & Law* for giving me this opportunity. Thank you as well to Professor Lea Shaver, for supervising this Note. I am forever indebted to my family; thank you for all of your faith and support. I wish to dedicate this Note to my fiancé Anthony J. Ferraro, who continues to be my “#1 Fan” in everything that I do.

<sup>1</sup> Zahavah Levine, *Broadcast Yourself*, BROADCASTING OURSELVES ; ) THE OFFICIAL YOUTUBE BLOG (Mar. 18, 2010), <http://youtube-global.blogspot.com/2010/03/broadcast-yourself.html>.

<sup>2</sup> Web 2.0 has been described as the “newest generation of Internet development, provid[ing] the technology that facilitates [user] participation: wikis, podcasting, news fora, social networking sites, hosting services, and search engines.” Jessica Wood, *The Darknet: A Digital Copyright Revolution*, 16 RICH. J.L. & TECH. 14, \* 3 (2010), (citing Claudia K. Grinnell, *From Consumer to Prosumer to Producer: Who Keeps Shifting My Paradigm? (We Do!)*, 21 PUB. CULTURE 577, 595 (2009)).

<sup>3</sup> This note defines an ISP as a “provider of online services or network access, or the operator of facilities therefor.” Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections for the Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. POL’Y 397, 413 (1999)(quoting Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 2860 §512 (1998)). When Congress enacted the DMCA, which is the domestic legislation currently governing ISP liability, it intended the legislation to cover ISPs that solely provided access to the Internet. However, subsequent to the enactment of the DMCA, courts have broadened the definition of ISP under the statute to include organizations that offer many different types of Internet “services,” including those offered by YouTube, FaceBook, et. al. See Neil A. Benchell, *The Digital Millennium Copyright Act: A Review of the Law and the Court’s Interpretation*, 2 BUFF. INTELL. PRO. L.J. 30, 43 (2003).

<sup>4</sup> Tanya Woods, *Copyright Enforcement at All Costs? Considerations for Striking Balance in the International Enforcement Agenda*, 37 AIPLA Q.J. 347, 349-350 (2009).

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fight against online copyright infringement.<sup>5</sup> In *Viacom v. YouTube*,<sup>6</sup> a U.S. federal district court held that under American copyright law, an ISP's legal obligation with respect to combating infringement is limited to removing infringing posts through an established "Notice and Take-Down"<sup>7</sup> regime.<sup>8</sup> Nonetheless, developments in international law suggest a trend in increased IPR enforcement that could threaten to undermine the balance struck by the *Viacom* court by placing higher obligations on ISPs to police against copyright infringement.

After providing background on the legal framework that enabled the *Viacom* court to reach its decision, this Note will predict the success of the court's approach in light of implications of evolving law regarding the role of ISPs in domestic and international copyright enforcement regimes. This Note will focus primarily on the *Viacom* case to demonstrate that the court's approach to the issue of ISP liability in that case translates into a balanced and effective copyright regime. Furthermore, despite some indications that the approach would be challenged by developments in domestic and international law, the thesis of this Note is that the *Viacom* court's approach will ultimately prevail.

Part I will explain the background of domestic and international digital copyright law. Part II will delve into the contrasting points of view regarding the "*Viacom* approach."<sup>9</sup> In Part III, this Note will demonstrate that the *Viacom* approach is indeed the most practical in terms of balancing increased enforcement of IPR with providing ISPs with the security and flexibility to continue expanding.

## I. BACKGROUND ON CURRENT DOMESTIC AND INTERNATIONAL DIGITAL COPYRIGHT LAW

### Background in American Copyright Law

It would be impossible to discuss a recent U.S. federal court decision without first introducing and explaining the rule of law that guided the court's decision. American copyright law provides a copyright owner, for some duration of time,<sup>10</sup> with five exclusive "fundamental rights:" reproduction, adaption, publication, performance, and display.<sup>11</sup> Those who infringe upon the owner's exclusive rights are subject to injunctive relief, damages, and, in some cases, costs and attorneys fees.<sup>12</sup> Copyright automatically "inheres" in a work the mo-

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<sup>5</sup> See Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375 (2009).

<sup>6</sup> 718 F.Supp.2d 514 (S.D.N.Y. 2010).

<sup>7</sup> "Notice and take-down," for the purposes of this Note, refers to current U.S. copyright law's requirement that an ISP not have "actual knowledge" of infringing material posted, nor be "aware of facts and circumstances from which infringing activity is apparent." Once an ISP becomes aware of infringement, it can be held secondarily liable for the infringement unless it "disables access to or removes [infringing] material expeditiously." See IAN C. BALLON, *E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS* § 4.12[6][C], at 4-358 (2d ed. 2011).

<sup>8</sup> See *Viacom*, 718 F. Supp. 2d at 525.

<sup>9</sup> The "*Viacom* Approach" will be used interchangeably to mean a "Notice and Takedown Regime."

<sup>10</sup> MELVILLE B. NIMMER, *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY* 240-45 (3d ed. 1985).

<sup>11</sup> H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674.

<sup>12</sup> Max Stul Oppenheimer, *The Time and Place for "Technology Shifting" Rights*, 14 MARQ. INTELL. PROP. L. REV. 269, 293 (2010).

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ment it is “created,”<sup>13</sup> but before any infringement case may move forward in a federal court, the rights owner must have first registered the work with the federal Copyright Office.<sup>14</sup>

Enforcing copyright protection grants a limited monopoly to the musicians, writers, and owners of creative works.<sup>15</sup> Historically, the government has therefore sought to craft balanced copyright enforcement legislation that would encourage the creation and innovation of new materials and also incentivize the distribution of these new materials to the public.<sup>16</sup> In an effort to craft such balanced legislation, legislators have carved a number of exceptions out of copyright laws, under which a non-owner could use the copyrighted material without facing threat of liability.<sup>17</sup>

### Updates in Copyright Law Accommodate Internet Explosion

Technological advances taking place at the start of the new millennium afforded copyright owners new opportunities to benefit from their creative works.<sup>18</sup> At the same time, those technological advances also provided additional opportunities for misappropriation of copyrighted materials.<sup>19</sup> Computers, in fact, have been referred to as the “world’s greatest copying machines.”<sup>20</sup>

Congress enacted the 1998 Digital Millennium Copyright Act (“DMCA”) to accommodate the development and subsequent explosion of the Internet as a vehicle for reproducing and distributing copyrighted material.<sup>21</sup> The DMCA is divided into Five Titles,<sup>22</sup> but only Title I and Title II are relevant to this Note. Title I implemented the “WIPO Treaties,” a pair of treaties designed to strengthen online intellectual property rights on a global basis.<sup>23</sup> The WIPO treaties will be discussed in greater depth below.

Title II of the DMCA amended earlier federal copyright law by limiting potential liability of Internet Service Providers for copyright infringement violations.<sup>24</sup> These limitations on liability, referred to as the DMCA “safe harbor” provisions, set forth prerequisites an ISP must satisfy to qualify for protection from liability.<sup>25</sup>

According to one of the senators who contributed to the writing of the DMCA, the purpose behind the legislation was to clarify ISP liability so that ISPs would be incentivized to

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<sup>13</sup> “Created” for the purposes of copyright law means “fixed in a copy or phonorecord for the first time.” 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16, at 7-147 (Matthew Bender, Rev. Ed., 2010).

<sup>14</sup> *Id.* at 7-152.

<sup>15</sup> Andrepont, *supra* note 3, at 397

<sup>16</sup> *Id.*

<sup>17</sup> For example, 17 U.S.C. § 107 (2010), sets forth an exception to the copyright holder’s exclusive rights to copyrighted materials for the “fair use” of that material. In cases involving the “fair use” of copyrighted material, no infringement liability attaches. *See Id.*

<sup>18</sup> *See Andrepont, supra* note 3, at 398-99.

<sup>19</sup> *See id.* at 398.

<sup>20</sup> *Id.* (quoting Wendy Leibowitz, *Lawyers and Technology*, NAT’L L.J. A16, (col. 1), Nov. 2, 1998 at ¶4).

<sup>21</sup> *See id.* at 398-97.

<sup>22</sup> *Id.* at 410.

<sup>23</sup> *Id.* at 402.

<sup>24</sup> *Id.* at 413

<sup>25</sup> *See James Chadwick, Copyright Owners have the Burden of Policing Ruling in ‘Viacom v. YouTube’ is the Latest in a Trend Involving the ‘Storage’ of Videos Under DMCA.* 32 NAT’L L.J. 10 Col. 1 (Aug. 16, 2010).

