Thwack!! Take That, User-Generated Content!: Marvel Enterprises, Inc. v. NCSoft Corp.

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*Marvel Enterprises, Inc. v. NCSoft Corp.*

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PART I - INTRODUCTION

Copyright protection, a constitutionally established right,\(^2\) is now endangered due in part to changes in technology. Established before the United States itself,\(^3\) American copyright protection has continued even as the media it protects have grown and changed. Copyright law has survived both the American Revolution and the Industrial Revolution. However, facing the Internet Revolution, copyright law, as it existed for hundreds of years, may become extinct unless it evolves with new technology.

The online world, with the ability to create instant anonymous copies of words, pictures, sounds, and videos, has become a breeding ground for unfettered copyright violations. The advent of user-generated content (“UGC”)\(^4\) further creates a significant venue for copyright infringement; a situation in which the rights of UGC hosting websites (“UGC sites”) are often antithetical to the rights of copyright holders.

Eventually this situation will be resolved. It almost happened not too long ago through the copyright infringement suit in *Marvel v. NCSoft Corp.*\(^5\) Had that suit not resulted in settlement, a court decision would have determined the liability of a UGC provider for copyright infringement. The court most likely would have upheld copyright holders’ rights making the UGC provider liable for secondary infringement and forcing all UGC sites to change or shut down.

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\(^2\) U.S. Const. art. I, § 8, cl. 2 (empowering Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

\(^3\) Created in 1709, the Statute of Anne established the common law copyright for the American colonies. *See* John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710* 39 n. 3 (Publishing History 1980).

\(^4\) Defined as “(i) content made publicly available over the [i]nternet, (ii) which reflects a certain amount of creative effort, and (iii) which is created outside of professional routines and practices.” Participative Web: User-Created Content, Directorate For Science, Technology and Industry, Committee For Information, Computer And Communications Policy, Apr. 12, 2007, available at http://www.oecd.org/dataoecd/57/14/38393115.pdf.

\(^5\) *Marvel Enters., Inc.*, 2005 WL 878090.
Despite conflicts between UGC sites and copyright holders, a solution exists. Striking a balance between these two competing interests represents a significant challenge comparable to that posed by the Gordian knot: either spend years trying to untangle it or simply cut it with a sword. What follows is an attempt at such an Alexandrian feat.

This case note looks at and attempts to temper, through judicial, legislative, and ultimately federal methods, the effects of UGC on copyright holders and society. Part II of this note addresses the history of UGC, its growth and exponential expansion. Next, Part III looks at the issues that arise between copyright holders and UGC sites. Part IV investigates the legal status of copyright law as it pertains to the internet and explores how courts currently struggle to adapt copyright law to fit the online world. Since the case at issue, *Marvel*, involves the infringement of superhero copyrights, Part V looks at the degree of copyrightability afforded to superheroes. Analyzing the *Marvel* case, Part VI discusses the history of this UGC related case, and applies tests established by Federal Court to postulate a hypothetical outcome. Part VII analyzes the effects of a hypothetical decision in *Marvel* and proposes an alternative for the UGC copyright dilemma by using Federal intervention to obviate any injustices. Lastly, Part VIII provides concluding statements.

**PART II - THE GROWTH OF USER-GENERATED CONTENT**

**A. The Birth of User-Generated Content**

Initially, the internet consisted of nothing more than virtual bulletin boards on which users could post messages consisting only of original content users created and wrote. However, within a short period, the internet changed from being originally-created content to

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7 *Id.*
commercially-produced content.\textsuperscript{8} Then, beginning in the early 2000s, the internet came full-circle with the inception of original user-generated content (“UGC”). UGC allows users to not only use information provided online, but also to create and add their own information to what is already available, making UGC “by users for users.” UGC technology enables users to readily contribute to the internet\textsuperscript{9} while continuing to use the internet as a source of information.

UGC initially manifested itself through “wiki” pages, a cooperative encyclopedia of knowledge built with user-contributed information,\textsuperscript{10} and “blog sites,” user-created online diaries.\textsuperscript{11} The user-created data on UGC sites remain on the sites’ servers, enabling other to users request and download the information. While instrumental in the conception of UGC, these initial sites limited themselves to text. Soon however, the capacities of UGC sites grew in ways that enabled users to stay connected to each other through the use of text, sound, and eventually, video.

