

DMCA SAFE HARBORS AND THE FUTURE OF NEW DIGITAL MUSIC SHARING PLATFORMS

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ABSTRACT

SoundCloud is an online service provider that allows users to upload, share, and download music that they have created. It is an innovative platform for both amateur and established producers and disc jockeys (DJs) to showcase their original tracks and remixes. Unfortunately, it is also a platform that lends itself to widespread copyright infringement. Looking toward potential litigation, several factors ought to be considered by SoundCloud and other similar providers. The Viacom v. YouTube case, decided in the Southern District of New York and now currently on appeal in the Second Circuit, sheds light on the potential liability service providers like SoundCloud face. It draws out the Digital Millennium Copyright Act's (DMCA) safe harbor provisions under which SoundCloud could potentially find protection. However, SoundCloud is unique among similar service providers because it provides users with a variety of viewing, sharing and downloading options that are built into the platform. These options could lead to infringement that would not fall under a DMCA safe harbor. This Issue Brief will discuss the various arguments to be made for and against SoundCloud's liability, and examine whether the unique utility provided by the service to users could be sustained in the face of potential litigation. Ultimately, the safeguards used by SoundCloud to filter blatant infringement, combined with the DMCA § 512(c) safe harbor, should allow this innovative platform to maintain its current model without neutering its core functionality.

INTRODUCTION

Modern Internet technology allows music listeners to access their favorite songs from any location. Services like YouTube and GrooveShark lend server space to users who upload music and stream the content for public consumption. SoundCloud, founded in 2007 and based in Berlin, Germany,¹ expands upon this idea through encouraging

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¹ *SoundCloud Review*, APP APPEAL, <http://www.appappeal.com/app/soundcloud> (last visited Sept. 5, 2011).

users to create their own works and upload them to share with others. The ease of sharing music through SoundCloud has led to it being referred as “the YouTube of Internet Audio files.”²

The problem faced by SoundCloud, as is true of similar service providers, is that, in addition to original music, an abundance of copyrighted material is uploaded by users who abuse the service.³ Exacerbating the problem, the platform’s promotion of the sharing and creation of new music allows users to freely upload musical creations that are often derivative works – that is, samples and remixes – of copyrighted tracks. The design of the platform complicates the task of separating songs that have been altered enough to constitute a new work from those that may have been minimally altered simply to hide the fact that the song is copyrighted. Thus, SoundCloud’s challenge becomes identifying uses of the platform that might give rise to copyright infringement, while still allowing the unique presentation and distribution of non-infringing music.

To combat infringing uses of its service, SoundCloud has recently implemented the use of Audible Magic, a “fingerprinting technology” that can automatically identify copyrighted works.⁴ However, Audible Magic, at best, works inconsistently.⁵ Most direct copies of copyrighted songs are consistently removed, as Audible Magic’s audio recognition software accurately identifies songs that have not been altered.⁶ Unfortunately, problems arise when the technology

² Anna Leach, *Why the Challenger MySpace Should Be Worried About is SoundCloud, not Facebook*, SHINY SHINY (Mar. 2, 2011), http://www.shinyshiny.tv/2011/03/why_the_challenge_myspace_soundcloud_not_facebook.html.

³ See, e.g., tiger_mendoza, Comment to *Copyright Infringement Notice from SoundCloud*, GYBO, <http://www.gybo5.com/viewtopic.php?p=24505> (Oct. 23, 2010, 11:46 AM) (detailing the experience of having SoundCloud files removed for copyright infringement); Ryan Tranzmission, *Copyright Wars: Tranzmission vs. Interpol vs. SoundCloud*, TRANZMISSION (Aug. 28, 2010, 8:16 PM), <http://www.thetransmission.com/2010/08/copyright-wars-tranzmission-vs-interpol.html> (reporting a SoundCloud request to remove a track the author believed he obtained permission to upload).

⁴ Eamonn Forde, *SoundCloud Partners with Audible Magic for Rights Identification*, MUSICWEEK (Jan. 5, 2011, 10:05 AM), <http://www.musicweek.com/story.asp?storyCode=1043741§ioncode=1>.

⁵ See Scott Smitelli, *Fun with YouTube’s Audio Content ID System*, COMPUTER SCIENCE HOUSE (Apr. 21, 2010), <http://www.csh.rit.edu/~parallax/> (finding that “any pitch or time alterations will also work [to thwart Audible Magic], provided you apply a 6% or greater change to the parameter you are adjusting”).

⁶ See *Technology Overview*, AUDIBLE MAGIC, <http://audiblemagic.com/technology.php> (last visited Sept. 5, 2011) (detailing how Audible Magic identifies

attempts to analyze remixes and samples. Some of these altered songs are successfully identified and removed, while other alterations of the same song are allowed by Audible Magic's algorithms to remain available.⁷ This leads to situations where users whose works are flagged will find that others' works, which seem to equally infringe, remain untouched. The presence of remixes that slip through the fingerprinting technology and exist in the grey area of copyright law⁸ may also be what eventually leads copyright holders to pursue litigation against SoundCloud.

