Next-Generation Piracy: How Search Engines Will Destroy the Music Business

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This Comment seeks to address the problems that search engines create for the music business in our ever-evolving digital society. Piracy costs are now measured in billions, encompassing lost revenue and job cutbacks. As the world becomes even more dependent on the Internet for entertainment, piracy can only get worse. Although in the United States piracy has been addressed with respect to P2P file sharing services, record companies are coming upon an era where search engines will enable effective, quick, and simple piracy. This evolution has already taken hold in China, a country where 99 percent of music files are estimated to be pirated, and copyright infringement is as easy as typing a song name into a specialized search engine. The problem is slowly starting to be felt domestically. Although Supreme Court precedents have addressed the issues of P2P file sharing, current statutes and decisions are unequipped to deal with the next generation of search engines.

This Comment argues that although search engines might be held responsible for some of their contributions to piracy through the court system, ultimately, the fundamentals which make up the business model of music companies must change. Statutes, court decisions, and society are comfortable allowing an open and unrestricted Internet, ensuring that search engine capabilities will not be curbed. As the digital age progresses, recording companies will bleed money until they are faced with a choice: adapt or die. This Comment proposes that to survive, recording companies must delve deep into alternative revenue streams, leaving behind their pursuit of pure music in the process. Ultimately, pure music as an art form will vanish.

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I. INTRODUCTION

The business model of the music industry is dying. Industry experts like John Kennedy, chief executive of the International Federation of Phonographic Industry, blame Internet piracy for continuously eroding musical sales.[1] Growing digital sales still cannot offset the damage caused by widespread musical copyright infringement: the Federation estimates that ninety-five percent of downloaded digital musical files worldwide are pirated.[2] Senior record label executives favor the adoption of strong measures, such as switching off pirates' Internet connections, to counteract their losses.[3] John Morton, the president of the International Federation of Musicians, has stated boldly that "[p]iracy is the major threat to creativity and tomorrow's music and musicians."[4] The myriad of changes that the Internet has brought to the industry has been called "devastating" and doomsday scenarios, where artists are forced to look elsewhere for work, abound.[5]

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[1] Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES, (Jan. 21, 2010) http://www.nytimes.com/2010/01/22/business/global/22music.html.

[2] *Id.*

[3] *Id.*

[4] John Morton, *Pro-Music Website Marks First Year with New Directory of Legal Online Music Services*, IFPI (May 27, 2004), http://www.ifpi.org/content/section_news/20040527a.html.

[5] *Id.* Alan McGee, the founder of Creation Records, has said that "illegal downloading is murdering the music business." Chris Mugan, *Alan McGee: Illegal Downloading is Murdering the Music Business*, SPINNER, (Feb. 10, 2011, 8:00 AM), http://www.spinner.com/2011/02/10/alan-mcgee-illegal-downloads/.

The industry insiders are right. Currently, the music business is losing more battles than it is winning, especially in foreign territories. The overall cost of piracy is measured in billions of dollars of lost revenue and job cutbacks.[6] Peer-to-peer ("P2P") downloading, one of the preferred methods of music piracy in the United States, reduces the probability of purchasing music by an estimated 30 percent.[7] A reporter for the New York Times accurately captured the resiliency of copyright infringers by stating that "[t]he recording industry's long-running battle against online music piracy has come to resemble one of those whack-a-mole arcade games, where the player hammers one rubber rodent's head with a mallet only to see another pop up nearby."[8] For all of the lawsuits filed against single mothers and college students,[9] recording studios still cannot turn profits like they used to. Even with increasingly used legal innovations such as iTunes, global music sales fell 30 percent from 2004 to 2009.[10]

Both legitimate digital music sales and illegal downloads continue to rise in this technological age, and the music industry is looking to place responsibility for its lost revenue.[11] Increasingly, the blame for the decay of this creative business has been placed on the People's Republic of China and its efficient method of pirating music through

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[6] *See The True Cost of Sound Recording Piracy to the U.S. Economy*, IPI CENTER FOR TECHNOLOGY FREEDOM, POLICY REPORT, 188, (2007), *available at* http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/51CC65A1D4779E408625733E00529174/$File/SoundRecordingPiracy.pdf?OpenElement; *See also*, BPI Research and Information, *The Impact of Illegal Downloading on Music Purchasing* (Nov. 20, 2009), http://www.ifpi.org/content/library/The-Impact-of-Illegal-Downloading.pdf [hereinafter *Impact of Illegal Downloading*]

[7] Alejandro Zentner, *Measuring the Effect of Music Downloads on Music Purchases* . CTR. FOR THE ANALYSIS OF PROP. RIGHTS AND INNOVATION, 1 (May 2003), *available at* http://som.utdallas.edu/centers/capri/documents/effect_music_download.pdf; *Impact of Illegal Downloading*, *supra* note 6.

[8] Steve Lohr, *Ideas & Trends: The Sharing Society; In the Age of the Internet, Whatever Will Be Will Be Free*, N.Y. TIMES, (Sept. 14, 2003), http://www.nytimes.com/2003/09/14/weekinreview/ideas-trends-sharing-society-age-internet-whatever-will-be-will-be-free.html?src=pm.

[9] In 2008, the recording industry gave up its aggressive litigation strategy. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008), http://online.wsj.com/article/SB122966038836021137.html. The much-maligned strategy not only failed to stop piracy, but it produced a "public-relations disaster for the industry, whose lawsuits targeted, among others, several single mothers, a dead person and a 13-year-old girl." *Id.*

[10] Pfanner, *supra* note 1.

[11] Digital music revenues grew by an estimated six per cent globally in 2010 to $4.6 billion, accounting for 29 per cent of record companies' trade revenues in 2010. *IFPI Digital Music Report*, IFPI (Jan. 20, 2011), http://www.ifpi.org/content/section_resources/dmr2011.html.

search engine deep links. The only difference between a deep link and a normal link is that the deep link does not access a website's home page but rather another page buried within the website's structure.[12] Specifically, deep linking is defined as "the practice of creating a link to a web page that the owner of the targeted web page doesn't define as the proper page from which users should begin accessing the website."[13] Although useful in maintaining an efficient Internet, deep links make it easy and fast for users to find pirated songs through a search engine.

China's piracy problems are indeed astounding. In 2009, legitimate online music sales in China were a mere $9 million.[14] By comparison, legitimate online music sales in the United States for the same year totaled approximately $2 billion.[15] Add to these statistics the fact that Chinese enforcement of copyright laws has historically been lenient, and the stage is set for a piracy problem of staggering proportions. Indeed, approximately 99 percent of online music files accessible in China are pirated.[16] The situation in the country is so bleak that Chinese artists "have to regard CDs as essentially promotional tools, not as end products."[17] Unless radical changes are made to the way the Internet is perceived and used, American artists will soon have to adopt the Chinese artists' business model.

II. THE EVOLUTION OF SEARCH ENGINES

Industry executives are not focusing on China solely for the vastness of its piracy problem. Indeed, although piracy rates are problematic in China, when put into perspective they are not as dire as the statistics suggest.[18] In fact, some argue that the United States is actually liable for more infringement than China,[19] as the per-capita

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[12] Andrew L. Dahm, *Database Protection v. Deep Linking*, 82 TEX. L. REV. 1053, 1055 (2004) (noting that "[t]echnically, a deep link is just a normal link. Deep links derive their significance from the link's target.").

[13] *Id.* at 1053.

[14] Press Release, RIAA, *Music Industry Reacts to USTR Report on Nations with Inadequate IP Protections* (Apr. 30, 2010) (on file with author).

[15] *Id.*

[16] Jiarui Liu, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. L.J. 621, 630 (2010). Today, the piracy of musical works in China is so pervasive that Liu refers to the phenomenon as "copyright anarchy." *Id.* at 624-31.

[17] Kevin Maney, *If Pirating Grows, It May Not Be the End of Music World*, USA TODAY (May 3, 2005), http://www.usatoday.com/tech/columnist/kevinmaney/2005-05-03-music-piracy-china_x.htm.

[18] *See generally* discussion *infra* Part I.

[19] *See generally* Robert H. Hu, *Protecting Intellectual Property in China: A Selective*

piracy rates in China are about one-third of those in the United States.[20] Moreover, the music industry would also benefit by focusing their attention elsewhere, since the battle which the United States has been fighting over Chinese enforcement of copyrights has proved unsuccessful on many occasions.[21]

The reason record companies have chosen China as a battleground is this: they are afraid of its efficient Internet-based technology and what it might mean for both foreign and domestic piracy.[22] Chinese music piracy utilizes more advanced systems than most current American ones, and the differences make the Chinese version irresistibly appealing. Piracy in China, primarily achieved through search engine deep linking,[23] is easier, swifter, and harder to control than corresponding piracy techniques in America, which have historically relied on cumbersome P2P file sharing.[24] Popular Chinese search engines such as Baidu have the ability to efficiently find copyrighted music available for free download.[25] A user merely types an artist or song name into a search box and a list of links will be displayed.[26] The beauty of the system lies in how easy the next steps

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Bibliography and Resource for Research, 101 LAW LIBR. J. 485, 494 (2009).

[20] Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT'L MEDIA & ENT. L. 65, 80 (2008).

[21] Indeed, "an undesirable pattern has emerged in China-U.S. trade relations: the United States threatens billions of dollars in sanctions, China threatens retaliatory sanctions, the two reach an eleventh-hour agreement in which China promises to change, China does not change, and the cycle repeats." Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, but You Can't Make It Drink*, 37 Va. J. INT'L L. 223, 250-51 (1996).

[22] The growing concern can be seen in many of the latest IFPI's digital reports. For example, in 2011, the IFPI stated that even though P2P file sharing still presented the biggest obstacle for record companies "alternative forms of illegal distribution . . . are a serious and growing problem." *IFPI Digital Music Report*, INT'L FED'N OF THE PHONOGRAPHIC INDUS. 14 (2011), *available at* http://www.ifpi.org/content/library/DMR2011.pdf. Moreover, industry experts are concerned that specialized search engines and cyberlockers could push piracy to new levels, since these methods "are often just a few clicks away from a Google search for popular content." Joe Mullin, *How 'Cyberlockers' Became the Biggest Problem in Piracy*, PAIDCONTENT (Jan. 20, 2011 10:32am), http://paidcontent.org/article/419-how-cyberlockers-became-the-biggest-problem-in-piracy/.

[23] Baidu, a Chinese search engine which relies on deep linking, has a market share of more than 60%, making deep linking the method of choice for pirating MP3 songs in China. *See* Liu, *supra* note 16, at 628.