\textbf{B. User-Generated Content Develops}

UGC sites appeared in droves in the early 2000s,\textsuperscript{12} breaking away from the mold of simple text-based communication. Sites such as Facebook\textsuperscript{13} and MySpace\textsuperscript{14} allow users to send messages, upload and tag photos, and reconnect with long-lost associates.\textsuperscript{15} While the number of

\begin{itemize}
  \item Id.
  \item Prior to the advent of UGC, the ability to contribute to the internet often required basic knowledge of computer programming languages. However, UGC provided users a significantly easier and more intuitive method for contributing their knowledge to the web.
  \item “A type of web page designed so that its content can be edited by anyone who accesses it, using a simplified markup language.” Oxford English Dictionary, wiki (2007).
  \item These included sites such as YouTube, YouTube, http://www.youtube.com/ (last visited Mar. 9, 2009), MySpace, MySpace, http://www.myspace.com/ (last visited Mar. 9, 2009), and Facebook, Welcome to Facebook!, http://www.facebook.com/ (last visited Mar. 9, 2009).
  \item Welcome to Facebook!, http://www.facebook.com/ (last visited Mar. 9, 2009).
  \item See, e.g., Welcome to Facebook!, http://www.facebook.com/ (last visited Mar. 9, 2009).
\end{itemize}
users and amount of revenue generated from UGC sites grew exponentially,\(^\text{16}\) UGC sites expanded still further into new realms including the realm of video-games.\(^\text{17}\)

YouTube, a site where users can upload, watch, and download copies of both home-made and professionally created movies and songs,\(^\text{18}\) presently represents the most public example of UGC sites. In 2006, talk surrounded YouTube\(^\text{19}\) as the future of communication\(^\text{20}\) and content interaction among individuals.\(^\text{21}\) YouTube became such an important business and communications asset that, in October of that same year, Google, Inc. acquired YouTube for $1.65 billion.\(^\text{22}\) Since acquisition, YouTube’s user base has increased 84 percent from previous years\(^\text{23}\) with daily uploads of over one-hundred million new videos.\(^\text{24}\)


\[^{17}\text{Scott Sharkey, Why User Generated Content Has Failed to Change The Face of Gaming, 1UP.com, Mar. 11, 2009, http://www.1up.com/do/feature?cld=3173199. For example, the video game “Little Big Planet” provides users the tools necessary to create levels and upload them for others’ use. LittleBigWorkshop, http://www.littlebigworkshop.com/en-us/ (last visited Mar. 6, 2009).}\]

\[^{18}\text{See About YouTube, http://www.youtube.com/t/about (last visited Mar. 9, 2009).}\]


C. Two Types of UGC Emerge

Despite all the praise UGC received, it ultimately fractured into two types of content: lawful and unlawful. Lawful content, original user-created content uploaded to a UGC site, operates in accordance with copyright law. However, unlawful content, user uploaded third-party-created content, such as commercial movies, to a UGC site operates in violation of copyright law. This second form of UGC creates the underlying problems facing many UGC sites.

PART III - COPYRIGHT INFRINGEMENT DEGRADES USER-GENERATED CONTENT SITES

Initially, UGC sites, such as YouTube, were developed to host only original-content created by users. However, other sites were developed specifically to host user-uploaded third-party-created copyrighted content. While only this second group of UGC sites intended to infringe on copyright laws, the lines between the two types of UGC sites soon blurred. Eventually, UGC sites created with no intent to host copyrighted content uploaded by users, nonetheless, became repositories for copyrighted material and in violation of copyright laws. Innocently created YouTube provides such an example. Shortly after its creation, YouTube stored, and made available for copying, thousands of pieces of user-uploaded, copyright infringing, material on its site.

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26 For example, a home video that is later uploaded to a UGC site.
27 For example, a commercially produced movie that is uploaded to a UGC site.
28 For example, TVOkay was created to be a website on which users can upload pirated movies for other users to stream. See TVOkay – FAQ, http://tvokay.com/faq.html (last visited Mar. 9, 2009).
29 Within one year of operation, YouTube faced a lawsuit from a video photographer. Soon after, it received over thirty-thousand take-down notices and faced several law suits for the infringing content on its site. John B. Meisel, *Economic and Legal Issues Facing Youtube and Similar Internet Hosting Web Sites*, 12 NO. 8 J. Internet L. 1, 8 (2009).
Because of the uploading and downloading of copyrighted content by UGC sites’ users, secondary liability exists for UGC sites like YouTube. This type of copyright law violation creates a difficult tug-of-war among: copyright holders trying to protect their rights, UGC sites providing a desired service, and the public which depends upon the communication outsources that UGC sites provide.

While UGC sites provide a significant public good, they must also ensure that they safeguard the interests of all parties affected. As the backlash by copyright holders against UGC sites increases, a third-party solution may provide a solution for all parties involved.

PART IV - THE LEGAL STATE OF SECONDARY INFRINGEMENT

The concept of unjustified income permeates law and judicial decisions. For example, a neighbor cannot freely feed his cattle from another person’s crop; a worker must be paid for tasks completed. These examples delineate clearly that benefits should be compensated for when they are earned at another’s detriment.