This Issue Brief will describe SoundCloud's platform and how it might give rise to a prima facie case for infringement. It will also explore available Digital Millennium Copyright Act⁹ ("DMCA") safe harbors, as well as possible fair use defenses tailored to the unique functionality of SoundCloud. Finally, it will argue that the current growth of the platform can be sustained without having to sacrifice the original creative utility provided to users.

I. SOUND CLOUD'S PLATFORM

The SoundCloud collection of tools creates visual representations of sound, allows playback and downloading of audio files, and encourages other users to provide feedback at specific points throughout the waveform (a waveform player that visualizes sound).¹⁰ Revenue is generated using a tiered subscription model with no advertisements.¹¹ Because of this subscription model, SoundCloud's revenue stream does not suffer as much from the use of Audible Magic as an ad-based model would.¹² With SoundCloud's subscription model, unless the user is solely purchasing extra server space to store and share

snippets of audio files and then matches the sound clip with a database containing more than 11 million copyrighted songs).

⁷ *Id.*

⁸ See Tonya M. Evans, *Sampling, Looping, and Mashing...Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law*, EXPRESSO, 3 (2011) (discussing a circuit split over the fair use status of remixes), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=tonya_evans.

⁹ Digital Millennium Copyright Act, 17 U.S.C. §§ 1201–05 (2006).

¹⁰ *Your Sound, in the Player*, SOUND CLOUD, <http://soundcloud.com/tour/> (last visited Sept. 5, 2011).

¹¹ Eliot Van Buskirk, *SoundCloud Threatens MySpace as Music Destination for Twitter Era*, WIRED (Jul. 6, 2009, 5:20 PM), <http://www.wired.com/epicenter/2009/07/soundcloud-threatens-myspace-as-music-destination-for-twitter-era/>.

¹² *Infra*, Part I.C.

infringing material, users will still pay the initial signup fee because utility remains to be derived from legitimate uses of the service.¹³

A. Features

SoundCloud's software takes an audio file and visualizes the sound, creating a "waveform" map through which other users can identify a specific moment or section of the music that they enjoyed.¹⁴ The waveform is depicted below in Figure 1.

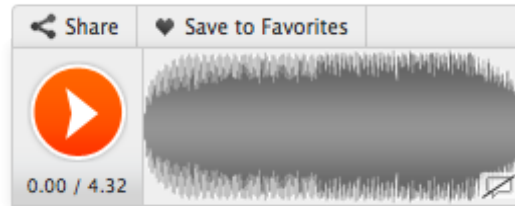


Figure 1: SoundCloud waveform¹⁵

This visualization gives users an alternative conceptualization of how the music was produced – allowing them to note where a particular section begins or ends and how sounds are aggregated together to produce the final piece.¹⁶ Users can then leave their personal comment or suggestions at specific points in the waveform, creating a potential back-and-forth between users.¹⁷

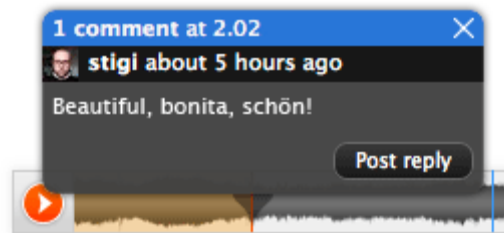


Figure 2: Timed comment box¹⁸

¹³ *Id.*

¹⁴ *Your Sound, in the Player*, *supra* note 10.

¹⁵ *Id.*

¹⁶ See, e.g., *Those Bloody Yanks!* SOUNDCLOUD <http://soundcloud.com/those-bloody-yanks> (last visited Sept. 5, 2011) (depicting visually where sound buildup occurs and entering breaks to signify a change in the momentum of the song).

¹⁷ *Id.*

¹⁸ *Your Sound, in the Player*, *supra* note 10.

The ability to display the components of a particular song while receiving continuous feedback makes SoundCloud a particularly appealing platform for new artists trying to build a network.¹⁹ It is also useful to more established producers and DJs, who are looking for a way to quickly distribute new songs to a large audience.²⁰ SoundCloud's uniquely interactive features help to create a feeling of personal investment in others' songs, strengthening the sense of community among users in that particular music genre. The waveforms can be embedded on separate sites such as blogs²¹ or even directly into a Facebook profile.²² Widgets that instantly notify all of a user's followers of a new upload are also available.²³ Users also have the option of allowing a file to be downloadable or keeping a file private to select users.²⁴

Through these interactive tools, SoundCloud "puts your sound at the heart of communities, websites and even apps."²⁵ A user can "watch conversations, connections and social experiences happen" through the medium of sharing music.²⁶ It is this call to personal creativity and musical innovation, along with no file-size limit and customizable sharing options, that separates this platform from other similar services like MySpace.²⁷ Ironically, it is precisely because of these unique features, together with SoundCloud's emphasis on "your sound," that the uploader often assumes that they own the audio files. Because of the

¹⁹ See Van Buskirk, *supra* note 11 (noting that artists can quickly share improvements and thoughts on new music).