[24] In the United States, P2P has dominated the world of piracy since the inception of Napster. Mullin, *supra* note 22.

[25] See Jonathan Landreth, *Report: China's Top Online Search Engine Baidu Encourages Music and Movie Piracy*, THE HOLLYWOOD REP. (Mar. 1, 2011), http://www.hollywoodreporter.com/news/report-chinas-top-online-search-162860.

[26] Philip Jagenstedt, *How to Download Chinese Music (Baidu, VeryCD, etc)*, PRETENTIOUS

are: the user clicks on a preferred link and the chosen song starts downloading to his computer from the original webpage; the user never has to leave the search engine website.[27] Thus, even though the pirated materials are provided exclusively by third party sites, Chinese search engines enable searchers to avoid actually visiting these sites, thereby decreasing the risk of malware[28] or similar security threats to the user's computer.[29] Obviously, these types of search engines do not pay royalties to recording companies.[30] In fact, deep linking services are responsible for providing links to an estimated 50 percent of illegally-downloaded music files in China.[31] With this system in place, China's music consumers can infringe copyrights without paying any price. Given the pervasiveness of the Chinese piracy problem, it is hardly surprising that infringement is as easy as typing a song name into a search box.

With technology permeating more of our lives each day, the music industry fears a change in how the American population infringes copyrights. Indeed, industry executives are afraid that specialized search engines, the Chinese pirating technology of choice, will become domestically popular.[32] If the current state of American music piracy is any indication, their fears are well-founded.[33]

NONSENSE (Oct. 3, 2008), http://blog.foolip.org/2008/10/03/how-to-download-chinese-music/.

[27] *Id.*

[28] "Malicious software, commonly known as malware, is a general term for software inserted into an information system to cause harm to that system or other systems, or to subvert them for use other than that intended by their owners. Malware can gain remote access to an information system, record and send data from that system to a third party without the user's permission or knowledge, conceal that the information system has been compromised, disable security measures, [or otherwise' damage the information system." Robert W. Ludwig, et al., *Malware and Fraudulent Electronic Funds Transfers: Who Bears the Loss?,* 26 FIDELITY L. J. 101, 103-04 (2010) (quotations omitted).

[29] *See* Nick Mediati, *The 17 Most Dangerous Places on the Web*, PC WORLD (Sept. 26, 2010), http://www.pcworld.com/article/206107/the_17_most_dangerous_places_on_the_web.html.

[30] Moreover, Baidu has been "complicit in the music downloads it offers, potentially hosting the content itself through a revolving series of ever-changing domains." Mike Masnick, *China Says: If You Must Infringe on Copyrights, Use Baidu*, TECHDIRT (Nov. 10, 2008, 4:26 AM), http://www.techdirt.com/articles/20081110/0025482785.shtml.

[31] RIAA, *supra* note 14.

[32] *See IFPI Digital Music Report*, INT'L FED'N OF THE PHONOGRAPHIC INDUS.14 (2011), *available at* http://www.ifpi.org/content/library/DMR2011.pdf.

[33] In its 2010 Digital Music Report, the IFPI cited a study which stated that although P2P is still the major enabler of piracy, illegal downloading through "other channels" such as cyberlockers and specialized search engines is growing substantially. *IFPI Digital Music Report*, INT'L FED'N OF THE PHONOGRAPHIC INDUS. 6 (2011), *available at* http://www.ifpi.org/content/library/DMR2010.pdf.

Until recently, musical copyright infringement in the United States relied largely on P2P file sharing rather than deep linking.[34] P2P file sharing makes use of a network where "participants share a part of their own hardware resources" in order to make files available to other users without "passing intermediary entities."[35] Unlike most search engines, this type of service was created with the specific intent to facilitate the transfer of music files at no charge.[36] Services such as Napster, Grokster, and Streamcast grew in popularity until the courts stepped in, finding the services liable under a contributory infringement theory.[37] Always central to the courts' decisions in imposing liability was that such services were essentially aware of the flagrant copyright abuses occurring on their systems – and they did nothing to stop them.[38] As a most transparent example, Grokster's business model explicitly encouraged users to pirate copyrighted works in order to gain more revenue.[39] In *Grokster*, the Supreme Court "affirmatively stated that P2P manufacturers, with generalized knowledge of their product's third party harmful uses, can be culpable based on reckless promotion of such uses."[40] In the wake of *Grokster*, the imposition of contributory infringement liability has effectively curbed P2P file sharing in the United States, stunting piracy growth and fostering a generalized fear of using such a system to access musical works for free.

In retrospect, it is easy to see how a program which blatantly encourages copyright violations can be held responsible for its activities. It is more challenging to hold search engines responsible for their role in copyright infringement. Unlike P2P systems, search

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[34] *See id.*

[35] Rüdiger Schollmeier, *A Definition of Peer-to-Peer Networking for the Classification of Peer-to-Peer Architectures and Applications*, IN PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON PEER-TO-PEER COMPUTING, 101 (2001), *available at* http://www.computer.org/plugins/dl/pdf/proceedings/p2p/2001/1503/00/15030101.pdf.

[36] GREG KOT, RIPPED: HOW THE WIRED GENERATION REVOLUTIONIZED MUSIC 25, 31-33 (Simon &Schuster, Inc. 2009); *see also* Wagman, *No One Ever Died from Copyright Infringement: The Inducement Doctrine's Applicability to Firearms Manufacturer Liability*, 32 CARDOZO L. REV. 689, 705 (2010).

[37] *See generally* Metro-Goldwyn-Mayer Studios v. Grokster, 545 U.S. 913 (2005); A&M Records v. Napster, 239 F.3d 1004 (2001); Wagman, *supra* note 36.

[38] The Court in MGM held Grokster liable for copyright infringement because it distributed its device with "the object of promoting its use to infringe copyright." *MGM Studios*, 545 U.S. at 936.

[39] For example, the company sent newsletters promoting Grokster's ability to effectively steal copyrighted music. *Id.* at 938.

[40] Wagman, *supra* note 36, at 710.

engines provide very real and legitimate benefits to users. They were created to simplify sifting through vast stores of digital data, not to facilitate copyright infringement. Given how ubiquitous search engines have become, it is difficult to imagine a properly functioning Internet without the ease of navigability that search engines provide.

Much like Chinese search engines, search engines in the United States such as Google can display deep links to pirated music in search results.[41] But, in some important respects, American search engines work differently than Chinese search engines. The key difference is the way a user downloads copyrighted songs. With most American search engines, the user must access a third party website that is hosting copyrighted material to download it.[42] In doing so, the user faces significant risks, including exposing her computer to malware.[43]

However, a shift in the United States is already evident: a new generation of search engines, most of them specifically tailored to find music at no charge, are coming into existence.[44] Sites such as Sideload, SeeqPod, and MP3Tunes emulate Chinese search engines by not requiring users to leave the search page.[45] Instead, users can stream or download almost any musical track without ever having to visit a third party website.[46] Users are beginning to realize the advantages of using these music aggregator sites: they are quicker, easier, safer, and less cumbersome than P2P file sharing. The popularity of these engines is also rising. For instance, SeeqPod averaged seven million music-related queries per day in 2008,[47] and in 2007, MP3Tunes provided links to approximately 400,000 music files, all of them

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[41] Andy Greenberg, *Why Google is the New Pirate Bay*, FORBES (Apr. 17, 2009, 4:00PM), http://www.forbes.com/2009/04/17/pirate-bay-google-technology-internet-pirate-bay.html.

[42] *Id.*

[43] *See* Nick Mediati, *The 17 Most Dangerous Places on the Web*, PC WORLD (Sept. 26, 2010), http://www.pcworld.com/article/206107/the_17_most_dangerous_places_on_the_web.html.

[44] See Chris Castiglione, *Digital Music Becomes (more) Rhizomatic: Evolutionary Traits of the Music Industry*, MUSICNEUTRAL, (Feb. 25, 2009), http://www.musicneutral.com/discuss/2009/02/25/digital-music-becomes-more-rhizomatic/. (discussing how a new generation of search engines are able to crawl the Internet and provide links directly to MP3 song files). For example, SeeqPod lets users play music files in its search results window. *See e.g.*, Asad, *16 Free Search Engines For Finding Music Online – Start Listening Now!*, ADDICTIVETIPS (Oct. 22, 2008), http://www.addictivetips.com/internet-tips/16-free-search-engines-for-finding-music-online-start-listening-now/.

[45] Anthony Bruno, *Search Warranted? Deep-Link Sites Find Songs Fast, and Labels Want a Cut*, BILLBOARD, Mar 15, 2008, at 1, 12 *available at* http://goo.gl/vUyxG.

[46] *Id.*

[47] Complaint at 11, Capitol Records, L.L.C. v. SeeqPod, Inc., (S.D.N.Y. 2010) (No. 09 Civ. 1584) 2010 WL 481228.

pirated.[48]

Arguably, the one major difference between Chinese search engines such as Baidu and their American progeny is that the latter are built solely to perform music searches.[49] The universe of American search engines is therefore split between two versions, one of which is exclusively targeted towards finding music files, and the other towards generalized searches.[50] Chinese search engines, on the other hand, are more advanced as they have melded the two purposes together: they are able to simultaneously search for pirated music and also perform everyday searches for non-infringing material.[51] Thus, they resemble Google for most searches, but also have the specific capability of searching for illegally pirated material.[52] The hybrid nature of Chinese search engines makes them dangerous; since they are not exclusively built to encourage infringement, the rationale of P2P case law does not apply.

As specialized American search engines continue to evolve, they will expand beyond merely searching for music files. New engines will begin to widen their horizons into other types of media, ultimately making their way into legitimate searches, while retaining their specific infringement capabilities. Over time, it will become harder to distinguish between "legitimate" search engines, such as Google, and search engines with illegitimate ends, such as SeeqPod. This expansion of technology will create a problematic legal gray area for American record companies because there is no case law applicable to these new, more generalized search engines. As the evolution towards Chinese-style search engines continues, it will become necessary to categorize these new types of search engines to determine whether they can be held liable for copyright infringement. However, attempts to impose liability against these search engines, both at home and in China, is likely to be limited by practical considerations. Deep links are necessary for the smooth functioning of the Internet as we know it, and legitimate search engines like Google have spoken out against the

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[48] Complaint at 2, Capitol Records, Inc. v. MP3Tunes, LLC, 2009 WL 5102794 (S.D.N.Y. 2009) (No. 07 Civ. 9931) 2009 WL 5102794.

[49] *See* Asad *supra* note 44.