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continue investing resources to maintain the Internet's speed and capacity.<sup>26</sup> The same senator theorized that by limiting the ISP's liability, the DMCA would ensure continued improvement in the Internet's efficiency while also ensuring the continued expansion of the variety and quality of services available on the Internet.<sup>27</sup>

Some academics have pointed out that the DMCA was enacted prior to YouTube's actual development and therefore the protections available under that legislation were not originally intended to cover YouTube and similar intermediaries.<sup>28</sup> Nevertheless, as YouTube's Senior Product Counsel Larry Kavanaugh has explained, lower courts' interpretations of the DMCA safe harbor provision have provided the "legal plumbing to allow small companies to innovate without the threat of crushing litigation," and thus Congress "struck the right balance" in passing the legislation.<sup>29</sup>

Historically, domestic (and foreign) legislation has required ISPs to take a passive-reactive role<sup>30</sup> in the battle against online copyright infringement, such that ISPs have only been obligated to react *ex post* to notices of infringement.<sup>31</sup> However, some commentators believe that the role of ISPs has changed since the beginning of 2007.<sup>32</sup> Their theory is that the ISPs, in reaction to increased pressure from entertainment industries, government legislators, and regulatory agencies, have become more actively involved, such that ISPs must police their networks to prevent copyright infringement *ex ante*.<sup>33</sup>

**Viacom v. YouTube: U.S. District Court Recently Affirms YouTube's Adherence to "Notice and Take-Down" Regime is Legally Enough**

Subsequent to the 1998 enactment of the DMCA, multiple cases have been litigated in federal courts regarding the extent to which an ISP "hosting"<sup>34</sup> infringing material may

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<sup>26</sup> See Hannibal Travis, *Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law*, 84 NOTRE DAME L. REV. 331, 348 (2008) (quoting 144 Cong. Rec. 9234 (1998) (statement of Sen. Hatch)).

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

<sup>28</sup> Webcast: Aspen Forum on The Internet and the Media - After the First Wave, What's Next?, held by the Technology Policy Institute (Aug. 23, 2010) ([http://www.techpolicyinstitute.org/video/aspen2010/100823-internet\\_and\\_media.php](http://www.techpolicyinstitute.org/video/aspen2010/100823-internet_and_media.php)) [hereinafter TECH. POL'Y INST. ASPEN FORUM]. (Professor Peter Menell, Professor of Law at UC Berkely and Director of the Berkely Center for Law and Technology raised this point during a discussion of whether U.S. legislation regarding ISP liability needed to be modernized to accommodate increased piracy and counterfeiting problems).

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

<sup>30</sup> Under this regime, ISPs allow users to store and transmit content without "interference, modification, or influence." de Beer & Clemmer, *supra* note 5, at 376.

<sup>31</sup> Most (domestic and foreign) legislation regulating ISP involvement with copyright infringement requires the ISP to take some specific action once the ISP has been made aware that infringing material has allegedly been posted to the site. de Beer & Clemmer, *supra* note 5, at 376.

<sup>32</sup> *Id.* at 375.

<sup>33</sup> See de Beer & Clemmer, *supra* note 5, at 376.

<sup>34</sup> For the purposes of 17 U.S.C.A. § 512(c) (2010), YouTube is a service provider that may be eligible for safe harbor protection in cases of copyright infringement "by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider," so long as the service provider complies with the statute's remaining requirements. See de Beer & Clemmer, *supra* note 5, at 382.

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have “knowledge”<sup>35</sup> of the infringement while still qualifying for DMCA safe harbor protection.<sup>36</sup> In *Viacom*, federal judge Louis J. Stanton, J., held that an ISP’s “mere knowledge of prevalence” of users’ infringing activity on its site is insufficient to disqualify an ISP from the DMCA’s safe harbor protections.<sup>37</sup> According to the *Viacom* court, in order for an ISP like YouTube to lose statutory protection from secondary liability, the ISP must have “knowledge of specific and identifiable infringements of particular individual items.”<sup>38</sup>

The court arrived at its decision nearly three years after the litigation commenced, after Viacom and several affiliates brought suit against YouTube and parent company Google for copyright infringement.<sup>39</sup> After YouTube moved for summary judgment on the grounds that the DMCA’s safe harbor provision protected it from liability, the plaintiffs cross-moved for summary judgment relief, asserting that YouTube was ineligible for protection under the safe harbor provision.<sup>40</sup> According to the plaintiffs, YouTube was liable for its users’ infringing activity because, *inter alia*, YouTube had “actual knowledge and [was] aware of facts and circumstances from which infringing activity was apparent.”<sup>41</sup> According to one writer, the plaintiffs sought relief because they felt that, while YouTube purported to be merely a forum for User Generated Content (“UGC”)<sup>42</sup>, a large amount of the actual content posted to the site consisted of infringing copies of Viacom’s copyrighted works.<sup>43</sup>

In its decision granting YouTube summary judgment, the court referred primarily to the DMCA’s legislative history.<sup>44</sup> The court also cited cases decided in other circuits to support its proposition that YouTube’s awareness of infringing activity was insufficient to disqualify the ISP from safe harbor protection.<sup>45</sup> The court also refuted the plaintiffs’ contentions by distinguishing the *Viacom* case from *MGM Studios Inc. v. Grokster, Ltd.*<sup>46</sup> In *Grokster*, the Supreme Court 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.”<sup>47</sup> As the

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<sup>35</sup> Pursuant to 17 U.S.C.A. §§ 512(c)(1)(A)(i)-(iii), an ISP will not be held liable for infringing material posted to its site so long as the ISP does not have “actual” knowledge that the posted material is infringing, or “in absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent,” or “having obtained such knowledge or awareness, acts expeditiously to remove, or disable access to the material.” See de Beer & Clemmer, *supra* note 5, at 383.

<sup>36</sup> If protected by the Safe Harbor provision, a service provider “shall not be liable for monetary relief, or . . . for injunctive or other equitable relief,” for infringing material that has been posted by an Internet user. 17 U.S.C.A. § 512(c)(1) (2010).

<sup>37</sup> *Viacom*, 718 F. Supp. 2d at 523.

<sup>38</sup> *Id.*

<sup>39</sup> “*Judge Sides With YouTube In Viacom Infringement Case*, 165 INTELL. PROP. COUNS. 7 (September 2010).

<sup>40</sup> *Viacom*, 718 F. Supp. 2d at 516.

<sup>41</sup> *Id.* (citing the parties’ Notices of Motion).

<sup>42</sup> One author has defined UGC by first defining “content” as movies, music and books, then categorizing UGC as a “sub-set” of this traditional content. It is “creatively produced ‘authorial’ content” which is “protected by copyright law.” Greg Lastowka, *User Generated Content and Virtual Worlds*, 10 VAND. J. ENT. & TECH. L. 893 (2008).

<sup>43</sup> “*Updates*” *Judge Sides With YouTube In Viacom Infringement Case*. 165 I.P. COUNS. 7 (September 2010).

<sup>44</sup> *Viacom*, 718 F.Supp.2d at 514.

<sup>45</sup> *Id.* at 523-27. (analyzing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009)); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004)).

<sup>46</sup> *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>47</sup> *Id.* at 919.

*Viacom* court pointed out, the *Grokster* case differed from the *Viacom* case because the defendant in *Grokster* distributed software that enabled “peer-to-peer” networks.<sup>48</sup> The *Viacom* court thus deemed the *Grokster* “model” inapplicable in cases like *Viacom*, where the service provider like YouTube “furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complaints of infringement, and removes identified material when he learns it infringes.”<sup>49</sup>

The *Viacom* court stated that based on plaintiffs’ submissions on the motions, a jury could find that YouTube had general awareness of and even “welcomed” its users’ placement of copyright-infringing material on the website.<sup>50</sup> However, according to the court, “mere knowledge of [the] prevalence of [infringing] activity” is insufficient to cause a website like YouTube to lose DMCA safe harbor protection.<sup>51</sup> It was “uncontroverted” that when *Viacom* provided YouTube with notice indicating the presence of a specific infringing work, YouTube removed that work.<sup>52</sup>

Accordingly, the court granted YouTube’s motion for summary judgment that the website qualified for protection under the DMCA.<sup>53</sup> By its order, the court therefore declined to shift the “substantial” burden to investigate copyright infringement from the rights holder to the ISP.<sup>54</sup> The underlying tenet in *Viacom* and cases similarly decided by courts in other circuits<sup>55</sup> is that websites that provide “video-sharing services,” and merely store UGC for subscribers,<sup>56</sup> qualify for DMCA safe harbor protection so long as there is no “actual notice” of the infringing activity.

### E-Commerce Directive: EU’s Version of DMCA Safe Harbor

The law under which the European Union operates provides ISPs with similar protections from secondary liability as those protections set forth by the DMCA. Under the Treaty on European Union,<sup>57</sup> the European Council of Ministers<sup>58</sup> may issue directives, which are binding on the EU member states but that may, to some degree, be implemented

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<sup>48</sup> According to the *Grokster* Court, “Peer-to-peer” networks enable computers to communicate directly with each other, not through central servers. Though its possible the software can be used for legitimate purposes, recipients of such “peer-to-peer” software have mostly used the software to share copyrighted music and video files without authorization. *Id.* at 919-20.