²⁰ See *id.* (emphasizing SoundCloud's connection to social media services such as Facebook and Twitter).

²¹ See *id.* (explaining that SoundCloud creates a unique URL for each of an artist's tracks, which allows them to embed the music elsewhere).

²² David Noël, *Updated Facebook Application*, SOUND CLOUD BLOG (Jan. 15, 2010), <http://blog.soundcloud.com/2010/01/15/facebook/>.

²³ Mike Ziarko, *SoundCloud Social Music Community Lets You Visually Comment On Music*, SOCIAL TIMES (Dec. 15, 2010, 3:45 PM), <http://www.socialtimes.com/2010/12/soundcloud-social-music-community-lets-you-visually-comment-on-music/>.

²⁴ *SoundCloud Review*, *supra* note 1.

²⁵ SOUND CLOUD, <http://soundcloud.com/> (last visited Sept. 5, 2011).

²⁶ *Id.*

²⁷ Van Buskirk, *supra* note 11 ("In a few short months SoundCloud has begun to give mighty MySpace a run for the hearts and minds of recording artists eager to interact more nimbly with fans than is possible on the giant social network which has, for the past five years, been the de facto online platform for musicians.").

ubiquity of this misnomer, the presence of copyright-infringing material on SoundCloud remains pervasive.²⁸

B. Monetization Model

As of February 2011, SoundCloud had over three million users.²⁹ Growth of the service exploded as the user base increased by over one million in a span of one hundred days.³⁰ Expansion of the platform into an iPhone application was just one factor that helped spur this exponential increase.³¹ With this growth, SoundCloud found new opportunities to differentiate between higher value and lower value users. As a result of this differentiation, SoundCloud monetizes its increasing user base by providing a variety of accounts, including both a free and paid option.³² SoundCloud's free version provides the basic waveform tools, but caps the number of uploadable minutes and does not provide secret link sharing.³³ Accounts are then available at increasing price intervals with additional features available at each interval.³⁴ Users can access more hours for uploads, more efficient distribution channels, and greater recognition for their musical creations – all depending on how much they are willing to pay.³⁵ Available upload hours do not reset monthly or yearly, rather, each account level has a set limit that can only be increased by purchasing a better plan.³⁶ There are no third party advertisements at any account level, but the top Premium accounts allow unlimited uploading, adjustable privacy settings, and unlimited contacts.³⁷

²⁸ See tiger_mendoza, *supra* note 3 (noting a user's removal of files for copyright infringement); Tranzmission, *supra* note 3 (detailing a request to remove a track thought to be uploaded with permission).

²⁹ *SoundCloud Reaches Three Million User Mark*, NME (Feb 11, 2011, 1:43 PM), <http://www.nme.com/news/various-artists/54934>.

³⁰ Martin Bryant, *SoundCloud Hits 3 Million Users, Grows by 50% in 100 days*, TNW EUROPE (Feb. 10, 2011), <http://thenextweb.com/eu/2011/02/10/soundcloud-hits-3-million-users-grows-by-50-in-100-days/>.

³¹ *SoundCloud Reaches Three Million User Mark*, *supra* note 29.

³² See *SoundCloud Premium*, SOUNDCLOUD, <http://soundcloud.com/premium/> (last visited Sept. 5, 2011).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Help/Premium & Billing*, SOUNDCLOUD, <http://soundcloud.com/help/premium-accounts> (last visited Sept. 5, 2011).

³⁷ Van Buskirk, *supra* note 11.

C. Audible Magic

Since the beginning of 2011, SoundCloud has used Audible Magic's content identification technology³⁸ to identify the upload of copyrighted material in a database containing millions of songs.³⁹ Because SoundCloud's revenue model is tied to providing better services in return for compensation – as opposed to accumulating as many page views as possible – Audible Magic's prevention of infringing uploads does not hurt SoundCloud's bottom line as it would a site like YouTube.⁴⁰ This conclusion is founded on the presumption that users who want to use SoundCloud's server space to upload and distribute infringing material would be unlikely to pay monthly for premium service.⁴¹ If a user consistently and knowingly uploaded infringing material, the reasonable choice for such a user would be to use the free account. Such a user has no need to pay for extra features when free accounts already allow the essential secret link sharing and download options. On the other hand, when a premium user, such as a well-known DJ, is blocked from uploading music deemed by Audible Magic to be infringing, that unspent upload time could still be used to upload legitimate songs. These professionals are the type of users that SoundCloud has historically attracted, although the attraction of such users may be coming to an end.⁴²

Despite the progressive nature of this technology, Audible Magic presents numerous problems. Tests have shown that basic aural manipulation of a copyrighted track – often accomplished through remixes and samples without even intending to avoid Audible Magic's detection – will fool the algorithm.⁴³ Given that SoundCloud's platform encourages users to borrow and modify content, Audible Magic fails to

³⁸ Forde, *supra* note 4.