[50] *See id.*

[51] For example, Baidu is regarded as a better version of Google. *Baidu: The Most Popular Search Engine You've Never Heard Of*, HUBPAGES, http://couchcontentcom.hubpages.com/hub/baidu-popular-search-engine (last visited July 6, 2012).

[52] *Id.*

imposition of any barriers to their search results.[53] And, at least so far, copyright laws, both in China and in the United States, have failed to properly address the problem.

III. FIGHTING ABROAD: CHINA

In China, American record companies have challenged Baidu, as well as other search engines which provide easy access to pirated works.[54] However, with its distinctive mix of ineffective enforcement remedies,[55] non-precedential case law,[56] rampant copyright infringement,[57] and advanced technology,[58] China presents a tough hurdle for the American music business to overcome. Although opponents of deep linking have won a few judgments in their favor,[59] the battle continues to rage. And at least at the moment, opponents of deep linking appear to be losing the war.[60]

The sources of copyright law under China's current system are many and varied, leaving the landscape full of gaping holes in copyright protection and inconsistent relief.[61] Though not binding, courts look to the "Judicial Interpretations of the Supreme People's Court Concerning the Application of Laws to the Trial of Civil Disputes of Copyright" and the "Judicial Interpretations of the Supreme People's Court Concerning the Application of Laws to the

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[53] *See* Nathan Olivarez-Giles, *Google's Eric Schmidt: Blocking File-Sharing Sites Would Make U.S., Britain like China*, L.A. TIMES (May 18, 2011), http://latimesblogs.latimes.com/technology/2011/05/google-eric-schmidt-says-blocking-filesharing-sites-would-make-u-s-u-k-ike-china.html. The article highlights a common misconception: imposing restriction on sites providing pirated material would make the United States less like China, not more like it.

[54] *See e.g.*, IFPI v. Baidu (Beijing High Court, 2007 No. 594) (China); *see also* Mike Masnick, *Record Labels Keep On Trying: Sue Baidu for Copyright Infringement yet Again*, TECHDIRT (Feb. 5, 2008, 12:27 PM), http://www.techdirt.com/articles/20080205/084632179.shtml; Matt Cantor, *Record Labels Sue Chinese Sites to Block Illegal Music*, NEWSER (Apr. 7, 2008, 2:45 AM), http://www.newser.com/story/23637/record-labels-sue-chinese-sites-to-block-illegal-music.html.

[55] *See* Jessica A. Wood, *The Darknet: A Digital Copyright Revolution*, 16 RICH. J.L. & TECH. 14, 64 (2010) (discussing how the lack of copyright enforcement in China permitted the development of the world's fastest online distribution networks).

[56] Nilay Patel, *Open Source and China: Inverting Copyright?*, 23 WIS. INT'L L.J. 781, 790 (2005).

[57] OFFICE OF THE U. S. TRADE REP., 2011 SPECIAL 301 REPORT 20, *available at* http://www.ustr.gov/about-us/press-office/reports-and-publications/2011/2011-special-301-report.

[58] *See* discussion *supra* Part I.

[59] *See e.g.*, IFPI v. Alibaba (Beijing High Court, 2007 No. 1190) (China).

[60] In 2011, China still pirates approximately 99 percent of its online music downloads. OFFICE OF THE U. S. TRADE REP., *supra* note 57.

[61] *See generally China's IP Journey*, WIPO MAGAZINE (Dec. 6, 2010), http://www.wipo.int/wipo_magazine/en/2010/06/article_0010.html.

Trial of Copyright Cases involving Disputes over Computer Network" for guidance.[62] To complicate matters further, China employs "natural law" which is merely supplemented by "catch-all" provisions in the Copyright Law of the People's Republic of China.[63] Thus, the system is vague and leaves much discretion to local judges, creating the perfect platform for inconsistent decisions.[64] Moreover, there is a tradition in China of protecting the interests of the state, even at the cost of the greater public good.[65] Thus, plaintiffs in China cannot hope to find relief against defendants who contribute a lot to society or are of great importance to the government.

China's Copyright Law is placed against this murky backdrop. It was amended in 2001, and again in 2010, in order to bring the country in compliance with the WIPO Internet treaties.[66] In this way, it is supposed to function as an analog to the Digital Millennium Copyright Act (DMCA) of the United States, and indeed many provisions in the Chinese Copyright Law resemble their United States counterparts.[67] Chinese Copyright Law was supplemented in 2006 by the Regulations for the Protection of Rights of Communication through Information Networks ("Regulations"),[68] which seek to address the problem of online piracy. The Regulations are therefore at the forefront of the digital music war.[69] Article 22 and Article 23 of the Regulations have

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[62] Li Yufeng, *Copyright Reform in China*, 22 INTELL. PROP. J. 203, 205-06 (2010).

[63] *Id.* at 217.

[64] For example, in enumerating the acts which would result in civil liability for copyright infringement, the Chinese Copyright Law prohibits the commission of "other acts of infringement upon copyright and upon other rights related to copyright." Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Feb. 26, 2010, effective Apr. 1, 2010), art. 47 [hereinafter Chinese Copyright Law], *available at* http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020100310354970932477.pdf.

[65] Yufeng, *supra* note 62, at 218.

[66] *Id.* at 216. The WIPO treaties are composed of two parts, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The treaties set minimum standards for intellectual property protection that signatory countries must abide by. *See generally* WIPO Copyright Treaty (WCT), Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 121 [hereinafter WCT]; WIPO Performances & Phonograms Treaty (WPPT), Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 203 [hereinafter WPPT].

[67] The DMCA was enacted in the United States in response to the WIPO treaties. *Piracy of Intellectual Property: The Register of Copyrights Before the Subcomm..on Intellectual Property, Comm. on the Judiciary,* 109th Cong. 1 (2005) (statement of Marybeth Peters), *available at* http://www.copyright.gov/docs/regstat052505.html.

[68] Seagull Haiyan Song, *A Comparative Copyright Analysis of ISP Liability in China Versus the United States and Europe*, 27 THE COMPUTER AND INTERNET LAWYER 7, 8 (2010).

[69] *See Regulations for the Protection of the Right of Communication Through Information Network*, art. 1-27, English translation *available at* http://www.cpahkltd.com/UploadFiles/

enabled copyright infringement suits to be brought with increasing frequency.[70] These provisions are modeled after the DMCA and provide for many of the same rights, including safe harbor provisions for Online Service Providers (OSPs) ("i.e., search engines or websites that allow Users to post content"[71]) which "[do] not know or [have] reasonable grounds to know that the works, performances, sound recordings or video recordings provided by [their] subscribers infringe any other persons' rights."[72] Article 23, which provides for searching and linking rights, states that a network service provider will be held liable for damages if "it knows or has reasonable grounds to know" that the links provided infringe copyrights.[73] Significantly, the article also provides protection for a search engine that "immediately removes or disables access to infringing materials upon receipt of a take-down notice."[74]

Interestingly, China's Regulations seem to suffer from some of the same shortcomings as the DMCA. It is unclear what constitutes a proper takedown notice that enables a network provider to "reasonably

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20100405151917721.pdf [hereinafter Regulations].

[70] *Id.* at art. 22-23.

[71] David E. Ashley, Note, *The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 563, 568 (2009).

[72] Article 22 states:

> A network service provider that provides its subscribers with network storage space for them to make works, performances, sound recordings or video recordings available to the public, and meets the following conditions shall not be liable for damages: (1) it clearly indicates that the network storage space is provided to its subscribers and discloses the name, person to contact, and network address of the network service provider; (2) it does not alter the works, performances, sound recordings or video recordings provided by its subscribers; (3) it does not know or has no reasonable grounds to know that the works, performances, sound recordings or video recordings provided by its subscribers infringe any other persons' rights; (4) it does not seek financial benefits directly from the works, performances, sound recordings or video recordings provided by its subscribers; (5) it promptly removes, according to these Regulations, the works, performances, sound recordings or video recordings alleged of infringement by the right owner upon receipt of notification.

Id. at art. 22.

[73] Article 23 states:

> Where a network service provider that provides searching or linking service to its subscribers, disconnects the link to the infringing works, performances, sound recordings or video recordings upon receipt of the right owner's notification according to these Regulations, it shall not be liable for damages; where it knows or has reasonable grounds to know that the linked works, performances, sound recordings or video recordings infringe another person's right, it shall be jointly liable for the infringement.

Id. at art. 23.

[74] *Id.* at art. 23; *see also* Song, *supra* note 68, at 9.

know" that its material is infringing, and, as a result, there have been many inconsistent verdicts against search engines which engage in deep linking to pirated material.[75] However, what is astounding is not that the outcomes are inconsistent; ironically, it is China's willingness to hold some deep linkers responsible for copyright violations under Article 23 of the Regulations, a step unlikely ever to be taken in the United States. In the Chinese case *IFPI v. Alibaba*, the International Federation of the Phonographic Industry (IFPI) sued the Alibaba search engine on direct and indirect liability claims.[76] The Beijing High Court stated that Alibaba was not directly responsible for copyright infringement.[77] However, IFPI ultimately prevailed on their indirect liability claim.[78] The court reasoned that Alibaba knew or should have known of the infringing materials present through its links.[79] The failure by the search engine to remove access to the pirated content was held to constitute gross negligence, and Alibaba was held jointly liable for copyright infringement.[80] Cases like *Alibaba* are encouraging for the music business, as are statistics that copyright infringement suits are on the rise in China. From 2007 to the first half of 2009, cases dealing with copyright issues rose seven percent in the country.[81]

Yet, for all of the improvements in copyright law and hope from recently decided cases, much remains unchanged in the country.[82] This is undoubtedly due, at least in part, to the nature of the Chinese legal system, where court decisions lack the same precedential value that they possess in the United States.[83] Moreover, the country still has no legitimate online music service which sells music legally like iTunes does in the United States.[84] To highlight the need for further

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[75] *Compare* IFPI v. Baidu (Beijing High Court, 2007 No. 594) (China) (holding that the takedown notice was not proper and relieving Baidu of liability), *with* IFPI v. Alibaba (Beijing High Court, 2007 No. 1190) (China) (holding the search engine liable for deep linking, on similar facts to Baidu case).

[76] IFPI v. Alibaba (Beijing High Court, 2007 No. 1190) (China).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Song, *supra* note 68, at 8.

[82] *See* OFFICE OF THE U.S. TRADE REP., *supra* note 57 (reporting that in 2011, 99 percent of Chinese online music downloads are still pirated).

[83] Patel, *supra* note 56.