<sup>49</sup> *Viacom*, 718 F.Supp.2d at 526.

<sup>50</sup> *Id.* at 518.

<sup>51</sup> *Id.* at 523.

<sup>52</sup> *Id.* at 526.

<sup>53</sup> *Id.* at 529.

<sup>54</sup> *Id.* at 523.

<sup>55</sup> See Chadwick, *supra* note 25 (discussing the courts’ decisions in *Io Group Inc. v. Veoh Networks Inc.*, 586 F. Supp. 2d 1132 (N.D. Calif. 2008), and *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081 (C.D. Cal. 2008)).

<sup>56</sup> Such websites include Twitter, Facebook, YouTube, etc.

<sup>57</sup> Now called the “Treaty of Maastricht,” this treaty, which entered into force in 1993, established the European Union by changing the structure of the former European Community. See *Treaties and Law*, EUROPA.EU, [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm) (last visited Jan. 8, 2011).

<sup>58</sup> The European Council of Ministers is the main “decision-maker” of the EU and shares legislative duties with the European Parliament. Michael J. McCormick, *A Primer on the European Union and Its Legal System*, 2002 ARMY LAW. 1, 4 (2002).

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differently between the states.<sup>59</sup> One such directive, the Electronic Commerce Directive (“ECD”), sets forth safe harbors for ISPs using wording very similar to the corresponding provision under the DMCA.<sup>60</sup> Specifically, the ECD requires member states to ensure ISPs will not be held liable for storing a subscriber’s information, so long as the ISP does not have “actual knowledge of illegal activity or information,” but “upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information.”<sup>61</sup>

Moreover, just as the court in *Viacom* refused to place an affirmative burden on ISPs to police against copyright infringement, the ECD prohibits member states from imposing an affirmative burden on ISPs to proactively investigate or monitor the legality of the information stored by the website’s users.<sup>62</sup> And while the ECD does allow for injunctive or administrative efforts to prevent or terminate infringement, it states that any such efforts undertaken must be consistent with the principle of freedom of expression.<sup>63</sup>

Accordingly, a comparison between the United States’ and the EU’s domestic law in the area of secondary liability for ISPs suggests that a court in the EU would reach the same decision as the court in *Viacom*.

### International Harmonization of IPR: From WIPO to ACTA

It has been said that differences in domestic IP enforcement regimes have resulted in the overall weakening of copyright law.<sup>64</sup> One appealing solution has therefore been to craft a global set of international copyright laws instead of relying on different domestic regimes to uphold intellectual property rights.<sup>65</sup>

The roots of modern international Intellectual Property law can be traced back to the Paris Convention of 1883 and the Berne Convention of 1886,<sup>66</sup> two multilateral<sup>67</sup> agreements that signified enhanced “international cooperation” regarding intellectual property.<sup>68</sup> Although not the first copyright treaty, the Berne Convention is considered significant in that it constituted the first “international treatment” of copyright.<sup>69</sup>

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<sup>59</sup> See Travis, *supra* note 26, at 340 (citing Consolidated Version of the Treaty Establishing the European Community art. 249, 2006 O.J. (C321) 37, 153).

<sup>60</sup> See *id.* at 365.

<sup>61</sup> Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L178) 1, 13 [hereinafter Council Directive].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 6.

<sup>64</sup> See Scott Burger, Note, *Eradication of a Secondary Infringer’s Safe Havens: The Need for a Multilateral Treaty Addressing Secondary Liability in Copyright Law*, 18 MICH. ST. J. INT’L L. 143, 157 (2009).

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

<sup>66</sup> Sisule F. Musungu & Graham Dutfield, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELL. PROP. ORG. (WIPO) 4 (2003), available at <http://www.wipo.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf>.

<sup>67</sup> “Multilateral” indicates that a large number of states participate in the treaty or trading system. This is in contrast to a “global” agreement or system, which would include all states. See *What is the World Trade Organization?* WTO [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Jan. 7, 2011).

<sup>68</sup> Musungu & Dutfield, *supra* note 66.

<sup>69</sup> See Burger, *supra* note 64, at 148.



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In response to treaty making in intellectual property, various international organizations formed in order to resolve related issues.<sup>70</sup> The World Intellectual Property Organization (WIPO) became a specialized agency of the United Nations (“UN”) in 1974,<sup>71</sup> its goal being to “promote the protection of intellectual property throughout the world.”<sup>72</sup> As of July 15, 2003, WIPO counted 179 states as members.<sup>73</sup> WIPO does not itself set minimum standards for IP protection, but instead strives to accomplish its objective by administering a collection of treaties.<sup>74</sup>

A number of developed countries, including the United States, perceived WIPO’s regime to be too lenient<sup>75</sup> to sufficiently protect IPR<sup>76</sup> on an international basis, and thus lobbied for an alternative forum for stricter IPR enforcement.<sup>77</sup> Their requests were ultimately satisfied at the conclusion of the General Agreement on Tariffs and Trade (“GATT”)<sup>78</sup> Uruguay Round<sup>79</sup> of negotiations, with the creation of the World Trade Organization (“WTO”).<sup>80</sup>

Like WIPO, the WTO is an intergovernmental organization (“IGO”) that regulates a “broad terrain of international trade relations.”<sup>81</sup> WTO incorporates the GATT system of international trade norms while also building upon them to include trade in services and intellectual property.<sup>82</sup> Over 150 countries are currently WTO members, and as such their trade

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<sup>70</sup> Musungu & Dutfield, *supra* note 66.

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

<sup>72</sup> Emily Ayoob, *Recent Development: The Anti-Counterfeiting Trade Agreement*, 28 CARDOZO ARTS & ENT. L.J. 175, 177 (quoting Sisule F. Musungu & Graham Dutfield, MULTILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO) 11 (2003), available at <http://www.quno.org/geneva/pdf/economic/Issues/Multilateral-Agreements-in-TRIPS-plus-English.pdf>).

<sup>73</sup> Musungu & Dutfield, *supra* note 72.

<sup>74</sup> Ayoob, *supra* note 72, at 177.

<sup>75</sup> In contrast, many developing countries favored the permissive nature of the WIPO regime, because it allowed them to pick and choose from a menu of treaties and therefore enabled them to tailor their IP regimes to meet their development goals. See Musungu & Dutfield, *supra* note 66, at 10.

<sup>76</sup> For those states seeking enhanced international IPR enforcement, the permissive nature of the rules under the WIPO regime (which enabled states to pick and choose treaties) and the lack of enforcement measures, caused these states to conclude that WIPO failed to secure adequate levels of IP protection. See Musungu & Dutfield, *supra* note 66.

<sup>77</sup> Ayoob, *supra* note 72, at 177.

<sup>78</sup> GATT provided the rules for a great deal of world trade during the period from 1948 through 1994. GATT also presided over periods that saw some of the highest growth rates in international commerce. Although it appeared well-established, it was merely a provisional agreement and organization. See *The GATT Years: From Havana to Marrakesh*; WTO.ORG, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Jan. 7, 2011).

<sup>79</sup> GATT helped establish a strong multilateral trading system, involving a number of different rounds of trade negotiations. The Uruguay Round came about after the GATT system experienced a great deal of trouble and needed an overhaul. The negotiating agenda for the Uruguay round of trade negotiations covered virtually every outstanding trade policy issue. *Id.*

<sup>80</sup> At the conclusion of the Uruguay Rounds, the WTO replaced GATT as the “organization overseeing the multilateral trading system.” “organization overseeing the multilateral trading system.” *The 128 Countries that had Signed GATT by 1994*, WTO.ORG, [http://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm) (last visited Jan. 7, 2011). The GATT organization mainly dealt with trade in goods, while the WTO and its agreements now cover additional issues, including IP. See also *What is the World Trade Organization?* WTO.ORG, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Jan. 29, 2011).

<sup>81</sup> “. . . broad terrain of international trade relations.” PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 88 (OXFORD 2nd ed. 2010).

<sup>82</sup> *Id.* at 89.