³⁹ *Technology Overview*, *supra* note 6.

⁴⁰ See Michael Rappa, *Business Models on the Web*, DIGITAL ENTERPRISE (2010), <http://digitalenterprise.org/models/models.html> (advertising models work best when the volume of viewer traffic is large and subscription fees are incurred irrespective of actual usage rate).

⁴¹ *Id.*

⁴² See Miles Raymer, *SoundCloud Raining on Its Own Parade*, CHICAGO READER (Mar. 3, 2011), <http://www.chicagoreader.com/chicago/sharp-darts-soundcloud-copyright/Content?oid=3351152> (noting that “DJs were the early adopters that helped [SoundCloud] reach critical mass,” but they are feeling betrayed by recent practices that “appear to defer to rights holders”).

⁴³ See Smitelli, *supra* note 5 (finding that the algorithm only recognizes a sound clip if it is a certain length, while changes in pitch, tempo, or background white noise may successfully cloak the clip).

catch many uploads that infringe copyrights.⁴⁴ The difficulty for SoundCloud is that their target market is primarily comprised of DJs, producers, and remixers, all of whose music frequently borrows and samples from copyrighted material.⁴⁵ These users witness the prevalence of such remixed music on SoundCloud and are led to erroneously believe that no serious legal repercussions exist due to uploading potentially infringing content. Ultimately, a significant number of infringing files are successfully uploaded to SoundCloud's servers,⁴⁶ but are not removed without the copyright holder's proactive search and notice action.⁴⁷

II. DMCA § 512(C) SAFE HARBOR

To avoid liability, SoundCloud ought to look to the recent *Viacom v. YouTube*⁴⁸ decision. The presence of a high volume of arguably illegal remixes on SoundCloud's servers may prompt major record labels or other rights holders to sue.⁴⁹ Through an understanding of the court's reasoning in *YouTube*, SoundCloud and other similar service providers can better understand the implications of the DMCA § 512(c) safe harbor, while anticipating how to best qualify for protection.⁵⁰

⁴⁴ See Larisa Mann, *Walling Off Another Garden: Is Soundcloud Turning on Its Supporters?*, RIPLEY (Dec. 25, 2010), <http://djripley.blogspot.com/2010/12/walling-off-another-garden-is.html> (positing that much of the content on SoundCloud would be considered infringing material).

⁴⁵ *Id.*

⁴⁶ See Evans, *supra* note 8, at 3 (discussing the circuit split over whether remixes of copyrighted songs are still illegal).

⁴⁷ Copyright holders may file a takedown notice for an upload that they believe to be infringing. The service provider is required to remove the accused upload even if the copyright holder presents no evidence that it is actually infringing. The uploader may then file a counter-notice that would force the copyright holder to provide proof. Mann, *supra* note 44.

⁴⁸ *Viacom Int'l Inc. v. YouTube Inc.*, 718 F.Supp.2d 514, 518 (S.D.N.Y. 2010).

⁴⁹ See *id.* (noting that copyright holder Viacom was suing YouTube over "tens of thousands of videos [that] were taken unlawfully" (quoting Brief for Viacom, at 1)).

⁵⁰ See generally Cassius Sims, *A Hypothetical Non-Infringing Network: An Examination of the Efficacy of Safe Harbor in Section 512(c) of the DMCA*, 2009 DUKE L. & TECH. REV. 9 (2009) (detailing the various elements of DMCA Section 512(c) and the standards by which service providers might qualify for protection).

A. The YouTube Decision’s Interpretation of DMCA Safe Harbors

1. Relevant § 512 provisions

Section 512(c)(1) of the DMCA states that a service provider will not be liable for storing copyright-infringing material if the service provider: (a) “does not have actual knowledge that the material or activity using the material on the system is infringing”; (b) “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent”; or (c) “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.”⁵¹ As an additional requirement, the service provider cannot have received “a financial benefit directly attributable to the infringing activity” when the service provider “has the right and ability to control such activity.”⁵² Finally, § 512(c)(1)(C) requires the service provider, when notified of a claimed infringement by the copyright holder, to quickly “remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”⁵³

Section 512(c)(2) and (3) articulate the steps necessary to satisfy the notification requirement, and include the service provider’s designation of an agent to receive notices, as well as what information the notice needs to provide.⁵⁴ Section 512(m) specifically provides that the § 512(c) safe harbor is *not* predicated on “(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent . . . with the provisions of subsection (i)” or “(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.”⁵⁵ Rather, § 512(i) requires a qualifying service provider to implement a system that “provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers.”⁵⁶ Service providers must also “accommodat[e] and . . . not interfere with standard technical measures.”⁵⁷

In *YouTube*, the court identified a “critical question” with regard to YouTube’s qualification for the DMCA safe harbor.⁵⁸ This question

⁵¹ Digital Millennium Copyright Act, 17 U.S.C. §§ 512(c)(1) (2006).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Viacom Int’l Inc. v. YouTube Inc.*, 718 F.Supp.2d 514, 517–18.