[84] *See generally* Liu, *supra* note 16, at 629. Whether the pirating of music will go down now that Baidu has made licensing deals with three American record companies still remains to be seen. *See infra* Part III.

improvement, in 2009 the Office of the United States Trade Representative sent out a Special Report stating that "overall piracy and counterfeiting levels in China remained unacceptably high in 2008."[85] Further, losses to the United States due to Chinese piracy in 2008 were estimated to be $3.5 billion for the music recording and business software industries alone.[86]

Several other explanations exist for the lack of change in the country. First, the intricacies of copyright law in China are lost under its legislative hierarchical system, and are unclear and sometimes inconsistent with the WIPO treaties.[87] Relief for copyright infringement under the current Chinese system can be sought in three different settings: civil, administrative, and criminal.[88] The administrative system has been found especially problematic by the National Copyright Administration[89] because of its lack of enforcement authority and its overall incompleteness.[90] Unsurprisingly, the World Trade Organization's assessment is that China's laws dealing with copyright protection are still in need of "critical reform."[91] Thus, true enforcement is still a distant goal, as Chinese compliance with copyright law has been described as "uneven"[92] at best and completely lacking in enforcement at worst.[93] Second, judges, unrestrained by precedent, are able to craft decisions as they see fit.[94] Therefore, even though foreign copyright holders were given extensive rights under the 2010 amendment to the Copyright Law,[95] relief for American record

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[85] OFFICE OF THE U.S, TRADE REP, *supra* note 57.

[86] *Id.*

[87] *See generally* Yufeng, *supra* note 62, at 205.

[88] *Id.* at 217.

[89] The National Copyright Administration is China's highest administrative agency responsible for interpreting China's copyright laws. *Id.* at 219.

[90] *Id.*

[91] U.S TRADE REP. 2009 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, (2009), *available at* http://www.ustr.gov/webfm_send/1572 ("[E]ffective enforcement of China's IPR laws and regulations remains a significant challenge.").

[92] Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Ready for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 80 (2002).

[93] Patel, *supra* note 56, at 790.

[94] *Id.* at 791. The Office of the USTR has listed "[i]nadequate IPR enforcement" as a key factor in China's persisting piracy problems. OFFICE OF THE U. S. TRADE REP.,, *supra* note 57, at 19. The report also discusses the fact that there are a number of legal obstacles to effective enforcement that result in limited deterrence provided by Chinese law." *Id.*

[95] The 2010 amendment to the Copyright Law was enacted in order to let China come into greater compliance with the WIPO treaties as well as to protect foreign copyright holders more. Under the 2001 version, foreign content was not fully protected by many Chinese local courts since it had not received censorship authorization. *See* Chinese Copyright Law, *supra* note 64, art. 4; Yufeng, *supra* note 62, at 217. Thus, foreign copyright owners could not

companies in China is likely still a distant goal.

IV. UNITED STATES HISTORY

The basic problem may be that developing countries such as China are better off with a system which empowers piracy. At a similar phase in its history, the United States similarly flaunted foreign copyrights. Therefore, if history is any indication, the United States' own systematic disregard for foreign copyrights is at least partly responsible for its current artistic wealth.

In the nineteenth century, the United States was guilty of what it now denounces in China: it gave precedence to its own literary works while expressly excluding from protection works by foreign authors.[96] The Copyright Act of 1790 explicitly permitted the pirating of non-domestic works.[97] Notoriously, Charles Dickens named the United States "the continental Brigands."[98] The reason often given for this disparate treatment was that American authors needed access to English works in order to learn from them and increase the quality of their own writings.[99] In reality, this amounted to nothing more than permission for authors to plagiarize from their English counterparts.[100] Thus, as a developing country, the United States was not only guilty of not recognizing international copyrights, but of blatantly encouraging the abuse of such rights when recognizing those rights did not expressly suit the needs of its people.

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successfully sue in Chinese courts under the WIPO treaties and as a result, record companies across the world were powerless to enforce their rights. This change, although a step in the right direction, is insufficient to solve the problem of music piracy in China, as enforcement of copyright rights still remains weak. Further, it seems likely that domestic companies will still be treated differently than foreign ones. China's record on copyright enforcement demonstrates disparate treatment between foreign and domestic companies, regardless of the strict letter of the law.

[96] *See* B. Zorina Kahn, *Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920*, NBER WORKING PAPER SERIES 10271, 8 (2004), *available at* http://www.nber.org/papers/w10271.

[97] Section Five of the Copyright Act of 1790 states: "[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States." Act of May 31, 1790, ch. 15, §5, 1 Stat. 124 (repealed 1831).

[98] Kahn, *supra* note 96, at 28.

[99] *See* Shubha Gosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 445-46 (2003).

[100] *See id.*

Interestingly, England tried to repair the damage done by American literary piracy through multilateral treaties with other countries,[101] much as the United States and the rest of the developed world is attempting to do today with WIPO treaties. However, the United States strongly resisted English efforts to recognize copyrights, declining to sign the 1886 Berne Convention agreement.[102] Instead, the United States allowed publishers to "indiscriminately reprint[] books by foreign authors without even the pretence of acknowledgement."[103] When China's current efforts at curbing piracy are examined with an eye towards history, its participation in international treaties is extraordinary given that the United States, when in a similar position, did nothing to curb its own piracy. Furthermore, blatantly stealing the substantive content of English literary works is arguably a much worse offense than having a search engine provide deep links to sites which may or may not contain infringing material. Search engines provide a host of useful purposes which are necessary for the growth of the Internet; outright endorsement of plagiarism through declining to sign onto the Berne Convention does not stand on equal footing.

Valid arguments may be made that literary piracy in the nineteenth century was much different than music piracy today. In 2007, the major players in the United States copyright industries accounted for $125.6 billion in revenue through foreign sales and exports, with an estimated annual growth rate of 8.4 percent.[104] This number leads "all major industry sectors, including chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and the agricultural sector."[105] Thus, intellectual property works represent the top export industry in the United States. In contrast, in the nineteenth century, England's intellectual property export industry was not a major portion of its economy.[106] Indeed, nineteenth century England relied on an "industry-based, goods economy;" intellectual property was not a significant source of international revenue.[107] Because of the difference, it seems only fair that the United States should be entitled

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[101] Kahn, *supra* note 96, at 8.

[102] *Id.*

[103] Kahn, *supra* note 96, at 8-9.

[104] *See* INT'L INTELLECTUAL PROP. ALLIANCE (IIPA), COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003–2007 REPORT 5–7 (2009), *available at* http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf.

[105] *Id.*

[106] *See* Joseph J. Beard, *Everything Old is New Again: Dickens to Digital*, 38 LOY. L.A. L. REV. 19, 47 (2004).

[107] *Id.*

to protect its copyrights more, as piracy would harm its economy to a greater extent than it would have England's.

In the end, the United States relented on its stance and recognized copyright, not because of international pressure, but because it had "developed its own native stock of literary capital."[108] At that point, the rights of foreign authors, American authors, and publishers all benefitted.[109] However, as history shows, it seems the process of granting rights to foreign works must emerge internally from a country regardless of the potential benefits to be gained.

If historical precedent is pushed to its limits, a controversial argument is inescapable: developing countries may not only have an incentive to not enforce copyrights, they might have a duty to let their own citizens benefit from foreign works at no cost. After all, if the United States gained its knowledge freely, why should it be upset when other countries attempt to do the same? As China evolves and starts to export its own music on a global scale, it will likely come to realize the value of copyright on its own. Already, there are signs that the country may be slowly mending the revenue holes which music piracy has caused on its soil.[110] Recent developments, such as Baidu's recent licensing deal with Universal Music Group, Warner Music Group, and Sony BGM, suggest that a shift in thinking is happening, forced not by overeager foreign record companies but by a developing country's sudden awareness that enforcement of copyrights is needed in order to protect its own domestic works.[111] Unfortunately for American record companies, change is bound to be slow, as peer pressure exerted by foreign countries is simply an ineffective way to motivate a developing

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[108] Kahn, *supra* note 96, at 30.

[109] *Id.* at 10.

[110] *See* Dan Levin, *China's Biggest Search Engine, Known for Illegal Downloads, Makes Music Deal*, N.Y. TIMES (Jul. 19, 2011), http://www.nytimes.com/2011/07/19/technology/baidu-chinas-search-giant-announces-music-licensing-deal.html?pagewanted=all.

[111] In March 2011, Baidu "deleted 2.8 million written works from its online library service, Wenku, in an effort to appease Chinese authors who demanded compensation, arguing that the company allowed pirated content on the site's servers for free download. The move came days after China's National Copyright Administration stated that it was investigating the company for copyright infringement of books." *Id.* The National Copyright Administration's unusually strong position suggests that China is starting to value copyrights, potentially seeing new avenues for profit. Moreover, in October 2010, China announced the "Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities," aimed at empowering enforcement efforts in IPR infringement cases, including through the illegal download of music. OFFICE OF THE U.S. TRADE REP., *supra* note 57, at 19.

country to change its ways.[112]

V. HOLDING SEARCH ENGINES LIABLE IN THE UNITED STATES

Record companies, forced to fight for their rights on a global scale, are also looking for ways to hold American-based search engines responsible for contributory infringement through the Copyright Act. Because of the dichotomy currently present in Internet technology in the United States, the cases will necessarily fall into two categories: those dealing with generalized search engines, which provide links to every type of content, and those dealing with specialized search engines, which are engines made for the express purpose of providing links to pirated music.

A. *Infringement Under the Copyright Act*

Whether the music industry is suing generalized search engines like Google or specialized ones like SeeqPod, the lawsuits are dependent upon the provisions of the Copyright Act for relief. Section 106 of the Act provides owners of copyrights with six exclusive rights in their works.[113] An underlying violation of at least one of these rights must form the basis of any copyright infringement lawsuit.[114] Two sub-sections of section 106 are potentially usable as the underlying basis of the claim against search engines. First, if the engines allow for the

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[112] Indeed, it is still estimated that "99 percent of all music downloads in China are illegal." *Id.* at 20. Although the "Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities" has had a limited impact by shutting down infringing websites and arresting and sentencing to prison three website operators, the problem still persists. *Id.*

[113] *See* 17 U.S.C. § 106 (2006). Specifically, the section states that an owner of copyright has "the exclusive rights to do and to authorize any of the following":

> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
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> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

[114] Pinkham v. Sara Lee Corp., 983 F.2d 824, 829 (8th Cir.1992).

downloading of songs by users directly through their interface, they can be held contributorily liable under section 106(1), since they are providing unauthorized "copies" of copyrighted works.[115] Second, search engines can be held liable for streaming music under section 106(6) since their ability to let users stream and downloads songs can be considered a public performance "by means of a digital audio transmission."[116] A party whose rights have been infringed is entitled to actual damages for the loss.[117]

However, most search engines in the United States do not directly infringe copyrights. Therefore, if they are to be found liable for their activities, it must be on a contributory liability theory. The Copyright Act does not specifically address contributory liability. However, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court made clear that "[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity."[118] Instead, the Court, analogizing to patent law, found that imposing contributory liability would be both possible and proper if Sony had sold its equipment with constructive knowledge that it would primarily be used for copyright infringement purposes.[119] Lower courts have followed this general model, finding liability for contributory infringement when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[120] To be liable, a secondary infringer must "know or have reason to know"[121] of the direct infringement and must take affirmative steps to encourage direct infringement.[122] Mere knowledge of the possibility of infringement or of actual infringing uses is not enough to be contributorily liable.[123]

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[115] *See* 17 U.S.C. § 106(1) (2006).