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agreements dealing with intellectual property must satisfy the WTO standard, which is enforceable through WTO's dispute settlement mechanism.<sup>83</sup>

WTO administers a "broad package" of trade agreements, but only one addresses the field of intellectual property, the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").<sup>84</sup> However, the TRIPS agreement is arguably the "most important instrument in the realm of international copyright,"<sup>85</sup> and that agreement "exemplifies the perceived advantages of the trade process in resolving differences over intellectual property protection."<sup>86</sup>

With the inclusion of several countries that had not participated in the Berne Convention, it was hoped that TRIPS would increase copyright "harmony."<sup>87</sup> It has been said that the WTO's comprehensive dispute settlement system has resulted in the first effective dispute resolution procedures for copyright and other international intellectual property relations.<sup>88</sup> TRIPS has further changed the international intellectual property regime by "introducing the principle of minimum intellectual property standards."<sup>89</sup> To that end, any IP agreement negotiated post-TRIPS and involving WTO members can only create *higher* IP standards.<sup>90</sup> This concept is commonly referred to as "TRIPS-plus."<sup>91</sup>

The WIPO Copyright Treaty of 1996 built upon earlier efforts and expanded international copyright principles "beyond traditional borders" and into the digital landscape.<sup>92</sup> However, none of the aforementioned efforts addressed secondary liability, resulting in a gap with respect to international standards for secondary liability for ISPs.<sup>93</sup>

### Anti-Counterfeiting Trade Agreement: Negotiating a Plurilateral Treaty to Harmonize IPR Enforcement

The most recent development in the efforts to craft an international IPR regime began in early 2007 when the United States and several of its trading partners started negotiating an agreement to harmonize various aspects of international IPR, including ISP secondary liability. In late 2010, the parties completed final negotiations for a proposed multilateral treaty, referred to as the Anti-Counterfeiting Trade Agreement ("ACTA").<sup>94</sup> The countries that participated in the ACTA negotiations included the United States, the European Union, Japan, Switzerland, Australia, Canada, Jordan, Korea, Mexico, Morocco, New Zealand, and the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 72.

<sup>87</sup> Ayoob, *supra* note 72.

<sup>88</sup> GOLDSTEIN & HUGENHOLTZ, *supra* note 81, at 74-75.

<sup>89</sup> Musungu & Dudfield, *supra* note 72, at 2.

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

<sup>91</sup> TRIPS-plus covers activities that either increase rights protection or reduce limitations on rights and exceptions. *Id.*

<sup>92</sup> Burger, *supra* note 64, at 149

<sup>93</sup> *See id.*

<sup>94</sup> Ayoob, *supra* note 72, at 175-76.

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United Arab Emirates.<sup>95</sup> A number of states, including Argentina, Brazil, and China, were excluded from negotiations.<sup>96</sup>

The idea to establish a new multilateral agreement on IP enforcement emerged after the first Global Congress on Combating Counterfeiting (“GCCC”).<sup>97</sup> The GCCC was convened by a combination of three international trading organizations (including WIPO) as well as a collection of international business organizations.<sup>98</sup> These groups convened the GCCC in order to address the numerous “adverse costs to social welfare and economic development that was resulting from the rampant theft of intellectual property.”<sup>99</sup> The GCCC hosted a series of meetings, the product of which was “The G8 Statement,” a document that stated the need for increased enforcement against IP piracy and counterfeiting.<sup>100</sup>

Between November 2005 and January 2007, GCCC meeting attendees considered the G8 Statement in conjunction with a proposal Japan had issued calling for a new international agreement on counterfeiting and piracy.<sup>101</sup> The attendees promised to consider Japan’s proposal.<sup>102</sup> In fact, the United States Trade Representative (“USTR”) indicated that the United States and Japan had already jointly considered a new multilateral treaty to combat counterfeiting and piracy as early as 2006, and that preliminary discussions regarding that matter had taken place from 2006 through 2007, between countries such as the United States, Canada, the European Union, Japan, and Switzerland.<sup>103</sup> On October 23, 2007, USTR Carol C. Schwab publicly announced that the United States and “some of its key trading partners” were looking to “negotiate a new, higher benchmark for enforcement”; she emphasized that these negotiations were not to take place within any pre-existing international organizations.<sup>104</sup>

The final ACTA text agreement was publicized via Dr. Michael Geist’s blog on December 6, 2010.<sup>105</sup> On December 17, 2010, the USTR issued a public request for comments on the ACTA, to provide additional consideration before the United States’ signing of the agreement.<sup>106</sup> With respect to the actual “finality” of the agreement, a press release statement from the office of the USTR merely indicated that following the “legal verification of

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<sup>95</sup> Margot Kaminski, Note, Recent Development, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247, 250 (2009).

<sup>96</sup> *Id.*

<sup>97</sup> *About the Congress*, GLOBAL CONGRESS: COMBATING COUNTERFEITING & PIRACY, <http://www.ccapcongress.net/about.htm> (last visited Jan. 27, 2011).

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

<sup>99</sup> Ayoob, *supra* note 72, at 178 (quoting *Global Congress Combating Counterfeiting & Piracy, About the Global Congress*, <http://www.ccapcongress.net/about/about.htm> (last visited Mar. 15, 2010)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

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

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

<sup>104</sup> *Id.* at 179 (quoting Press Release, Office of the U.S. Trade Representative, Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes (Oct. 23, 2007), available at <http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreementfight-fakes>).

<sup>105</sup> See Michael Geist, *Final Version of ACTA Posted*, MICHAEL GEIST BLOG, (Dec. 6, 2010), <http://www.michaelgeist.ca/content/view/5499/196/>.

<sup>106</sup> *USTR Seeks Comments by February 15 on ACTA*, 81 PTCJ 263, available at [http://news.bna.com/ptln/display/batch\\_print\\_display.adp](http://news.bna.com/ptln/display/batch_print_display.adp).

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the drafting, the proposed agreement [would] then be ready to be submitted to the participants' respective authorities to undertake relevant domestic processes."<sup>107</sup>

### II. THE CURRENT STATUS OF THE DEBATE

As explained in Part I, the *Viacom* court decided that YouTube's adherence to its "Notice and Take-Down" regime was sufficient to carry out its obligations in the fight against online copyright infringement.<sup>108</sup> However, this decision faces some challenges from domestic and international legal systems.

#### **Viacom Court's Approach Challenged by Developments in Domestic Legislation**

In December 2010, Viacom appealed the district court's decision to the Court of Appeals for the Second Circuit, with some legal commentators surmising that the issue would lead to a circuit split.<sup>109</sup> Advocates for both parties have likewise filed comprehensive amicus briefs on the issue.<sup>110</sup>

Daniel Mandil, general counsel of the Motion Picture Association of America, indicated he would be filing an amicus brief on Viacom's behalf because service providers "have a real serious legal responsibility to attend to online copyright infringement," and this "principle . . . needs to be defended and needs to be upheld by the appellate court." Mr. Mandil described the issue from a legal standpoint. However, advocates for increasing the ISP's obligation to police against copyright infringement have also framed the argument from an economic standpoint. As such, they have emphasized the substantial undisputed evidence that online copyright piracy has robbed profits from influential entertainment corporations and creative artists,<sup>111</sup> and thus fought with increased tenacity to increase the burden placed on the ISPs to police against copyright infringement activity.

One attorney, who planned to file an amicus brief on Viacom's behalf, called copyright infringement a "cat-and-mouse game" and opined that the "Notice and Take-Down" regime was "no way to keep up with infringement." There must be, in her opinion, "some onus on the service provider who is making money from [protected] content to take responsibility."<sup>112</sup> Moreover, a group of legislators recently took action to increase prosecution of online counterfeiting with the potential incidental effect of increasing ISP's burden to "police" against such acts.<sup>113</sup> On September 20, 2010, the Combating Online Infringement and Coun-

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<sup>107</sup> Press Release, Office of USTR, U.S., Participants Finalize Anti-Counterfeiting Trade Agreement Text, <http://www.ustr.gov/acta> (last visited Feb. 20, 2011).

<sup>108</sup> See *supra* Part One.

<sup>109</sup> See e.g., Amanda Bronstad, *Viacom v. YouTube Appeal May Decide Future of Web*, LAWTECHNOLOGYNEWS.COM (Dec. 14, 2010) available at 2010 LEXIS 1202476144090.)

<sup>110</sup> *Id.*

<sup>111</sup> TECH. POL'Y INST. ASPEN FORUM, *supra* note 29 (President of Recording Industry Association of America (RIAA) Cary Sherman estimates 50% decline in music industry sales revenue over the last 10 years. Asserts online piracy a major factor in the decline).

<sup>112</sup> Bronstad, *supra* note 109, at 114.