⁵⁵ *Id.* at 518.

⁵⁶ Digital Millennium Copyright Act, 17 U.S.C. § 512(i)(1).

⁵⁷ *Id.*

⁵⁸ *YouTube*, 718 F.Supp.2d at 519.

was whether the “actual knowledge” and “facts or circumstances from which infringing activity is apparent” language in § 512(c)(1)(A)(i)–(ii) required a general awareness by YouTube of infringements, or in fact required the higher standard of “actual or constructive knowledge of specific and identifiable infringements of individual items.”⁵⁹ The court held that the higher standard of actual or constructive knowledge was indeed required.⁶⁰

2. Legislative History

The Senate and House Reports concerning the DMCA demonstrated Congress’ dual concerns of providing an effective method to combat clear and repeated cases of infringement while simultaneously ensuring that these methods were not overly onerous for service providers.⁶¹ One of the concerns that led to the creation of the safe harbor, after all, was to protect important service providers from having to implement practices that would be impractical to execute on a large scale.⁶² In *YouTube*, the court initially examined the text of the Senate Committee on the Judiciary Report, and noted that the overarching purpose of the DMCA was to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁶³ Next, the court looked at the Senate Judiciary Committee Report and the House Committee on Commerce Report to find clarification for § 512(c)(1)(A)(i)’s “actual knowledge” language.⁶⁴ The court ruled that “actual knowledge” means “actual or constructive knowledge of specific and identifiable infringements.”⁶⁵ Finally, the court examined the Reports’ explanation regarding how to approach the § 512(c)(1)(A)(ii) “red flag” test, which articulates how to know that an “infringing activity is apparent.”⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.* at 520.

⁶¹ *See id.* at 522–23 (discussing § 512(d) – which deals with information location tools – and elaborating on specificity requirements as well as “red flag” cases of infringement involving “pirate” sites that lead service providers to a greater likelihood of awareness of infringement in the absence of actual knowledge. Also discussing the purpose of the safe harbor to “promote the development” of service providers like Yahoo! as long as they follow the notice and takedown requirements).

⁶² *See id.* at 523 (discussing § 512(d) and its proscription that “awareness of infringement . . . should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances”).

⁶³ *Id.* at 519.

⁶⁴ *Id.* at 519–23.

⁶⁵ *Id.* at 519.

⁶⁶ *Id.*

The House and Senate Reports on the passage of the DMCA describe § 512(c)(1)(A)(ii) as a “red flag” test that requires “both a subjective and an objective element.”⁶⁷ The test’s subjective element involves a determination of the “awareness of the service provider of the facts or circumstances in question.”⁶⁸ An objective standard is then used to determine “whether those facts or circumstances constitute a ‘red flag’ – in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.”⁶⁹

The *YouTube* court went on to examine the Reports’ comparison between § 512(d)’s “need for specificity” when dealing with information location tools like Yahoo! and the § 512(c) provisions.⁷⁰ The Reports state that under the “actual knowledge” and “not aware of facts or circumstances from which infringing activity is apparent” language, “a service provider would have no obligation to seek out copyright infringement.”⁷¹ However, a service provider “would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.”⁷² The court went on to elaborate that, “[a]bsent such ‘red flags’ or actual knowledge,” however, a directory provider cannot be reasonably expected to know whether content is infringing from a “brief cataloguing visit.”⁷³ This test was made to “strike[] the right balance” for online editors and cataloguers, as it is unreasonable to require them to “make discriminating judgments about potential copyright infringement” unless the case is “obviously pirate.”⁷⁴ Therefore, a high level of certainty of repeated infringement is required before the name of a party or site can be qualified as a “red flag.”⁷⁵ From a policy perspective, the court reasoned that “information location tools are essential to the operation of the Internet,” and requiring a higher standard for human judgment and discretion – when the legal question is already complicated enough – would have a chilling effect on whether directory providers are willing to keep cataloguing potentially infringing material.⁷⁶ In reaching this conclusion, the court seemed to be guided by the utilitarian

⁶⁷ *Id.* at 520.

⁶⁸ *Id.*

⁶⁹ *Id.* at 520–21.

⁷⁰ *Id.* at 522.

⁷¹ *Id.*

⁷² *See id.* (explaining an example of a clear red flag where a directory provider came across a “pirate” site that allowed downloading of copyrighted material).

⁷³ *Id.*

⁷⁴ *Id.* at 523.

⁷⁵ *Id.*

⁷⁶ *Id.*

conception of potential societal loss outweighing the rights holders' actual loss.