[116] *See* 17 U.S.C. § 106(6) (2006).

[117] 17 U.S.C. § 504(b) (2006).

[118] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 435 (1984).

[119] *Id.* at 439-42.

[120] Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1169 (C.D. Cal. 2002) (*citing* A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001)).

[121] Adobe Sys., Inc. v. Canus Prods., Inc., 173 F. Supp. 2d 1044, 1048 (C.D. Cal. 2001); *see* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1160 (9th Cir. 2004).

[122] *MGM Studios*, 545 U.S. at 936.

[123] *Id.* at 937.

B. *The Safe Harbor Provisions of the DMCA*

Passed in 1998, the DMCA amended the Copyright Act in order to implement the World Intellectual Property Organization (WIPO) Internet treaties.[124] The WIPO treaties were enacted in an effort to combat the ever-changing landscape of the digital world.[125] They consist of two separate treaties: the WIPO Copyright Treaty (WCT), which protects authors of literary and artistic works,[126] and the WIPO Performances and Phonograms Treaty (WPPT), which covers the rights of performers and producers of phonograms.[127] Signed in 1996, the treaties seek to provide an international framework for intellectual property rights in the Internet age by setting minimum standards of intellectual property protection for signatory countries.[128]

Specifically, the DMCA aims "both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,' 'automatic' action."[129] Thus, the statute is designed to protect copyright holders and to permit Internet expansion and innovation, two divergent goals. As a whole, however, it is clear that the effect of the DMCA has been to provide far more protection for Internet expansion than protection for artists in the music industry.[130]

The DMCA does not provide any novel ways to hold copyright infringers responsible. Instead, the statute explicitly protects both

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[124] *Piracy of Intellectual Property, supra* note 67 (noting that the United States implemented the WIPO treaties "through the Digital Millennium Copyright Act ("DMCA"), which stands as a model for the world").

[125] *See generally* WIPO Copyright Treaty (WCT), Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 121 [hereinafter WCT]; WIPO Performances & Phonograms Treaty (WPPT), Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), 2186 U.N.T.S. 203 [hereinafter WPPT]. The WCT and the WPPT are sometimes referred to as the "Internet Treaties." *See* Kamil Idris, *Forword to* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTENRNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 418, vii (2002).

[126] WCT art. 1-8

[127] WPPT art. 5, 11.

[128] *See* The International Bureau of WIPO, THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT), *available at* http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/wct_wppt.pdf; Anne Hiaring, *What's New in the Neighborhood -- The Export of the DMCA in Post-TRIPS FTAs*, 11 ANN. SURV. INT'L & COMP. L. 171, 175 (2005) ("[T]he WIPO Internet Treaties . . . help raise the minimum standards of intellectual property protection around the world, particularly with respect to Internet-based delivery of copyrighted works.").

[129] ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001) (citing H.R. CONF. REP. NO. 105-796, at 72 (1998), reprinted in 1998 U.S.C.C.A.N. 649; H.R. REP. NO. 105-551(I), at 11 (1998)).

[130] *See* discussion *infra* Part IV.d.

Internet Service Providers (ISPs) ("i.e., providers of access to the Internet, such as broadband, DSL, or dial-up providers"[131]) and OSPs through safe harbor provisions.[132] The provisions are structured to protect eligible service providers from all monetary and most equitable relief resulting from copyright liability.[133] Under the provisions, search engines are not responsible for users' copyright infringement activities so long as they: (1) are deemed service providers under the DMCA, (2) have adopted and reasonably implemented a policy for the termination of users who are repeat infringers, and (3) accommodate and do not interfere with standard technical measures used by copyright owners to identify or protect copyrighted works.[134]

The term "service provider" is defined very broadly under the statute as a "provider of online services or network access, or the operator of facilities therefore."[135] This definition has been held to encompass so many different types of online services, from Photobucket[136] to YouTube[137] to Amazon,[138] that courts "would have trouble imagining the existence of an online service that would not fall under the definition."[139] Specifically, the DMCA applies the term to "(1) transitory digital network communications, (2) system caching, (3) information residing on systems or networks at the direction of users, and (4) information location tools."[140] Search engines fit squarely within the "information location tools" category and are therefore service providers under the statute, eligible for safe harbor protection.[141]

Generalized search engines also satisfy the last two prongs of the safe harbor provisions, and thus qualify for protection under the

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[131] David E. Ashley, Note, *The Public as Creator and Infringer: Copyright Law Applied to the Creators of User-Generated Video Content*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 563, 568 (2009).

[132] *See* 17 U.S.C. § 512(c) (2006).

[133] Wolk v. Kodak Imaging Network, Inc. 2011 WL 940056, at *1 (S.D.N.Y. 2011); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1098-99 (W.D. Wash. 2004).

[134] *See* 17 U.S.C. § 512 (2006)

[135] 17 U.S.C. § 512(k)(1)(B) (2006)

[136] Wolk, 2011 WL 940056, at *2.

[137] Viacom Int'l, Inc. v. Youtube, Inc., 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010)

[138] Hendrickson v. Amazon.com, 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004).

[139] Wolk, 2011 WL 940056, at *2 (quoting *In Re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 658 (N.D. Ill. 2002))

[140] 17 U.S.C. §§ 512(a)-(d) (2006); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1099 (W.D. Wash. 2004).

[141] *See* 17 U.S.C. § 512(d) (2006).

DMCA. Although search engines are not able to control the initial search results displayed to a user, they do exclude links from their search results once notified of possible copyright infringement.[142] Also, they do not prevent copyright owners from identifying or protecting their copyrighted works since their job is to merely return information in the form of links when prompted by a user.

Once protected by the DMCA, mere knowledge of infringement is not enough to cause search engines to be contributorily liable. Instead, a search engine that meets all of the safe harbor criteria will only be liable for infringement if it satisfies all three prongs of section 512(c)(1) of the DMCA: (1) it has actual knowledge of user infringement or is aware of such infringement, (2) it receives a financial benefit directly attributable to the infringing activity and has the right and ability to control such activity, and (3) upon notification of infringement, it does not respond quickly to remove or disable access to the infringing material.[143]

The requirements for assessing actual knowledge are far from clear or settled under United States case law.[144] Generally, the first prong can be satisfied in two ways: through a takedown notice from the copyright owner or through the existence of red flags.[145] If a notice from a copyright holder is proper, a service provider must "respond expeditiously to remove, or disable access to, the material that is claimed to be infringing" in order to not be held liable.[146] Thus, these provisions preemptively shield service providers at the expense of copyright holders.

Further, the takedown notice from the copyright holder needs to substantially comply with six requirements found in section 512(c)(3)(A) of the DMCA in order to be deemed proper.[147] Only

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[142] *See* Removing Content From Google, http://www.google.com/support/bin/static.py?page=ts.cs&ts=1114905 (last visited July 6, 2012) (providing Google users a way to request removal from Google's services of a specific website or link because of "applicable laws").

[143] 17 U.S.C. §§ 512(c)(1)(A)-(C) (2006).

[144] Song, *supra* note 68, at 3-4.

[145] *See* 17 U.S.C. § 512(c)(1)(A)(i)-(ii) (2006). Section 512(c)(1)(A)(i) states that a service provider shall not be liable if it "does not have actual knowledge that the material or an activity using the material on the system or network is infringing." Actual knowledge is achieved through receipt of a take-down provision. Section 512(c)(1)(A)(ii) states that a service provider shall not be liable if it, "in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent. Viacom Intern. Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 520 (S.D.N.Y. 2010).

[146] 17 U.S.C. § 812(c)(3)(A)(iii) (2006); Recording Indus. Ass'n of America v. Verizon Internet Servs., 351 F.3d 1229, 1234 (D.C. Cir. 2003).

[147] 17 U.S.C. § 512(c)(3)(B)(iii) (2006). The six requirements are: (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right

when all six requirements are met will the OSP be required to remove or disable access to the pirated material. Circuit courts have construed these requirements differently: the Ninth Circuit holds a narrow view, while the Fourth Circuit interprets them broadly. In *Perfect 10 v. CCBill*, the Ninth Circuit concluded that the statute "signals that substantial compliance means substantial compliance with *all* of section 512(c)(3)'s clauses, not just some of them."[148] Furthermore, the court read the text requiring "*a* written communication" to mean that a single correspondence must meet all of the requirements.[149] Plaintiffs were not allowed to pool "defective notices" together in order to overcome Section 512(c)(3)'s hurdle.[150] By contrast, the Fourth Circuit, in *ALS Scan, Inc. v. RemarQ Communities, Inc.*, held that notices lacking identification of specific infringing content were proper.[151] Impossible under *Perfect 10's* reasoning, the *ALS Scan* court held that the DMCA safe harbor provisions were satisfied even though notice was imperfect.[152] Thus, in the Fourth Circuit, a notice which only substantially complies with the DMCA is proper.[153]

The red flag test is even less clear.[154] To be held responsible, the statute requires search engines to "be aware of facts or circumstances from which infringing activity is apparent."[155] Two requirements are needed for a finding of liability under this test: (1) the search engine must objectively know that pirated material is located on its system,

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that is allegedly infringed; (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted; (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. 17 U.S.C. § 512(c)(3)(A) (2006).

[148] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007) (emphasis in original).

[149] *Id.* at 1113 (emphasis in original).

[150] *Id.*

[151] ALS Scan, Inc. v. RemarQ Communities, Inc. 239 F.3d 619, 625 (4th Cir. 2001).

[152] *Id.* at 620.

[153] *Id.*

[154] *See* 17 U.S.C. § 512(c)(1)(A)((ii) (2006).