<sup>113</sup> See *Senators Introduce Bipartisan Bill to Combat Online Infringement*, 80 PTCJ 679 LEGISLATION/COPYRIGHTS, available at (<http://0-news.bna.com.libweb.hofstra.edu/ptln/>) (follow "News Archive" hyperlink; then follow "2010" hyperlink; then follow "09/24/10" hyperlink; then follow "Legislation/Copyrights" hyperlink) (last visited Sep. 24, 2010).PAT. TRADEMARK & COPYRIGHT J. (BNA) (Sept. 24, 2010) (<http://0->

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terfeits Act (S. 3804) bipartisan bill was introduced in the U.S. Senate.<sup>114</sup> According to Senator Orrin Hatch (R-Utah), legislators hope that by “coordinating [their] efforts with industry stakeholders and law enforcement officials, [they’ll] be better able to target those who are profiting from illegal activity.”<sup>115</sup> The Act would give the U.S. Attorney’s Office the authority to shut down websites that are “dedicated to infringing activities,” and notably, would impose upon ISPs an *affirmative duty* to stop doing business with such an infringing website.<sup>116</sup> Thus, while YouTube and similar ISPs have benefitted from current copyright laws without having to “police” against copyright infringement, these developments indicate that there is legislative movement to change that area of the law.<sup>117</sup>

### Advocates for Flexible Copyright Legislation Support Viacom Court’s Approach

While there are those who support a copyright regime that would require ISPs to take a more active role in preventing infringement, there have also been a number of opponents against the use of such a regime.<sup>118</sup> In its motion for summary judgment, Google highlighted a number of reasons why it would be impractical to obligate ISPs like YouTube to proactively investigate and filter out its users’ infringing posts.<sup>119</sup> Google asserted that Viacom purposefully uploaded its own clips to YouTube for marketing purposes.<sup>120</sup> While that specific assertion cannot be unequivocally accepted as factual, it does illuminate various flaws in the argument that ISPs should proactively investigate infringement, instead of relying solely on the “Notice and Take-Down” regime.

There are a number of circumstances under which infringing content can be posted without the ISP’s knowledge or awareness. For instance, an aspiring filmmaker may claim copyright infringement after the work he had posted on the Internet was copied without au-

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news.bna.com.libweb.hofstra.edu/ptln/) (follow “News Archive” hyperlink then follow “2010” hyperlink then follow “09/24/10” hyperlink then follow “News” hyperlink then follow “Legislation/Copyrights” hyperlink)

<sup>114</sup> Press Release, Senator Orrin Hatch, Senators Introduce Bill to Combat Online Piracy, Counterfeiting (Sept. 21, 2010), *available at* (<http://hatch.senate.gov/public/>)(follow “news room” hyperlink; then follow “Press Releases” hyperlink; then follow “September 2010” hyperlink). Press Release, Senator Orrin Hatch, Hatch, Senators Introduce Bill to Combat Online Piracy, Counterfeiting (Sept. 21, 2010), [http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=3529eac8-1b78-be3e-e007-14ad6c807d44&Month=9&Year=2010](http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3529eac8-1b78-be3e-e007-14ad6c807d44&Month=9&Year=2010).

<sup>115</sup> *Id.*

<sup>116</sup> See *Senators Introduce Bipartisan Bill to Combat Online Infringement*, PAT. TRADEMARK & COPYRIGHT J. (BNA) (Sept. 24, 2010) (<http://0-news.bna.com.libweb.hofstra.edu/ptln/>) (follow “News Archive” hyperlink then follow “2010” hyperlink then follow “09/24/10” hyperlink then follow “Legislation/Copyrights” hyperlink)

<sup>117</sup> See *IP Enforcement Plan Judged ‘Moderate’ But Some Worry About ISPs Acting as ‘Cops’*, 80 PTCJ 686 CONFERENCES/ENFORCEMENT (Sept. 24, 2010) (follow “News Archive” hyperlink then follow “2010” hyperlink then follow “09/24/2010” hyperlink then follow “Conferences/Enforcement” hyperlink) (known hereafter as “ISP Cops”) See *IP Enforcement Plan Judged “Moderate” but Some Worry About ISPs Acting as “Cops,”* PAT. TRADEMARK & COPYRIGHT J. (BNA) (Sept. 24, 2010) (<http://0-news.bna.com.libweb.hofstra.edu/ptln/>) (follow “News Archive” hyperlink then follow “2010” hyperlink then follow “09/24/2010” hyperlink then follow “Conferences/Enforcement” hyperlink) (known hereafter as “ISP Cops”)

<sup>118</sup> See de Beer & Clemmer, *supra* note 5, at 377.

<sup>119</sup> Andy Greenberg, *The Most Cringeworthy Quotes From The Viacom/YouTube Spat*, FORBES-BLOG, <http://www.forbes.com/sites/velocity/2010/03/18/the-most-cringeworthy-quotes-from-the-viacomyoutube-spat/> (last visited Dec. 14, 2010).

<sup>120</sup> *Id.*

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thorization and stored in a different area other than where he first posted it, while, at the opposite end of the spectrum, marketing executives working for a protected professional TV show may post a clip for viral marketing purposes.<sup>121</sup>

Ironically, while the *Viacom* court held that it was sufficient for YouTube to rely on “Take Down Notices,” the website has elected to implement a variety of tools to assist copyrights holders in protecting their rights and controlling their content.<sup>122</sup> One such tool is a copyright enforcement system called “Content ID,” which enables YouTube to resolve copyright infringement issues in a way that will provide the rights holder with the greatest satisfaction.<sup>123</sup> The rights holder sends YouTube the files to which he owns the rights, and then selects the action YouTube must take if and when a user finds his file.<sup>124</sup> Such a tool makes it possible to protect the copyright holder’s rights while still providing YouTube users with the content they so desire.

It seems as if YouTube’s decision to enact measures instead of merely relying on take down notices would satisfy even those members of the media and entertainment industries who spoke out in favor of enhanced IPR protection following the *Viacom* decision. For example, Cary Sherman, President of the Recording Industry Association of America (“RIAA”), once indicated that even though he had disagreed with the court’s decision, he still appreciated the effort YouTube put forth to cooperate with content providers.<sup>125</sup> According to Mr. Sherman, legislation is “too slow and inflexible” to provide a sufficient solution to copyright infringement. Mr. Sherman indicated that the RIAA believed that voluntary efforts to promote cooperation between rights holders and ISPs would provide the best tool to combat the infringement.<sup>126</sup> In 2008, the RIAA publicized this sentiment by announcing its plan to abandon unpopular lawsuits waged against individual file-sharers in favor of increasing collaborative efforts with ISPs.<sup>127</sup>

### Foreign Court Decisions Imply Issues Also Remains Unresolved Abroad

Just as a debate continues domestically over the proper role of ISPs in regulating IPR protection, a similar debate likewise wages abroad. Companies like Google must be especially cognizant of varying foreign domestic laws on IPR because the borderless nature of the Internet means Google is accountable to “hundreds” of different legal systems at one time.<sup>128</sup> Varying national legal systems create substantial uncertainty for Google, despite the fact that

<sup>121</sup> See BALLON, *supra* note 7, at 4-370.

<sup>122</sup> See *Resources for Content Owners*, YOUTUBE.COM, [http://www.youtube.com/t/copyright\\_owners](http://www.youtube.com/t/copyright_owners) (last visited Nov. 12, 2011).

<sup>123</sup> See *Content ID*, YOUTUBE.COM, <http://www.youtube.com/t/contentid> (last visited Nov. 12, 2011).

<sup>124</sup> *Id.* (such action includes blocking the video or receiving a portion of the profits from an advertisement preceding the video).

<sup>125</sup> See TECH. POL’Y INST. ASPEN FORUM, *supra* note 28.

<sup>126</sup> *Id.*

<sup>127</sup> Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374 (Dec. 2010).

<sup>128</sup> Andre Jaglom, *Internet Distribution, E-Commerce and Other Computer Related Issues: Current Developments in Liability On-Line, Business Methods Patents and Software Distribution, Licensing and Copyright Questions*, A.L.I –A.B.A. CLE (June 4, 2010), available at <http://www.ali-aba.org/index.cfm?fuseaction=online.preview&segmentid=21698> (last visited Jan. 15 2011)(stating that because Internet use is now “ubiquitous” and “hundreds” of countries currently have Internet access, it raises issues as to which law governs and where an Internet company may be subject to jurisdiction. Different countries have different laws relating IP infringement (as well as defamation, free speech, etc)).

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the EU operates under a single directive regarding secondary liability for ISPs.<sup>129</sup> Foreign national courts conflict over the best interpretation of the single directive. A brief survey of these varying laws demonstrates how the central inquiry varies as well when determining whether an ISP should be held secondarily liable, depending on the country.