YouTube applied a similar utilitarian rationale to service providers as well.⁷⁷ In terms of efficiency, the court believed that rights holders themselves were in the best position to identify infringing material and determine whether they actually wanted to stop the infringing action.⁷⁸ After analyzing further commentary on other § 512 provisions, the court concluded that the DMCA did not intend to force service providers like YouTube to affirmatively seek "facts indicating infringing activity" in order to qualify for safe harbor protection.⁷⁹

The House and Senate Reports also give clarification regarding how to apply § 512(c)(1)(B), the provision that bars service providers from receiving a financial benefit directly attributable to the infringing activity. The court stated that "[i]n determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one."⁸⁰ This means "in general, a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service."⁸¹ For example, "receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity.'"⁸² This analysis is an especially relevant consideration when trying to fit SoundCloud's particular monetization model under § 512(c)(1)(B).⁸³

3. Case History

The *YouTube* decision identified the outcome of the case as turning on how specific the § 512(c)(1)(A) "actual knowledge" requirement was, and what kind of "awareness" of infringement was

⁷⁷ *Id.*

⁷⁸ *See id.* at 524 (reasoning that the amount of infringing material on a service provider's servers may be insignificant and the copyright owner or licensor is in the best position to determine if they actually want to fight a case of infringement).

⁷⁹ *Id.*

⁸⁰ *Id.* at 521.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See infra*, Part II.B.2.

expected from service providers.⁸⁴ The court ultimately held that “general knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search its services for infringement.”⁸⁵ The court reached this conclusion after examining previous cases that, while not directly applicable as precedent, used a line of reasoning appropriate to service providers that were comparable in size and function to YouTube.⁸⁶

The court drew further justification for its interpretation from *Tiffany Inc. v. eBay*,⁸⁷ which involved a claim of contributory liability for trademark infringement.⁸⁸ There, the court held that Tiffany needed to show that eBay knew of “specific instances of actual infringement,” and had more than a “generalized notice that some portion of the Tiffany goods sold on its website might be counterfeit.”⁸⁹ Drawing parallels between *YouTube* and *eBay*, the court decided that Congress, through the DMCA, intended the copyright holder to bear the burden of identifying specific instances of infringement.⁹⁰ Because of this, without a showing that YouTube knew of specific infringing material and did not quickly remove it, Viacom could not win its case through § 512(c)(1)(A).⁹¹

Regarding the § 512(c)(1)(B) “financial benefit” requirement, Viacom argued that YouTube received ad revenue which was directly attributable to the infringing content in question.⁹² Despite this, the court

⁸⁴ Amanda Bronstad, ‘*Viacom v. YouTube*’ Appeal May Decide Future of Web, LTN L. TECH. NEWS (Dec 14, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202476144090&slreturn=1&hbxlogin=1>.

⁸⁵ *Youtube*, 718 F.Supp.2d at 525.

⁸⁶ *See id.* at 524 (explaining that if the identification of cases of infringement required an investigation of “facts and circumstances,” then those cases did not constitute “red flags,” and explaining that a “blatant” showing of infringement was necessary to prove that Amazon had actual knowledge of infringement by its users).

⁸⁷ *Tiffany Inc. v. eBay*, 600 F.3d 93 (2d Cir 2010).

⁸⁸ *Youtube*, 718 F.Supp.2d at 525.

⁸⁹ *Id.* (quoting *Tiffany*, 600 F.3d 93 at 106–07).

⁹⁰ *See id.* (explaining that although *Tiffany* did not involve the DMCA, the DMCA applies the same principle: without a “red flag” or notice from the owner of specific instances of infringement, the service provider is not obligated to identify the infringement).

⁹¹ *See id.* (“[I]f a service provider knows . . . of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search its service for infringements.”).

⁹² *Id.* at 527.

– scrutinizing § 512(c)(1)(B)’s “right and ability to control” language – reasoned that “the provider must know of the particular case before he can control it.”⁹³ Because it is the burden of the copyright holder to alert YouTube of specific cases of infringement, YouTube will virtually never “control” infringing material without having first received notice from the owner.⁹⁴ After receiving notice and promptly removing the offending material, the court found that YouTube had by all accounts acted in good faith compliance with the DMCA guidelines for quick removal, and could therefore not be held liable for infringement.⁹⁵

B. Application of § 512(c) to SoundCloud

Using the *YouTube* court’s guidelines for applying § 512(c) to service providers, SoundCloud and other similar platforms should fall under the DMCA safe harbor, thereby limiting their potential liability for infringing material uploaded to their servers. However, because *YouTube* is still on appeal in the Second Circuit, SoundCloud needs to consider the pertinent arguments made against YouTube and protect itself accordingly.⁹⁶

1. § 512(c)(1)(A) Analysis

YouTube’s interpretation of the “actual knowledge” standard would require SoundCloud to have knowledge of “specific and identifiable infringements of particular items” beyond the “mere knowledge of prevalence of such activity in general.”⁹⁷ Since SoundCloud does not directly monitor uploads – instead utilizing the Audible Magic technology to preemptively stop infringement – this argument is unlikely to succeed on behalf of rights holders in a potential suit. Even if the title of an uploaded song indicated that the song could

⁹³ *Id.*

⁹⁴ *See id.* (“[T]he provider must know of the particular case [of infringement] before he can control it.”).

⁹⁵ *See id.* at 524 (explaining that after receiving notice of over 100,000 infringing videos from Viacom, YouTube “had removed virtually all of them” by the next business day).