[155] 17 U.S.C. § 512(c)(1)(A)(ii) (2006).

and (2) the illegal activity must have been "apparent to a reasonable person operating under the same or similar circumstances."[156] This combination of objective and subjective requirements is especially difficult to apply on a consistent basis. All that is clear is that willful blindness to infringing activities constitutes constructive knowledge.[157]

Due to the confusion surrounding the red flag test, record companies have mostly tried to utilize the DMCA takedown provisions to protect their copyrights. The results have ranged from successful to embarrassing. For example, in 2003, the Recording Industry Association of America (RIAA) sent a notice to Pennsylvania State's Department of Astronomy and Astrophysics for alleged theft and illegal distribution of copyrighted songs.[158] The department turned out to be blameless: the RIAA had confused a faculty member named "Peter Usher" who sang a cappella song about gamma rays with the R&B musician Usher.[159] To make matters worse, because of the mishap, the innocent department was almost forced to shut down its servers during final exams.[160] The RIAA ultimately blamed a "temporary employee."[161] In the end, the utilization of the DMCA has proven burdensome, and sometimes embarrassing, for the recording industry as a whole.

C. *A Practical Problem: The Usefulness of Search Engines*

Even setting aside various DMCA mishaps, the music business faces an arduous task in trying to curb search engine piracy both at home and in China. Beyond the DMCA protections, the main reason the task is so difficult is that, in general, search engine linking is necessary in order to maintain the openness of the Internet.[162] Since the only difference between a deep link and a normal link is that the deep link does not access a website's home page but rather another page buried within the website's structure, search engines are able to target either a particular home page or a deep link when users type in a

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[156] H.R. REP. NO. 105-551, at 53 (1998); Song, *supra* note 68, at 3.

[157] *In re* Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003).

[158] Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 210 (2010).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Many commentators argue that deep linking is a beneficial practice that promotes the growth of the Internet. Without it, competition would be threatened. *See e.g.,* Andrew L. Dahm, Note, *Database Protection v. Deep Linking*, 82 TEX. L. REV. 1053, 1085-89 (2004).

search parameter.[163] Moreover, the technology used to display the results, Hypertext Transfer Protocol (HTTP), does not distinguish between these different types of links.[164] Therefore, for search engine purposes, all links are functionally equal.[165]

The practice of deep linking is problematic for several reasons. Many website owners (not just record companies) abhor deep linking because, by bypassing the home page, advertisements are also skipped over and precious potential revenue is lost.[166] Further, the Internet surfer does not experience the website the way the owner intended.[167] The music business is especially punished under a system which does not distinguish between "normal" and deep links: it takes almost no effort for a web surfer to type into Google the name of popular song and download it from a resulting deep link which appears in the results.

However real the consequences of deep linking are for legitimate businesses, this type of linking arguably has value. Specific Internet research in a world where deep linking is prohibited would be an arduous task. Imagine an Internet user trying to search for lyrics from a song when they do not know its title. In today's world, such a user would merely have to type the few words they do remember from the song into the search engine and hit "search". Several deep links will come up, one of them inevitably identifying the correct song. If only links to home pages were allowed, a user would first have to find a lyrics database, then hope that the page has a sufficiently advanced search function to be able to do the same thing as the search engine does with deep links. Even if the page did, it might not have the specific song the user is thinking of, leaving him or her to go search for yet another database in order to restart the process. Abolishing deep links would thus mean an inefficient digital world.

Moreover, commentators have noted that deep linking does not have to be detrimental to website owners. Instead, it "can be beneficial to the originating site because the Internet user might simply use the services on the specific linked site and return to the originating site rather than being sidetracked into the myriad of other options that may

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[163] *Id.* at 1055 (noting that "[t]echnically, a deep link is just a normal link. Deep links derive their significance from the link's target.").

[164] *Id.* at 1055 ("[I]f a document is publicly available to browsers of the Web, any other page on the Web may link to it.").

[165] *Id.*

[166] *Id.* at 1055-56.

[167] *Id.*

be available on the home page of the referred site."[168] Treating deep links differently than normal links might also slow the growth and development of the Internet as a whole, which should arguably be prevented at all costs.[169] Deep link abolishment would also threaten competition between websites, leading to decreased benefits for consumers as a whole.[170] If search engines were not able to link to different products within a website for instance, buyers would not be able to easily compare prices for the same product, leading to suboptimal shopping decisions.[171]

Furthermore, if a website owner is truly worried about deep links, there are a myriad of solutions available, including "password-protected content, firewalls, periodically changing the page's URL, dynamic paging, and Java navigation programs."[172] Although some argue that these solutions are circumventable in practice and unappealing to commercial interests, they still provide some protection for businesses hurt by deep linking.

The arguments for allowing deep links are convincing if applied solely to websites that display legitimate context. However, the arguments fail to address the problems that deep linking causes with respect to sites that intentionally abuse technology to promote music piracy. Thus, there is an inherent conflict between those who favor a decentralized and open Internet and those who want to profit from their works, especially music artists and publishers.

D. *Holding Generalized Search Engines Responsible*

Although deep linking has likely harmed the music business, holding generalized search engines such as Google contributorily liable is unlikely to achieve meaningful relief. For the most part, courts have been reluctant to impose any restrictions on search engines' linking practices. Likewise, the DMCA provides a portentous shield. As of yet, no case in the United States has centered on the possibility of holding an unspecialized search engine liable purely for providing deep links to infringing material.

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[168] Karlyn D. Stanley, *Leading Internet Issues in 2000*, 630 PLI/PAT 189, 251 (2000).

[169] Dahm, *supra* note 163, at 1085 (referring with favor to Internet theorists who argue that "free linking is essential if the Web is to remain a universal space of information.").

[170] *Id.* at 1087.

[171] *Id.* at 1086-87.

[172] Rebecca Lubens, *Survey of Developments in European Database Protection*, 18 BERKELEY TECH. L.J. 447, 467 (2003).

Popular search engines such as Google provide many legitimate services through searches and deep links that our Internet age simply cannot do without. Consider a search for "Let It Be by The Beatles" typed into Google. The legitimate results displayed will be many and varied: there will be deep links to a variety of the Beatles' live performances, to snippets of the song, and to discography lists. The results will also return links to sites which allow users to illegally download the entire song. A user simply has to click on the third party website and follow instructions to infringe a copyright.

However, should all of those legitimate searches be stunted in order to let the music business thrive? The answer, highlighted by the *Ticketmaster* litigation, is clearly "no". *Ticketmaster Corp. v. Tickets.com, Inc.* specifically addressed deep linking in the United States with respect to websites that provide these types of links to non-infringing material. For record companies, the results have been disheartening, if not entirely surprising: courts have continually denied that the practice of deep linking – by itself – is illegal, at least in the absence of any breach of contract.[173] In the case, Ticketmaster, an online ticket vendor, sued Tickets.com, claiming copyrights violations and unfair competition due to Tickets.com's practice of deep linking to Ticketmaster's website.[174] Deep linking was held to not constitute copyright infringement since there was no actual copying of the website besides purely factual information.[175] The court reasoned that "purely factual information may not be copyrighted" and "unfair as it may seem to [Ticketmaster], the basic facts that [Tickets.com] gathers and publishes cannot be protected from copying."[176] Since Tickets.com did not use the "manner of expression" and "format" that Ticketmaster employed, no claim for copyright infringement could be sustained.[177] Instead, it was found to be significant that the deep link transferred the customer "to the particular genuine web page of the original author" and thus no "actual" copying took place.[178] In addition, unfair competition was also precluded as a method for finding deep linkers liable. The court reasoned that deep linking involves no

[173] Dahm, *supra* note 166, at 1056-57 ("In the context of standard deep linking involving no breach of contract, no court in the U.S. has imposed liability on a deep linker.").

[174] Ticketmaster Corp. v. Tickets.com, Inc., 2000 WL 1887522, at *1-2 (C.D. Cal. 2000) (describing how Tickets.com collected information from different websites and provided users with deep links to them).

[175] *Id.* at *3.

[176] *Id.*

[177] *Id.*

[178] Dahm, *supra* note 163, at 1058.

deception.[179] Instead, website users know that by clicking on a deep link, they are transferred to a genuine third party website.[180]

There can be little doubt that American courts are willing to protect the openness of the Internet, since the trend in this country has been to allow the unabated use of deep linking. On balance, it seems that American courts prefer an easily searchable Internet to the protection of copyrights.

Besides practical considerations, several other obstacles stand in the way of holding generalized search engines liable. The most prominent impediment is the DMCA. Since search engines such as Google qualify for the safe harbor provisions as service providers, they are shielded from liability for user searches that eventually allow third parties to infringe copyrights. The protection given to generalized search engines is highlighted in a recent Ninth Circuit case involving Google in-line linking to images that infringed copyrights.[181] In refusing to impose liability, the court reasoned that the search engine could only be held directly responsible for copyright infringement if it had knowledge that the infringing images "were available using its search engine, [and] could take simple measures to prevent further damage to [the] copyrighted works, and failed to take such steps."[182] The court further stated that in order to be contributorily liable, Google must have "both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so."[183] Ultimately, the court held that the plaintiff had failed to show that Google had sufficient control over these third party infringers or that it had the practical ability to police this type of conduct.[184] Importantly, any other generalized search engine which merely links to a third party website with infringing content would be subject to exactly the same analysis, and would be found liable only if it "substantially assists users in finding infringing material."[185] In the end, the burden of proof imposed is so high that no plaintiff is likely to succeed in court.

Under another possible approach, record companies might be able to analogize generalized search engines to P2P file sharing services. However, if this route is taken, it is likely that courts will find search engines more similar to third party platforms or to VCRs than to the

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[179] *Id.*

[180] *Id.*

[181] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 114 (9th Cir. 2007).

[182] *Id.* at 1172.

[183] *Id.* at 1173.

[184] *Id.* at 1173-74.

[185] Perfect 10, Inc. v. Visa Int'l Service Ass'n, 494 F.3d 788, 813 (9th Cir. 2007).

file sharing services.

Suits that have focused on whether sites that merely host material which infringes copyrights should be held liable provide part of the framework for analyzing this approach. Predictably, courts have applied the DMCA Safe Harbor Provisions and have shielded the infringing sites from liability.[186] The *Veoh* and *Viacom* cases provide useful examples. Veoh, a flash video Web site operator, allowed users to upload content onto its website.[187] Some users uploaded pirated material.[188] The court held that Veoh was neither directly nor indirectly liable for the infringing content which was uploaded onto its site, since it had no actual or constructive knowledge of the infringing activities that its users were engaging in.[189] Similarly, in *Viacom*, the DMCA provisions provided an effective shield for YouTube, a service which provides a platform for third party users to upload material.[190] In granting summary judgment, the court made it clear that under the DMCA, "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements."[191] Under these precedents, if courts were to analogize search engines to website platforms, there would be no relief for the music industry. The DMCA Safe Harbor Provisions are simply too powerful a shield for websites which passively allow users to post infringing material.