Canada and the United Kingdom, two countries that impose “stricter” standards for secondary liability, focus on the extent of the ISP’s authorization of direct infringement and control over the infringing activities when assessing liability.<sup>130</sup> In fact, courts in these countries have characterized authorization of copyright infringement as direct infringement liability for the ISP.<sup>131</sup>

Secondary liability standards in Australia appear to be more relaxed. In *Roadshow Films v. iiNet Limited*,<sup>132</sup> the Federal Court of Australia held that an ISP was not liable for copyright infringement, even where the ISP had knowledge that such infringement was occurring and did not take any steps to prevent it.<sup>133</sup>

Different “flavors” of secondary liability for ISPs emerge even within the EU, despite the fact that all EU nations are governed under the over-arching concepts embodied in the Electronic Commerce Directive (ECD).<sup>134</sup> As described above, the ECD sets forth a “safe harbor provision” for ISPs similar to those set forth in the United States’ DMCA.<sup>135</sup>

A number of national courts in the European Union system have denied ISPs the safe harbor protections of the directive. For example, in *Tiscali Media v. Dargaud et al.*,<sup>136</sup> the French *Cour de Cassation*<sup>137</sup> held that an ISP was not immune from copyright infringement liability under the directive.<sup>138</sup> The court’s decision turned on its definition of “host” in that the court in this case held that the ISP functioned not merely as a service provider, but a publisher as well, because it displayed paid advertising on infringing websites of its customers.<sup>139</sup> Thus, the French court rejected the defendant’s argument that the ISP was immune under the EU E-Commerce Directive’s “hosting services providers” provision.<sup>140</sup> As one attorney pointed out, the decision would have “dramatic” consequences for websites like YouTube and Facebook, who also “go beyond hosting” by placing advertisements next to posted content and who also might edit content that has been posted by their users.<sup>141</sup>

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<sup>129</sup> The European Community’s Electronic Commerce Directive (“ECD”), sets forth safe harbors for ISPs akin to those available under U.S. law. See Council Directive, *supra* note 61 and accompanying text.

<sup>130</sup> Burger, *supra* note 64, at 153.

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

<sup>132</sup> *Roadshow Films v. iiNet Limited* (No. 3) (2010) Federal Court of Australia 24 (Austl.).

<sup>133</sup> See Jaglom, *supra* note 128 (citing *Roadshow Films v. iiNet Ltd.* (No. 3) [2010] Federal Court of Australia 24).

<sup>134</sup> Council Directive, *supra* note 64 and accompanying text.

<sup>135</sup> See Travis, *supra* note 26, at 365.

<sup>136</sup> *Tiscali Media v. Dargaud et al.*, Cour de Cassation (1st section, civil), 14 January 2010, (Telecom Italia (formerly Tiscali Media) v. the companies Dargaud Lombard and Lucky Comics).

<sup>137</sup> “The Cour de Cassation is the highest court in the French judiciary”. Marc Lempriere, *e80: French Cour de Cassation Threatens Web 2.0*, EVERSHEDS.COM (Mar. 12, 2010), [https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata\Eversheds\articles\data\en\E80\e80\\_French\\_Cour\\_de\\_Cassation\\_threatens\\_Web\\_2\\_120310](https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata\Eversheds\articles\data\en\E80\e80_French_Cour_de_Cassation_threatens_Web_2_120310).

<sup>138</sup> Jaglom, *supra* note 128 (citing *Tiscali Media v. Dargaud et. al.*, Cour de Cassation (1st section, civil), 14 January 2010).

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

<sup>140</sup> *Id.*

<sup>141</sup> Lempriere, *supra* note 137.

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As a result of the lack of conformity regarding secondary liability for ISPs among national legal systems, YouTube remains embroiled in a number of lawsuits that have been brought to different European courts by various European media companies.<sup>142</sup> YouTube has so far been victorious in at least one of these foreign cases. Charges brought to the Spanish courts by Spanish Broadcaster Gestevisión Telecinco SA against YouTube were dismissed.<sup>143</sup> In that case, the court in Madrid, like the *Viacom* court, held that copyright owners, and not the ISPs, are responsible for identifying infringing material and alerting the ISP that specific material should be removed.<sup>144</sup> Representatives from Google's legal team said that the court in that case interpreted the E-Commerce Directive to require ISPs like YouTube to remove infringing posts only after having been notified of the specific posting.<sup>145</sup>

In a posting on Google's corporate blog, corporate representatives commented on the "wisdom" of European laws in reaching this decision and stated that the decision would not only affect YouTube, but would also affect ISPs like Facebook, Twitter, and MySpace.<sup>146</sup> A decision opposing YouTube, would have the effect of forcing ISPs to screen "all videos, photos, and text before allowing them on a website," which would cause these media giants to "grind to a halt."<sup>147</sup>

In the case above, the foreign court decided in YouTube's favor, and some believe the decision from the Spanish court will influence decisions from other courts,<sup>148</sup> but the fact remains that this decision is not precedential for any other European court's decision. YouTube is still vulnerable to liability for millions or billions of dollars worth of damages in suits still to come.

To that end, one month prior to the decision handed down by the Madrid court, the Hamburg Regional Court of Germany decided that YouTube might be liable for damages stemming from videos that were posted to the website without the rights holder's permission for rebroadcast.<sup>149</sup> In stark contrast to the decisions set forth by both the the Southern District of New York and the Madrid courts, the Hamburg Court concluded that YouTube was "treating content uploaded by its users as its own," resulting in a more "strenuous duty" to police the content, and that YouTube failed to sufficiently fulfill that duty.<sup>150</sup> As one of the attorneys for Google Hamburg pointed out, the Hamburg court's decision created "substantial legal uncertainty" for Google and other ISPs in Germany.<sup>151</sup>

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<sup>142</sup> David Bario, *Google, YouTube Beat Back Spanish Copyright Suit over Unauthorized Content*, THE AM LAW DAILY (Sept. 23, 2010, 1:29 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/09/youtube-telecinco.html>.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See* Aaron Ferstman, *A Big Win for the Internet*, GOOGLE EUR. POL'Y BLOG (Sept. 23, 2010, 10:27 AM), <http://googlepolicyeurope.blogspot.com/2010/09/big-win-for-internet.html>

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Landgericht Hamburg [LG Hamburg] [District Court of Hamburg] Mar. 9, 2010, 308 O 27/09 (Ger.); *see* Jann Friedrich Bettinga & Ragnhild Kjetland, *German Court Limits YouTube's Use of Copyrighted Online Video Material*, BLOOMBERG NEWS (Sept. 3, 2010, 4:33 PM), <http://www.bloomberg.com/news/2010-09-03/hamburg-court-limits-youtube-use-of-uploaded-material-that-is-copyrighted.html>.

<sup>150</sup> Deutsche Presse-Agentur, *YouTube Loses Case Over Brightman Songs*, M&C NEWS (Sept. 03, 2010), [http://www.monstersandcritics.com/news/europe/news/article\\_1582216.php/YouTube-loses-case-in-German-court-over-Brightman-songs](http://www.monstersandcritics.com/news/europe/news/article_1582216.php/YouTube-loses-case-in-German-court-over-Brightman-songs).

<sup>151</sup> *See* Friedrich Bettinga & Kjetland, *supra* note 149.



In addition to a number of foreign decisions that suggest the notice and take down regime is insufficient to protect ISPs from liability, there has been some movement, both on legislative and non-legislative fronts, that indicate a desire to place additional obligations on ISPs to police against infringement.<sup>152</sup> In France and the UK, for instance, there has been movement toward enacting legislation that will obligate ISPs to undertake a “graduated response” regime to combating copyright infringement.<sup>153</sup> In fact, before the more recent versions of the ACTA text were released to the public, it was believed ACTA would include a provision to affirmatively obligate ISPs to undertake such a regime.<sup>154</sup> However, ACTA texts released to the public most recently have not had any sort of affirmative obligation.<sup>155</sup>

### **ACTA Heavily Critiqued, but Final Agreement Will Likely Have Little Influence on ISP Secondary Liability**

For a period of time, it appeared that new international law making, in the form of the proposed ACTA, threatened to overturn the balance achieved by the *Viacom* court’s decision. However, developments that have occurred since initial ACTA negotiations suggest that the agreement, if successfully implemented, would not pose a threat to the decision. Instead of requiring the ISPs to act as copyright police, the agreement now affords the negotiating parties broad flexibility in enforcing their particularized enforcement regimes.<sup>156</sup> ACTA’s finalized text fails to delineate the scope of the ISP’s obligations and liabilities. If anything, it only further clouds the issue, as it merely requires participating states “adopt[ ] or maintain[ ] a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of the right holder.”<sup>157</sup>

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<sup>152</sup> See David W. Quist, *Three Strikes and You’re Out: A Survey of Foreign Approaches to Preventing Copyright Infringement on the Internet*, 66 BUS. LAW. 261, 261 (2010).

<sup>153</sup> In contrast to the “Notice and Take-Down” regime, where the ISP acts by removing infringing material that has already been posted, a “graduated response” regime would engage the ISP in action directly against the infringing subscriber. It is known alternatively as a “three strikes” regime, in that the ISP would be required to suspend or terminate a subscriber’s account after three incidents claimed or actual copyright infringement. See *id.* at 261.

<sup>154</sup> *Id.* at 266.

<sup>155</sup> *Id.* 266-67.