⁹⁶ *Cf.* Mike Masnick, *YouTube’s Reply In Viacom Case Demolishes Each of Viacom’s Key Arguments*, TECHDIRT (Apr. 1, 2011, 7:48 AM), <http://www.techdirt.com/articles/20110401/02080513719/youtubes-reply-viacom-case-demolishes-each-viacoms-key-arguments.shtml> (describing YouTube’s response to Viacom’s appeal).

⁹⁷ *Youtube*, 718 F.Supp.2d at 523.

potentially infringe a copyright,⁹⁸ this would not constitute “actual knowledge” under the court’s ruling. The artist of such a remix might secure a license from the original musician, for example, but a SoundCloud employee would be unable to know this without further inquiry. SoundCloud will need to know that the song is infringing, which, if the song passes the Audible Magic filter, requires proactively contacting the presumed rights holder. Such a requirement arguably extends to the type of “investigative duties” that the Ninth Circuit in *Perfect 10 v. Google*⁹⁹ attempted to discourage.¹⁰⁰ The “actual knowledge” requirement will therefore be difficult to prove.

A more challenging standard for SoundCloud to overcome will be the § 512(c)(1)(A)(ii) “is not aware of facts or circumstances from which infringing activity is apparent” language, and the “red flag” test used to verify it. The operative question will be whether any “red flags” objectively exist on SoundCloud’s servers – meaning “whether infringing activit[ies] would have been apparent to a reasonable person” in the “same or similar circumstances” as one of SoundCloud’s employees.¹⁰¹ Even if material can objectively be identified as a “red flag,” the subjective element still exists, which requires determining how aware SoundCloud is of these red flags. Awareness will be easier to impute if the infringing content is highly visible, such as content available on the SoundCloud “Explore Tracks” page,¹⁰² or if the artists themselves are highly visible. If such a clearly infringing song somehow bypassed Audible Magic, and became popular enough to reach that level of exposure, then SoundCloud would be forced to act under § 512(c)(1)(A)(iii) by removing that content.

The DMCA’s legislative history indicates that due to “factual circumstances” and “technical parameters” that “may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.”¹⁰³ When SoundCloud does receive specific knowledge of infringing material, it is almost always through the copyright holder’s notice, at which point SoundCloud acts swiftly in accordance with § 512(c)(1)(A)(iii), sending out takedown notices almost immediately.¹⁰⁴

⁹⁸ Such potential infringement might, for instance, be identified as a remix of a top pop song appearing on SoundCloud’s “Hot” list. See, e.g., *Explore Tracks*, SOUNDCLLOUD, <http://soundcloud.com/tracks> (last visited Sept. 12, 2011).

⁹⁹ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

¹⁰⁰ See *Youtube*, 718 F.Supp.2d at 524 (quoting *Perfect 10*, 488 F.3d at 1114).

¹⁰¹ *Id.* at 520–21.

¹⁰² See *Explore Tracks*, *supra* note 98 (listing the “Hot” and “Latest” tracks).

¹⁰³ *Youtube*, 718 F.Supp.2d at 521.

¹⁰⁴ See *Mann*, *supra* note 44 (discussing how producers often complain about having remixes taken down due to copyright complaints).

The alacrity of SoundCloud's response is likely to satisfy the "expeditious action" requirement elucidated in *YouTube*, especially considering that the statute is flexible enough to utilize case-specific determinations when deciding the appropriate time limit. If the *YouTube* decision stands in the Second Circuit, then SoundCloud's emulation of YouTube's procedural safeguards against infringement should allow it to stand up to a § 512(c)(1)(A)(iii) challenge.

2. § 512(c)(1)(B) Analysis

SoundCloud's business model can be used to eliminate the financial benefit SoundCloud receives from the presence of infringing material on its servers. The way that the DMCA's legislative history treats service providers requiring a "one-time set-up fee and flat periodic payments" strongly supports the conclusion that SoundCloud meets the § 512(c)(1)(B) requirement.¹⁰⁵ SoundCloud can also apply the *YouTube* court's ruling that "control" is not possible without specific knowledge – and as it was with YouTube – that the DMCA does not place the burden on the provider to proactively seek specific knowledge of infringing uploads. However, it may be argued that, by allowing its users to upload and download songs in greater quantities as the user pays more, SoundCloud has created a key feature that incentivizes paying for premium accounts and therefore violates § 512(c)(1)(B). This argument would necessarily be premised on the proposition that SoundCloud's limit on uploading and downloading for free accounts is purposely instituted. SoundCloud would have to be aware of infringing material uploaded to its servers, and want users to purchase higher level accounts in order to upload with less restrictions. This, however, is a difficult argument to support, and as such SoundCloud should not be concerned with § 512(c)(1)(B).