A company at least partly responsible for infringement is also protected under *Sony*. In that case, the Supreme Court addressed the issue of whether Sony could be held liable for users' utilization of the VCR to infringe copyrights.[192] Specifically, the Court noted that "[i]f vicarious liability is to be imposed on petitioners in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material."[193] The Court argued that the VCR could certainly be used towards illegal ends, but found it significant that it was also "capable of commercially

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[186] *See* Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008); Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).

[187] *Io Group*, 586 F. Supp. 2d at 1148-49.

[188] *Id.*

[189] *Id.*

[190] *Viacom*, 540 F. Supp. 2d at 518.

[191] *Id.* at 525.

[192] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[193] *Id.* at 439.

significant non-infringing uses."[194] Further, the Court argued that Sony had no intent to infringe copyrights with the use of this technology and was merely aware that some users might use the technology to that end.[195]

Ultimately, the Court held in favor of Sony.[196] The holding was based on two separate considerations. First, the Court found that "substantial numbers of copyright holders who license their works for broadcast on free television would not object" to the uses to which the VCR was being put.[197] Second, it found the potential harm to the market for the copyrighted works to be minimal.[198] It is likely that a similar analysis would be applied to generalized search engines in our digital society. Since knowledge that some consumers would use a product for infringement of copyrights has been shown to not be enough to establish indirect liability,[199] such search engines would almost surely prevail on the argument that their service (their "product") provides users with a method of searching the Internet which most often results in no copyright violation. Most of the "uses" of the "product" do not infringe any copyrights. True, some users will use the technology to download pirated music from third party sites, but overall, the legitimate uses of a search engine far outnumber the potentially infringing uses.

Both third party platforms and VCRs have escaped liability, and both involve much more infringing behavior than a search engine might employ. Unlike a platform, an engine does not host any potentially infringing material on its servers. Furthermore, a search engine is essential to the functioning of the Internet as a complete medium of expression. In contrast, a VCR provides no such service. Record companies only have the verdicts relating to P2P services to cling to.

The Copyright Act has been employed successfully to curb music piracy only with regards to holding P2P services liable for copyright infringement. In each of these cases, the plaintiffs' position was relatively easy and clear-cut: all the services knew or had reason to know that their primary use was for infringement of copyrights. In

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[194] *Id.* at 456.

[195] *Id.* at 813 (noting that the District Court "concluded that Sony had not caused, induced, or contributed materially to any infringing activities.").

[196] *Id.* at 456.

[197] *Id.*

[198] *Id.*

[199] *Id.*; *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005).

MGM, Inc. v. Grokster, Ltd., the Supreme Court held Grokster liable for copyright infringement by third parties through an inducement claim.[200] The Court defined the standard for inducement liability as providing a service "with the object of promoting its use to infringe copyright."[201] It did not prove to be difficult to hold Grokster responsible, as "90% of works available on one of the networks were shown to be copyrighted."[202] Further, the plaintiff showed that Grokster distributed its service with "the object of promoting its use to infringe copyright" through "affirmative steps to foster infringement."[203] Search engines are different. It is much easier to establish that a service such as Grokster, which was created solely to facilitate file sharing of copyrighted content, is illegal than a search engine which is primarily used to access legitimate content. Practically speaking, they also provide a crucial technology to search the Internet, regardless of the substantive content of the search. The P2P analysis can potentially be applied to search engines, but with difficulty since it would be hard to show knowledge of infringement, and almost impossible to prove that the objective of the engine was indeed copyright violation.

Although P2P cases might provide a glimmer of hope for record companies, what is more likely is that search engines will be seen as either platforms for various materials or as something like VCRs. In fact, the Ninth Circuit has already pointed out that "Google's activities do not meet the 'inducement' test explained in *Grokster* because Google has not promoted the use of its search engine specifically to infringe copyrights."[204] If a suit ever arises, search engines will likely be understood as technology "capable of commercially significant non-infringing uses." Therefore, in all likelihood, the music industry will not be able to use the DMCA to hold generalized search engines responsible for facilitating copyright infringement because the safe harbor provisions would apply and *Veoh*, *Viacom*, and *Sony* would provide additional safeguards.

E. *Holding Specialized Search Engines Responsible*

Unlike generalized search engines, futuristic, specialized search engines are more likely to be held responsible under the Copyright Act.

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[200] *MGM Studios*, 545 U.S. at 940-41.

[201] *Id.* at 936-37.

[202] *Id.* at 933.

[203] *Id.* at 936-37.

[204] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170 n. 11 (9th Cir. 2007).

With the development of new technology and the advent of next-generation search engines, the music industry might finally have found some relief. Although holding generalized search engines such as Google liable for contributory copyright infringement is most likely impossible for record companies, curbing the practices of specialized search engines specially built for facilitating music piracy is likely to be more successful.

The reasons for this stark difference and treatment under the Copyright Act and the DMCA are many. First, the activities enabled by these engines fall squarely within those prohibited by the Copyright Act and can be held to directly infringe copyrights. Since an engine's interface allows users to download and stream a song from sites, it can be deemed that they allowed the making of copies through reproduction or public display of third party content for a user, thus violating section 106 of the Copyright Act. Traditional search engines merely provide links to infringing sites; they are not equipped with software which allows for downloading and streaming off of their pages. This crucial difference protects generalized search engines from liability and condemns specialized ones.

Second, these types of engines will not quality for safe harbor protection under the DMCA. While they may claim to be a traditional search engine,[205] it is obvious that the services they provide are directed towards copyright infringement. Due to their programming, a user does not have to leave the search engine webpage in order to pirate songs. This provides further proof that these engines are not made simply to put up links to search queries as generalized search engines would do. A court went so far as to say that even if such an engine "meets the definition of a 'service provider' it must still surmount the other hurdles of section 512 – a proposition of doubtful certainty" to qualify for safe harbor immunity.[206] It seems easier for those seeking to challenge specialized search engines' activities to argue liability under prongs two and three of section 512(c) than for those seeking to challenge generalized search engines.

Therefore, in the context of contributory liability, it is likely that specialized search engines will be found to have the responsibility to supervise infringing activities. This control comes from the general ability of a search engine to delete infringing links from its database when warned of potential infringement, though it might not possess the power to prevent links to infringing sites from being displayed when

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[205] *See* Arista Records, Inc. v. Mp3Board, Inc., 2002 WL 1997918, at *10 (S.D.N.Y. 2002).
[206] *Id.*

users search for them.[207] In addition, these specialized search engines also have the ability to disable downloading and the streaming functions entirely from their software. Moreover, all of these specialized engines possess a direct financial interest in infringing activities or else they would not partake in such activities so blatantly in the first place.[208] Furthermore, in these types of cases, the precedents involving third party platforms, P2P file sharing sites, and *Sony* are all helpful in holding these specialized engines responsible.

Third party platforms were shielded by DMCA safe harbor provisions because they had no actual or constructive knowledge of infringing activities.[209] In turn, *Grokster* was found liable because of its knowledge and promotion of illegal activities.[210] Specialized search engines like SeeqPod and MP3Tunes cannot argue that they do not know that they facilitate copyright infringement since their express purpose is to facilitate access to pirated music files. These engines are so intertwined with their illegal purpose that they at times go beyond providing mere search results. SeeqPod, for example, allows users to add the searched-for music files to playlists, blogs, and social networking sites.[211] MP3Tunes allows users to have digital "lockers" where they can upload their downloaded music collection and thus have it available on any computer.[212]

Sony provides yet another favorable precedent for record companies. In *Sony*, the Court held the company not liable because the VCR was capable of "significant noninfringing uses."[213] Specialized search engines are capable of no such significant noninfringing use. Rather, they are expressly built to facilitate copyright infringement. In fact, MP3Tunes even advertises that the engine is a place to get "free music on the Internet."[214] Owners of such engines obviously derive

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[207] *See id.* at *11.

[208] *See id.* The court found it significant that the search engine was "exclusively and consciously devoted to locating audio files, and its financial interest in the locating and copying of music files is thus far more substantial and direct than the general interest, content neutral search engines with which MP3 wishes to compare itself." *Id.*

[209] *See* Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008); Viacom Int'l Inc. v. YouTube, Inc., 540 F. Supp. 2d 461 (S.D.N.Y. 2008).

[210] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[211] Complaint at 12, Capitol Records, L.L.C. v. SeeqPod, Inc., 2010 WL 481228 (S.D.N.Y. 2010) (No. 09 Civ. 1584).

[212] Jeffrey P. Cunard, *Intellectual Property 2008: Select Developments*, 953 PLI/PAT 383, 415 (2008).

[213] *See supra* note 115, at 456.

[214] Complaint at 2, Capitol Records, Inc. v. MP3Tunes, LLC, 2009 WL 5102794 (S.D.N.Y. 2009) (No. 07 Civ. 9931).

economic benefit from the illegal activities through the sale of advertisements, leaving them vulnerable to liability because DMCA protections do not apply under these circumstances.

Litigation against specialized search engines, although still undeveloped, is having at least one desirable effect for the music industry: it is bankrupting the young specialized search engines.[215] However, this is likely only a temporary setback, and the proliferation of replacement engines will not be stopped. In fact, the site Gimado, an engine with similar features to those of SeeqPod, launched right after Warner Brothers sued SeeqPod.[216] Seemingly undeterrable, these engines will continue to evolve, spawning newer, more creative ways to infringe music copyrights.

VI. WHAT LIES AHEAD

The development of a new generation of specialized engines has already started: engines such as Freemusiczilla have taken SeeqPod's concept and made it more refined and powerful. For instance, Freemusiczilla is capable of monitoring online radio station playlists and downloading a song as soon as it is played.[217] The website's software tracks radio station playlists across the country and downloads any song a user is looking for.[218] The website is able to do this because each song is embedded with a digital code that can be readily recognized.[219]

This new type of search engine shares many of the same characteristics with older versions of specialized search engines. After all, they provide similar features. For example, with Freemusiczilla, users are able to remain at the website while waiting for the site to download a specific song from a third party. However, one key difference could prove significant: the content which the site is

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[215] *See* Matt Rosoff, *Seeqpod Bankruptcy Will Affect Other Sites*, CNET (April 1, 2009, 2:39 PM), http://news.cnet.com/8301-13526_3-10209631-27.html.