<sup>156</sup> See Anti-Counterfeiting Trade Agreement, art. 27 ¶¶ 1-2, Dec. 03, 2010, European Commission, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/> [hereinafter Anti-Counterfeiting Trade Agreement Text]; see also Michael Geist, *Final Version of ACTA Posted*, MICHAEL GEIST (Dec. 06, 2010), <http://www.michaelgeist.ca/content/view/5499/196/> [hereinafter Geist, *Final Version*]. Article 27, entitled “Enforcement in the Digital Environment,” sets forth the final agreement with respect to ISP involvement in copyright infringement protection. Paragraph 1 requires, in pertinent part, each negotiating party ensure that those civil and criminal enforcement procedures agreed upon under the agreement are available under law to “permit effective action against an act of infringement . . . including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.” Paragraph 2 elaborates on the first paragraph, specifying that each party’s enforcement procedures “shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with that Party’s law, preserves fundamental principles such as freedom of expression, fair process, and privacy.” It contains a footnote that states, by way of example, a Party adopting a regime to limit liability available against an ISP while simultaneously preserving the legitimate interests of the rights holder.

<sup>157</sup> Anti-Counterfeiting Trade Agreement Text, *supra* note 156.

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It is still highly questionable to what extent ACTA will be implemented by its various negotiating parties.<sup>158</sup> Academics, legislators, and commentators from across the globe have critiqued ACTA as a proposed solution to lack of transnational conformity in IPR and ISP secondary liability. These critiques highlight additional reasons why the finalized ACTA agreement will not resolve the current issue of ISP liability.

The first aspect of ACTA that has been analyzed and critiqued has been the negotiating process. One might expect that such a multilateral trade agreement would be proposed first within established trade and IP fora such as the WTO or WIPO.<sup>159</sup> Instead, the contracting countries decided to negotiate independently and to the exclusion of a number of countries that are parties to the established trade groups.<sup>160</sup> Such a closed negotiating process directly conflicts with the sort of open and cooperative relationship that must be fostered between the content providers and the legitimate ISPs.

Moreover, many critics have pointed to the lack of transparency as another troublesome feature of the negotiation processes.<sup>161</sup> Negotiations began in 2008 behind closed doors, and it was not until recent months that the parties authorized the release of portions of the drafted agreement to the public.<sup>162</sup> In the interim, several public interest groups had started a suit against the Bush administration for the release of the negotiations, only dropping the suit after the Obama administration entered and proclaimed it would continue the Bush administration's "non-disclosure" policy.<sup>163</sup> Such a lack of transparency throughout the negotiating process was especially disconcerting considering that the provisions of the tentative agreement that have become public strongly suggest that the agreement will "'potentially change[ ] United States law by transforming' civil infringement into criminal acts."<sup>164</sup>

James Love, the director of the NGO "Knowledge Ecology International," commented about various ambiguities present in ACTA draft released to the public on October 2, 2010.<sup>165</sup> Love pointed out that the agreement sets forth a number of different obligations for the parties regarding the enforcement of IP rights.<sup>166</sup> Notably, there are some cases where exceptions to obligations are expressly written into the agreement, while there are other provisions that do not include such express exceptions.<sup>167</sup> As Love explained, the agreement was therefore ambiguous in whether exceptions were available only where expressly written into the agreement, or whether exceptions were also available in other circumstances.<sup>168</sup> The

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<sup>158</sup> Mike Masnick, *Let's Face Facts: ACTA is Called an 'Executive Agreement' to Change the Law With Less Hassle Than a Treaty*, TECH DIRT (Feb. 9, 2010, 05:17 PM), <http://www.techdirt.com/articles/20100209/1505538101.shtml>.

<sup>159</sup> See Ayoob, *supra* note 72, at 176.

<sup>160</sup> See *id.*

<sup>161</sup> Pablo M. Bentes et al., *International Trade*, 44 INT'L LAW. 93, 97 (2010).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Mart Kuhn, *Intellectual Property Owners Oppose Anti-Counterfeiting Agreement*, PUBLIC KNOWLEDGE, (July 14, 2010, 10:50 AM), <http://www.publicknowledge.org/blog/ip-owners-oppose-acta> (quoting Letter from Douglas K. Norman, President of Intellectual Prop. Owners Ass'n, to Hon. Ron Kirk, Ambassador (June 25, 2010), available at <http://www.ipo.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=26212>).

<sup>165</sup> James Love, *Areas Where the Oct. 2, 2010 ACTA Text is Inconsistent with U.S. Law*, KNOWLEDGE ECOLOGY INT'L (Oct. 9, 2010, 9:59AM), <http://www.keionline.org/node/970>.

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

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

availability of exceptions would be particularly important in cases where a contracting party's domestic law set forth different obligations from those provided in the ACTA agreement.

The general tone and obligations set forth in the provisions of the publicized final text differ greatly from those used in preliminary versions of the agreement.<sup>169</sup> The United States started negotiations intending to obligate the contracting parties to agree to a strict IP rights enforcement regime.<sup>170</sup> However, scholars suggest that the finalized text of the agreement indicates that the United States compromised on many of the areas of strict enforcement it originally sought- including imposition of higher standards of liability on intermediaries.<sup>171</sup> The current form of the agreement has been described as a much "weaker" version of the strict enforcement regime initially proposed.<sup>172</sup>

For some time, it was feared that the ACTA agreement would include a provision that would impose the affirmative obligation upon ISPs to incorporate a "three-strikes"<sup>173</sup> provision for online copyright infringement.<sup>174</sup> However, the text of the agreement most recently released to the public included no such provision, and instead required only that negotiating parties "promote cooperative efforts within the business community to address infringement."<sup>175</sup> One U.S. official has been quoted saying that the proposed "three-strikes" requirement provision "had been 'dropped out'" of the earlier version of the text.<sup>176</sup>

With the "final" version of the ACTA text released to the public, some have expressed concern that the process of implementing the agreement into law would be unconstitutional.<sup>177</sup> For example, American University's Program on Information Justice and Intellectual Property (PIJIP) posted to its website a letter sent to President Barack Obama, by a collection of American law professors, in which the professors expressed their concern over the USTR's declaration that the United States could sign onto the ACTA agreement by virtue of it being a sole executive agreement.<sup>178</sup> As explained in the letter, one of the reasons it was particularly important the agreement undergo the correct legal process to be implemented as law was that "the agreement may complicate legislative efforts to solve widely recognized policy dilemmas," including in the area of secondary copyright liability.<sup>179</sup> Sean Flynn, As-

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<sup>169</sup> Michael Geist, *Digital Advocacy's "Weak Ties" Should Not be Underestimated*, MICHAEL GEIST BLOG (Oct. 18, 2010) <http://www.michaelgeist.ca/content/view/5381/159/>.

<sup>170</sup> *Id.*

<sup>171</sup> Daniel Pruzin & Nathan Pollard, *U.S., EU to Iron Out Reservations As Draft ACTA Text is Released*, 80 PTCJ 778 (2010), available at [http://0-news.bna.com.libweb.hofstra.edu/ptln/PTLNWB/split\\_display.adp?fedfid=18004156&vname=ptcjnotallissues&wsn=497109000&searchid=15622638&doctypeid=1&type=date&mode=doc&split=0&scm=PTLNWB&pg=0](http://0-news.bna.com.libweb.hofstra.edu/ptln/PTLNWB/split_display.adp?fedfid=18004156&vname=ptcjnotallissues&wsn=497109000&searchid=15622638&doctypeid=1&type=date&mode=doc&split=0&scm=PTLNWB&pg=0).

<sup>172</sup> Rob Pegoraro, *Almost-Final, Much Weaker ACTA Draft Published*, posting to *Faster Forward*, WASHINGTON POST.COM, (Oct. 7, 2010, 06:54 AM), [http://voices.washingtonpost.com/fasterforward/2010/10/latest\\_acta\\_details--still\\_lea.html](http://voices.washingtonpost.com/fasterforward/2010/10/latest_acta_details--still_lea.html).

<sup>173</sup> See Quist, *supra* note 152, at 261. The "three-strikes" mechanism has been defined as one that "suspends or terminates a subscriber's internet account after some number [depending on the jurisdiction] of incidents involving claimed or actual infringement of another's intellectual property."

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 267.

<sup>176</sup> *Anti-Counterfeiting Trade Agreement Final; Group Calls Process 'Unconstitutional'*, 81 PTCJ 72 (2010), available at [http://0-news.bna.com.libweb.hofstra.edu/ptln/PTLNWB/split\\_display.adp?fedfid=18556708&vname=ptcjnotallissues&fn=18556708&jd=ptcj\\_81\\_72&split=0](http://0-news.bna.com.libweb.hofstra.edu/ptln/PTLNWB/split_display.adp?fedfid=18556708&vname=ptcjnotallissues&fn=18556708&jd=ptcj_81_72&split=0).

<sup>177</sup> *Id.*

<sup>178</sup> Brook Baker et al., *Over 75 Law Profs Call for Halt of ACTA*, PIJIP (Oct. 28, 2010), [http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta#\\_ftnref6](http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta#_ftnref6).