3. § 512(c)(1)(C) Analysis

SoundCloud, like YouTube, needs to be sure to identify and eliminate blatant and repeated infringement, which is already being done through the implementation of Audible Magic. SoundCloud can address the more egregious cases of potential infringement that slip past the technology by following § 512(c)(1)(C)'s provisions for timely notice and takedown.¹⁰⁶ An examination of SoundCloud's terms of use demonstrates rigorous adherence to the DMCA's guidelines.¹⁰⁷

¹⁰⁵ See *Youtube*, 718 F.Supp.2d at 521.

¹⁰⁶ *Id.* at 522.

¹⁰⁷ See *SoundCloud Terms of Use*, SOUND CLOUD, <http://soundcloud.com/terms-of-use> (last visited Sept. 12, 2011) (including, among other compliance-related terms, that "any unauthorized use of copyright protected material within Your

SoundCloud's notice and takedown procedures have been implemented with rights holders' interests as a primary main concern, and as such should satisfy § 512(i)(1)(A)'s "reasonably implemented" requirement.¹⁰⁸

4. Summation

The central legal concern for SoundCloud remains the fact that potentially infringing material exists on its servers, and the legality of such material is difficult for the service provider to unilaterally determine without the assistance of rights holders. If the district court's holding in *YouTube* stands on appeal, SoundCloud should have strong assurance that their policies will fully protect them against liability under the DMCA § 512(c) safe harbor. In the meantime, the use of Audible Magic should function effectively as a precautionary mechanism for SoundCloud.¹⁰⁹ Moving forward, the real problem for SoundCloud will be reconciling their preventative measures with the original creative purpose of their platform.¹¹⁰ The safeguards that SoundCloud has instituted, while wise from a legal point of view, cast too wide a net.¹¹¹ Echoing this sentiment, one blogger noted that "computers, for example, have no algorithm to determine fair use."¹¹² SoundCloud is taking precautionary action by monitoring their own content at the point of upload while the *YouTube* appeal approaches, but for now, such action functions more as a burden borne on both the service provider and its users before it is truly necessary.

Content (including by way of reproduction, distribution, modification, adaptation, public display, public performance, preparation of derivative works, making available or otherwise communicating to the public via the Platform) may constitute an infringement of third party rights and is *strictly prohibited*.”).

¹⁰⁸ Raymer, *supra* note 42.

¹⁰⁹ Mike Masnick, *Permission Culture And The Automated Diminishment Of Fair Use*, TECHDIRT (Dec. 27, 2010, 2:32 PM), <http://www.techdirt.com/articles/20101227/09520712421/permission-culture-automated-diminishment-fair-use.shtml>.

¹¹⁰ See Phil Morse, *Why You Shouldn't Post Your Mixes On SoundCloud*, DIGITAL DJ TIPS (Mar. 11, 2011), <http://www.digitaldjtips.com/2011/03/why-you-shouldnt-post-your-mixes-on-soundcloud/> (“[M]ost of the material on SoundCloud of interest to DJs comprises DJ mixes or reworks, remakes and remixes that can't be found through official channels.”).

¹¹¹ See *id.* (“[DJs] can no longer trust a DJ mix posted on SoundCloud to remain there.”).

¹¹² Mike Masnick, *How Copyright Filters Present A Serious Challenge to DJ Culture*, TECHDIRT (Mar. 21, 2011, 10:11 PM), <http://www.techdirt.com/articles/20110311/01520813455/how-copyright-filters-present-serious-challenge-to-dj-culture.shtml>.

CONCLUSION

SoundCloud's future is dependent upon the eventual resolution of the *YouTube* case.¹¹³ If service providers like YouTube are found to fall outside the DMCA § 512(c) safe harbor, SoundCloud and many other platforms designed to share original music could no longer rely freely on user-generated content without facing increased liability for infringing material that inevitably ends up on their servers.¹¹⁴ Such platforms may ultimately rely on fingerprinting technology like Audible Magic to satisfy copyright holders' concerns about widespread infringement on their site. Despite this, technology such as Audible Magic needs to adapt to the myriad ways users alter audio files before it can effectively filter out a majority of the infringing content.¹¹⁵ In the meantime, the hit-or-miss approach of manual removal will continue to frustrate artists who hoped to utilize the platform in a variety of wholly legal ways.¹¹⁶ SoundCloud will soon need to make a decision to either follow a conservative approach until a conclusive ruling is made in *YouTube* – and risk further alienating its user base – or rely on a system of notice and takedown that may not be sufficient to escape liability. Considering the nature of the platform and the societal utility derived from service providers like SoundCloud and YouTube, SoundCloud would be wise to remember what made them successful in the first place, until the courts determine they should act otherwise.

¹¹³ See Rob Arcamona, *What the Viacom vs. YouTube Verdict Means for Copyright Law*, MEDIASHIFT (Jul 2, 2010), <http://www.pbs.org/mediashift/2010/07/what-the-viacom-vs-youtube-verdict-means-for-copyright-law183.html>.

¹¹⁴ Masnick, *supra* note 109.

¹¹⁵ See Smitelli, *supra* note 5 (concluding that “it is quite possible to thwart . . . [filtration] system[s]”).

¹¹⁶ See Morse, *supra* 110 (discussing the removal of arguably legal material).