[216] See Mark Hefflinger, *Gimado Gets $300,000 for Music Search Engine*, DIGITALMEDIAWIRE (Feb. 20, 2008, 7:40 AM), http://mashable.com/2008/02/19/gimado-funded/. Other engines, including Songerize, have also launched. Kristen Nicole, *Songerize Simple Song Search, Powered by Seeqpod*, MASHABLE (Feb. 4, 2008), http://mashable.com/2008/02/04/songerize/.

[217] Michael Arrington, *Freemusiczilla: Best Downloader I've Tested*, TECHCRUNCH (Jan. 2, 2008), http://www.techcrunch.com/2008/01/02/freemusiczilla-best-music-downloader-ive-tested/; Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO. L. 409, 430 (2008).

[218] *Id.*

[219] *Id.*

accessing does not infringe copyrights. In this sense, Freemusiczilla is indistinguishable from the VCR. The VCR has the capability of recording non-infringing content from live television for its user. It engages in time-shifting. Similarly, Freemusiczilla is recording legitimate content for a user to enjoy later. Whether the search engine will be deemed to have substantial non-infringing uses still remains to be seen. Moreover, the site could also be analogized to digital video recorders (DVRs), which also provide a time-shifting function similar to that performed by the VCR. The Second Circuit, by looking at the plain meaning of the statute as well as its legislative history, has held that a DVR playback is not a performance "to the public" within the meaning of the Copyright Act and thus does not infringe any exclusive right of performance.[220] Therefore, it can be argued that Freemusiczilla does nothing more than take licensed works, as a DVR takes licensed television shows or movies, and plays them back at a later time to a particular user. If analogized in this way, Freemusiczilla could escape sanction. Through using the Second Circuit's reasoning, the mere "potential" usage of a work for public performance is not enough to impose liability.[221]

Regardless of whether sites such as Freemusiczilla may be conceptualized as VCRs or DVRs, in the end, it is likely that all that specialized search engines would have to do to be shielded from liability would be to transform themselves into Google clones with an enhanced capability for searching for music, whether pirated or not. After all, if these engines can provide substantial noninfringing uses, courts will likely be unwilling to protect music copyrights at the expense of Internet efficiency.

VII. THE UNDESIRABLE SOLUTION: MUSICAL ARTISTS AS ENTERTAINERS

Promising steps have been taken to eradicate the music piracy problem, especially in China. However, the war is far from over. Technology is expanding and the Internet is becoming faster, more

[220] Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 134-36 (2d Cir. 2008).

[221] *Id.* at 135-36. According to the Second Circuit, the Copyright Act "speaks of people capable of receiving a particular "transmission" or "performance," and not of the potential audience of a particular "work." Indeed, such an approach would render the "to the public" language surplusage. Doubtless the potential audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court's interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after 'performance.'" *Id.*

pervasive, and easier to access. Even with some court battles won, Chinese cases continue to have no precedential value. And indeed, the piracy rate in China remains staggeringly high. Chinese record companies have learned a valuable lesson: in the digital age, it is not enough to be a musician; one must also be an entertainer. To remain in business, American record companies must also come to terms with the changes brought by the Internet. Since imposing technological barriers is infeasible and relief from courts is slow and incomplete, record companies must internally change.

The evolution of this new business concept is best seen in China, where the disregard for copyrights has not only proven detrimental to foreign record companies, but to Chinese companies as well. From 2000 to 2006, China's market share of domestic sales fell from 55 percent to 13 percent.[222] Ever-decreasing sales each year threaten music as an art form in that country, leaving the whole industry comparatively underdeveloped.[223] Through the years, the music industry in China has become "increasingly dependent on alternative revenue streams such as advertising, merchandizing, and live performance."[224] Chinese artists, finding their niche inundated with free foreign music, are simply not able to reach listeners. Because of advanced search engine technology, the Chinese music industry is experiencing the same effects of piracy at home that the American music industry is experiencing through piracy abroad.

The music industry in China, instead of relying on winning court battles which inevitably bleed revenue from the business, has adapted. It has focused on a few wonderfully successful musical artists and has turned them into entertainers. In essence, Chinese record companies are now talent management agencies, placing their artists in many different entertainment areas.[225] Chinese musicians still produce records, but they are also immersed in acting, advertising, and a slew of live performances in order to earn revenue.[226] The record companies are engaging in bundling advertisement-supported music, merchandizing, and synchronization.[227] All of these strategies enable Chinese record companies to survive. As the music business stands

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[222] IFPI, RECORD INDUSTRY IN NUMBERS 2000-2006; Liu, *supra* note 16, at 634-35.

[223] Liu, *supra* note 16, at 631-32 (describing how music sales in China decreased by 25% from 2000 to 2007).

[224] *Id.* at 623.

[225] *Id.* at 643.

[226] *See id.* at 636-38.

[227] *See id.* at 638-44.

today, "[i]t is no longer enough to be a pure musician" in China. [228]

The Chinese music industry should be applauded for its efforts to remain afloat in a country where piracy is the norm, but the change has had serious negative consequences. Since alternative revenue streams are dependent on the name recognition of the artist, new acts are hard to sign.[229] New talent is seen as a risk by executives and talent is therefore stifled. Non-mainstream music has also been rejected. Advertisers and sponsors demand music which is easy to listen to and memorable.[230] Different music, even that which receives critical acclaim, is shunned for more immediately likable and profitable tracks. The musical talent of China is being drowned in a sea of music picked by executives at advertising agencies.

Although it is an undesirable solution, American record companies must adapt their business model to emulate the Chinese one in order to survive. Already, the digital world and its accompanying piracy have induced changes, although the results are not nearly as dramatic and far-reaching as they have been in China.[231] Britney Spears provides a useful example. Gaining popularity in the late 1990s when piracy was still in its infancy, her first album reached sales in the United States of ten and a half million.[232] The latest album for which figures are reliable shows a dramatic drop in sales: they failed to reach 100,000.[233] Yet, despite the drops in record sales, Spears' net worth has continued to increase, from $100 million in 2007[234] to $155 million in 2011.[235] In

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[228] *Id.* at 643.

[229] *Id.* at 647.

[230] *Id.* at 648 (explaining that "an increasing number of musical works are created to accommodate the tastes of entrepreneurs, such as sponsors and advertisers, rather than those of average consumers.").

[231] The entertainment industry has already toned down its reliance on litigation as an enforcement measure. *See e.g.,* Grace J. Bergen, *Litigation as a Tool Against Digital Piracy*, 35 MCGEORGE L. REV. 181, 201 (2004). I believe this was mostly due to the ineffectiveness of litigation as a whole rather than a desire to keep college students happy and engaged into the record companies' music.

[232] Gary Trust, *Ask Billboard: Britney Spear' Career Sales*, BILLBOARD (Jan. 14, 2011), http://www.billboard.com/column/chartbeat/ask-billboard-britney-spears-career-sales-1004139083.story#/column/chartbeat/ask-billboard-britney-spears-career-sales-1004139083.story/

[233] *Id.* Spears' latest album *Femme Fatale* also underperformed in its first week, selling a mere 276,000 copies, down from 506,000 copies for her album before that. Keith Caufield, *Britney Tops U.S. Album Charts Despite Weak Sales*, REUTERS (Apr. 6, 2011), http://www.reuters.com/article/2011/04/06/us-sales-idUSTRE7354V920110406.

[234] Lea Goldman & Kiri Blakeley, *The 20 Richest Women in Entertainment*, FORBES (Jan. 18, 2007, 6:00 AM), http://www.forbes.com/2007/01/17/richest-women-entertainment-tech-media-cz_lg_richwomen07_0118womenstars_lander.html.

2010 alone, Spears earned an estimated $64 million,[236] as compared to approximately $38.5 million in 2004.[237] These figures are possible because the executives behind Spears have parlayed her singing success into alternative revenue streams. She has a line of perfumes, has lent her persona to endorsement deals, has acted both in a movie and television shows, and has co-written a book. In short, Spears defies categorization as a musician – she is an entertainer. It is the public's recognition of her likeness and name that makes her wealthy today. Indeed, a news article bearing the title "Britney Spears Debuts New Commercial- Err, Music Video" seems eerily appropriate.[238]

Copyright infringement has forced a business which for decades has entertained millions to become a monstrosity lying in wait for the next marketable face and body. Although several artists have been able to use the Internet as a platform to showcase their talents and gain the attention of executives, as early as 2003, record companies signed fewer new artists and produced fewer records than in previous years.[239] The digital age is hurting music more than it is helping it. The blame can be placed on the advancement of search engine technology and the courts' reluctance to curb its powers, whether through prohibitions on deep linking or by using the available statutes in an expansive way. In this digital age, which is supposed to develop enlightenment, music as an art form is sacrificed; form over substance is now commonplace.

Piracy is here to stay. Lawsuits, international agreements, technological barriers, billions in lost revenue, and brute peer pressure have all failed as mechanisms to curb the spread of global copyright infringement. Search engines have provided the ultimate tool to efficiently pirate music. To limit these engines would be to negatively impact the functionality of the Internet, a result that is unacceptable since our society has come to depend on the web for its most basic activities. It seems that the salvation for record companies, at home and abroad, is to leave pure music behind. But to accept this means the transfor-

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[235] *Britney Spears Net Worth 2011*, THE RICHEST (Mar. 6, 2011), http://www.therichest.org/entertainment/britney-spears-net-worth.

[236] Special Report, *The Celebrity 100*, FORBES (Jun. 28, 2010, 6:00 PM), http://www.forbes.com/lists/2010/53/celeb-100-10_The-Celebrity-100.html.

[237] Special Report, *Forbes Celebrity 100*, FORBES.COM (2004), http://www.forbes.com/finance/lists/53/2001/LIR.jhtml?passListId=53&passYear=2001&uniqueId=PREW&passListType=Person&datatype=Person.

[238] Amanda Massa, *Britney Spears Debuts New Commercial- Err, Music Video*, MASSAPPEAL BLOG (Feb. 18, 2011, 12:48 PM), http://blogs.forbes.com/amandamassa/2011/02/18/britney-spears-debuts-new-commercial-err-music-video/.

[239] Bill Holland, *Big Publishing Advances Dry Up For Most New Acts*, BILLBOARD Apr. 5, 2003, at 1.

mation of music from artistic endeavor to common commodity. The domestic music industry will have to adapt to this new reality. The question we must ask ourselves is whether this is an acceptable result for music innovation. Perhaps it is time to reevaluate the balance between an open, limitless Internet and the rights of artists and record companies if we are to truly save music from this new reality.