The concept of unjustified income extends to copyright law in which one party, without permission, generates a financial benefit from the copyrighted material of another. Courts sometimes attempt to rectify unjustified benefit by adjusting legal concepts in the interests of

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30 This is best seen by the increasing number of law suits against YouTube for copyright infringement. See, e.g., John B. Meisel, Economic and Legal Issues Facing Youtube and Similar Internet Hosting Web Sites, 12 NO. 8 J. Internet L. 1, 8 (2009).
31 See, e.g., Eric Mayer, Implied and Constructive Contracts, CJS ImpliedCon § 5 (2008) (“A subcontractor cannot sue on quantum meruit for work done under an express contract with another person, and where there is a contract between two persons for the furnishing of services to a third, the latter is not liable on an implied contract simply because he has received such services.”).
32 See Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 399 (1940) (stating that copyright laws were written to prevent free-riding).
fairness. Currently, courts use the concepts of contributory infringement and vicarious liability as starting points to put right this imbalance as it affects on-line copyright law.

A. Secondary Infringement - Defining Contributory Infringement and Vicarious Liability

Secondary infringement stems from tort law. Under secondary infringement, as opposed to direct liability, the liable party is a secondary party to the infringement, not the infringing party itself. Thus, under secondary infringement the liable party need not commit the actual copyright infringement, but only involve itself in the infringement to a significant degree. Courts have applied the concept of secondary infringement to copyright law in the form of contributory infringement, and, or, vicarious liability.

In copyright law, contributory infringement and vicarious liability establish the requisites for determining a secondary party’s involvement in an instance of copyright infringement. Contributory infringement originally required that the secondary party “[1] with knowledge of the infringing activity, [2] induces, causes or materially contributes to the infringing conduct of another.” Similarly, vicarious liability required that the secondary party “[1] has the right and ability to control the infringer's acts and [2] receives a direct financial

33 The Supreme Court created the active inducement test as an attempt to maintain fairness in copyright law. See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (creating the new test of active inducement for copyright law.

34 See infra IV.B.

35 C. Colin Rushing, Grokster, the Supreme Court, and You, Wilmer Hale, p.17, available at http://www.wilmerhale.com/files/Publication/08fb9f14-2028-47ab-b1ad-0518b97eca3a/Presentation/PublicationAttachment/956b926f-831d-47c5-b1d3-14731b0e4125/VCopyrightInfringement_WH.pdf.

36 This is “intended to impose copyright liability on those who are not direct infringers but who are sufficiently related to the infringing activity that courts think they should be liable for the infringement.” Id.

37 Id.


benefit from the infringement."\textsuperscript{41} Despite the differing definitions, contributory infringement and vicarious liability tend to blend together in case law.\textsuperscript{42} Nonetheless, these definitions provide a strong springboard for the application of secondary infringement to copyright law.

**B. Applying Secondary Infringement to Network Administrators**

The courts regularly adapt their original interpretations of contributory infringement and vicarious liability to meet the needs of changing communications technology, changes that began in 1984\textsuperscript{43} and continue today.\textsuperscript{44}

In 2001, due to increased peer-to-peer\textsuperscript{45} online copying of copyrighted material, the Ninth Circuit, in *A&M Records, Inc. v. Napster, Inc.*,\textsuperscript{46} changed the definition of contributory copyright infringement as applied to network administrators. As a result, courts now hold a network administrator responsible for halting infringing uses of its products when the knowledge of, and capacity to do so, exists. Subsequently, the two new requirements of contributory infringement are now: (1) failure to prevent distribution of infringing works, (2) with reasonable knowledge of an infringing use.\textsuperscript{47}


\textsuperscript{42} When looking at a copyright suit involving both contributory infringement and vicarious liability, the Supreme Court stated, “the lines between direct infringement, contributory and vicarious infringement are not clearly drawn.” *Sony*, 464 U.S. at 435 n.17 (internal quotation omitted).

\textsuperscript{43} See *Sony*, 464 U.S. 417.

\textsuperscript{44} See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Note that this paper does not address the decisions in *Grokster*. The issues affecting *Marvel* and UGC sites alike fall within the auspices of contributory infringement and vicarious liability, and not active inducement.


\textsuperscript{46} *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

\textsuperscript{47} *Napster*, 239 F.3d 1004.
Due to Napster’s maintenance of a centralized supernode, a conduit through which all potentially infringing transfers begin, the Ninth Circuit held that Napster was aware and capable of stopping illegal file transfers. Since Napster failed to take action to do so, the court found Napster guilty of contributory copyright infringement.

Napster was also found guilty of vicarious liability. Using the classic rule of vicarious copyright liability, the Ninth Circuit found that Napster fulfilled both prongs of vicarious liability by: (1) having a centralized server system that provided Napster the “right and ability to supervise” its customers, and (2) receiving a direct financial benefit from an increased customer base as a result of the infringing content.