<sup>179</sup> *Id.*

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sociate Director of PIJIP, articulated a number of reasons why it would be unconstitutional for the agreement to be implemented into law by virtue of being a sole executive agreement.<sup>180</sup>

Interestingly, one of the ACTA provisions purports to encourage the cooperation between intermediaries and content providers in order to defeat online piracy. Such a provision is aligned with this note's suggested solution, but the flawed negotiation process, lack of transparency, and general disapproval of ACTA by members of both the rights holder and ISP community suggest that ACTA will not be useful in fostering such cooperation.

### III. DOMESTIC AND FOREIGN LEGAL SYSTEMS SHOULD CONTINUE TO ENFORCE THE VIACOM COURT'S APPROACH

In order for an international copyright enforcement regime to be successful, it must balance the interests of those in the copyright industry with individuals' rights to access and engage copyright content.<sup>181</sup> However, the difficulty in finding this balance has been demonstrated by the fact that "no country has really achieved the fine balance of representing human rights, culture and privacy concerns effectively and in such a way as to offer a suitable counterweight to corporate interests."<sup>182</sup>

Despite arguments to the contrary from copyright holders and members of the media and entertainment industry, the decision set forth by the *Viacom* court laid the foundation for such a balanced copyright enforcement regime. In light of the relative ease with which a rights holder can monitor the inappropriate use of its copyrighted material, compared to the proactive investigation required for the ISP to determine the same, the court correctly placed the burden to police on the rights holder.

In fact, to keep the obligation placed on the ISPs at the "Notice and Take-Down" level would stay in line with those objectives expressed by many in the content provider and intermediary industries.<sup>183</sup> While placing additional legal obligations upon the ISPs would result in additional litigation, on top of that which has already been pulling Google and other ISPs into court, an express refusal to place such an obligation on the intermediaries would better foster a sense of cooperation between the two industries. With the latter, YouTube can continue to experiment with such tools like the successful "Content ID" tool, which has received praise from proponents both for and against the *Viacom* court's approach.<sup>184</sup>

Moreover, stakeholders from both sides of the debate have expressed extensive critiques regarding the ACTA negotiations and resulting text, demonstrating the difficulty in using a multilateral trade agreement to successfully strike the balance between battling against piracy and allowing for development and growth.<sup>185</sup> The extensive watering-down of the ACTA provisions regarding ISP liability demonstrate that the desire to hold ISPs to a higher standard of obligation with regards to screening out infringing works is helpful in theory but

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<sup>180</sup> Sean Flynn, *ACTA's Constitutional Problem*, PIJIP (Nov. 15, 2010), <http://www.wcl.american.edu/pijip/go/blog-post/acta-s-constitutional-problem#4>.

<sup>181</sup> See Woods, *supra* note 4, at 386-88.

<sup>182</sup> *Id.* at 387 (quoting Mira Sundara Rajan, *Copyright: Let's Take Ownership*, THE GLOBE & MAIL, Aug. 2, 2009, <http://www.globeandmail.com/news/opinions/copyright-lets-take-ownership/article1238407/>).

<sup>183</sup> See TECH. POL'Y INST. ASPEN FORUM, *supra* note 135 and accompanying text.

<sup>184</sup> See *id.*

<sup>185</sup> See *supra*, notes 158-182, and accompanying text.

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unrealistic and detrimental in practice.<sup>186</sup> The extreme levels of criticism towards ACTA from industry stakeholders and legal commentators illustrate that any such agreement must undergo a more transparent and stringent approval process from legislators who are answerable to the voting public of their sovereign countries.<sup>187</sup>

Also noteworthy is the lack of success thus far to integrate new legislation that will affirmatively obligate ISPs to take on additional duties to counteract counterfeit and piracy.<sup>188</sup> This activity only strengthens the argument that the approach taken by the court in *Viacom* was the most balanced approach and will be most effective in integrating an international copyright enforcement regime.

There has been a great deal of movement domestically as well as on the international level suggesting that in the near future a more definite legislative measure will be carried out to concretize the ISP's precise duty. With the rapid changes that occur in technology every day, legislation regulating this area of communication must be carefully vetted and considered before becoming binding on a domestic or international level.

Finally, there is a great deal of evidence, based on Google's recent actions, that the corporation will continue to fortify its own foreign policy with respect to not only counterfeit and piracy, but also additional issues like privacy and freedom of information.<sup>189</sup> In any case, as Google and YouTube continue to emphasize, the developments to this point could not have occurred without the same flexible legislation that has thus far enabled them to experiment without fear of facing destructive litigation. The United States and foreign nations must maintain this flexibility to continue to encourage digital development and growth into the future.

#### IV. CONCLUSION

Matt Lauer, host of NBC's "Today Show," recently asked, "Do you need proof that life in this country can change overnight? Look no further than Ted Williams."<sup>190</sup> Ted Williams, referred to as "The Man with the Golden Voice," was a homeless former drug addict, panhandling along the side of the road in Columbus, Ohio.<sup>191</sup> He would hold up a sign that said "he'd fallen on hard times but has a God-given gift of voice."<sup>192</sup> However, when a reporter posted on YouTube a video of him using his "God-given gift of voice," Mr. Williams shot to relative fame overnight.<sup>193</sup> Following in the steps of other "Internet sensations" like Susan Boyle<sup>194</sup> and Justin Bieber,<sup>195</sup> Mr. Williams' video quickly garnered almost 3 million

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<sup>186</sup> Pegoraro, *supra* note 172.

<sup>187</sup> See, e.g., Bentes, et. al, *supra* note 161.

<sup>188</sup> *Supra*, notes 111-115, and accompanying text.

<sup>189</sup> See Mark Landler, *Google Searches for a Foreign Policy*, N.Y. TIMES, Mar. 27, 2010, <http://www.nytimes.com/2010/03/28/weekinreview/28landler.html>. Google's corporate actions regarding privacy and freedom of information are outside the scope of this Note.

<sup>190</sup> Matt Toder, *Golden-Voiced Ted Williams Announces Today Show Opening*, GAWKER (Jan. 6, 2011, 9:32 AM), <http://gawker.com/5726480/golden-voiced-ted-williams-announces-today-show-opening>.

<sup>191</sup> Ted Williams, "Man with Golden Voice," *Speaks*, THE EARLY SHOW, broadcast on CBS (Jan. 5, 2011), <http://www.cbsnews.com/stories/2011/01/05/earlyshow/main7215450.shtml> [hereinafter *Ted Williams*, "Man with Golden Voice," *Speaks*].

<sup>192</sup> *Id.*

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

<sup>194</sup> See Associated Press, *Susan Boyle is First Woman to Have No. 1 Album in UK and US at the Same Time Twice in One Year*, N.Y. DAILY NEWS (Nov. 18, 2010), [http://articles.nydailynews.com/2010-11-18/entertainment/27081664\\_1\\_susan-boyle-uk-album](http://articles.nydailynews.com/2010-11-18/entertainment/27081664_1_susan-boyle-uk-album). Susan Boyle was the first woman to have a number one

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hits on YouTube.<sup>196</sup> Since his video's success on YouTube, many individuals, including Oprah Winfrey, offered to employ Mr. Williams.<sup>197</sup> Mr. Williams' story is significant because it demonstrates the power of the human spirit, but is also significant because it demonstrates YouTube's influence over the American public at large. YouTube's ability to have such influence depends on the continuation of the flexible legislation that has thus far enabled the site to connect billions of people within this country, and across the world, without fear of incurring destructive litigation costs.

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album in the U.S. as well as the U.K. at the same time twice in one year. She became a singing star after her audition for a British television show was posted to YouTube and received more than 120 million views on the site. *Id.*

<sup>195</sup> See Desiree Adib, *Pop Star Justin Bieber Is on the Brink of Superstardom*, GOOD MORNING AMERICA (Nov. 14, 2009), <http://abcnews.go.com/GMA/Weekend/teen-pop-star-justin-bieber-discovered-youtube/story?id=9068403>. Recording artist Usher discovered Justin Bieber when the 12 year old posted videos to YouTube of himself performing. He attained management after his videos started garnering tens of thousands of views. Since being discovered, his success has continued off the Internet as well, as he's achieved hit records and earned millions of dollars. *Id.*

<sup>196</sup> Ted Williams, "Man with Golden Voice," *Speaks*, *supra* note 191.

<sup>197</sup> See Larry McShane & Aliyah Shahid, *Oprah Comes Calling For Man With Golden Voice Ted Williams as Mom Offers Tough Love on 'Today' Show*, N.Y. DAILY NEWS (Jan. 7, 2011), [http://www.nydailynews.com/news/national/2011/01/07/2011-01-07\\_ted\\_williams\\_man\\_with\\_golden\\_voice\\_and\\_mother\\_reunite\\_on\\_today\\_mom\\_says\\_dont\\_dis.html?r=news](http://www.nydailynews.com/news/national/2011/01/07/2011-01-07_ted_williams_man_with_golden_voice_and_mother_reunite_on_today_mom_says_dont_dis.html?r=news).

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