The Napster case imposed on public servers of content a higher legal burden and a potential need for self-policing. Through the decisions in Napster, and later Grokster, the courts established a reasonably clear rule to determine when secondary copyright infringement occurs in these types of technologically controlled situations.

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48 Napster employs a supernode at their main indexing servers. When a user engaged in a search, the Napster supernode would search all computers and return the ones that contained the desired files. The centralized supernode allowed Napster full control of all file transfers. Jeff Tyson, How the Old Napster Worked, http://computer.howstuffworks.com/napster.htm (last visited Mar. 21, 2009).
49 Napster, 239 F.3d at 1020 (stating that “[t]he district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music”).
50 “Without the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.” A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 836, 919-20 (N.D. Cal. 2000).
51 Because all searches go through Napster’s centralized supernode Napster possessed a valve to shut down the illegal file sharing, but failed to use it. While Napster could have restricted the searches for and transfer of copyrighted MP3s it chose not to.
52 Napster, 239 F.3d at 1029 (9th Cir. 2001).
53 Id. at 1024.
54 Unlike the definition of contributory infringement, the Ninth Circuit did not alter the definition of vicarious liability. See id.
55 The Ninth Circuit took a stern look at the actions of Napster. It stated that “[t]he ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise,” and that “[t]o escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability.” Napster, 239 F.3d at 1023.
56 “Financial benefit exists where the availability of infringing material acts as a ‘draw’ for customers.” Id. at 1023 (internal citation omitted).
57 This paper does not address Grokster. See supra note 44.
While copyright cases regarding superheroes\footnote{Defined as “a fictional hero having extraordinary or superhuman powers.” Superhero, Merriam-Webster Online Dictionary (2009).} date back to the 1930s,\footnote{The first instance of comic-book superhero copy protection arose from a suit for copyright infringement of Superman in 1939. \textit{Detective Comics v. Bruns Pubs.}, 28 F. Supp. 399 (S.D.N.Y. 1939).} determining what specific content about superheroes is copyrightable remains in question. Initially, the courts attempted to parse the difference between a stock character, one who is not copyrightable, and a unique character, one who \textit{is} copyrightable. Ultimately, the courts decided that once a character is drawn and named, copyright protection transforms the character from stock to unique.\footnote{Once drawn to paper and named, the courts grant high deference towards finding a unique expression rather than simply the idea of a stock character. \textit{Gaiman v. McFarlane}, 360 F.3d 644, 661 (7th Cir. 2004) (“Although [the plaintiff’s] verbal description of [the character] may well have been of a stock character, once he was drawn and named and given speech he became sufficiently distinctive to be copyrightable.”).} The courts then delineated the consideration factors when determining if copyright infringement occurred. In general, the courts look to a confluence of the following factors in making their decisions:\footnote{Courts start by breaking down the alleged copy into different factors. \textit{Apple Comp., Inc. v. Microsoft Corp.}, 35 F.3d 1435, 1443 (9th Cir. 1994) (“[W]hen it comes to the ultimate question of illicit copying, we use analytic dissection to determine the scope of copyright protection before works are considered ‘as a whole.’”).} \footnote{When a “new” superhero is so substantially similar to an existing one as to remind a viewer of the original, then courts can find copyright infringement. \textit{Warner Bros. Inc. v. Am. Broad. Cos., Inc.} 720 F.2d 231, 243 (2d Cir. 1983)} a superhero’s costume, name, powers, and plot.\footnote{In analyzing the similarities or differences in comic book characters, a reader must take notice of more than the characters name, powers, and costume. The reader must consider the character’s background story, which includes the story of origin and the character’s alter ego, personality, and mission.” \textit{In re Marvel Entm’t Group, Inc.}, 254 B.R. 817, 824 (D. Del. 2000). \textit{See also D.C. Comics Inc. v. Unlimited Monkey Buix., Inc}. 598 F. Supp. 110, 117 (D.C. Ga. 1984) (making its decision, in part, based upon the similarity of “plot structure, phrases, costumes, and names”); \textit{Warner Bros. Inc.}, 720 F.2d at 243 (analyzing “not only the visual resemblance but also the totality of the characters’ attributes and traits”).} The courts find that copyright infringement has occurred by balancing these factors between the protected character and the allegedly infringing one and then determining if the characters are similar enough to remind a viewer of the original superhero.\footnote{When a “new” superhero is so substantially similar to an existing one as to remind a viewer of the original, then courts can find copyright infringement. \textit{Warner Bros. Inc. v. Am. Broad. Cos., Inc.} 720 F.2d 231, 243 (2d Cir. 1983)
Each factor pertains to key identifying information about the superhero. Given the importance and distinctive nature of the superhero’s costume (i.e., the visible “look” that distinguishes one superhero from another), courts grant the greatest protection and deference to a superhero’s costume\footnote{In National Comics Publication, the plots of the potentially infringing and the copyrighted material failed to overlap. Despite, the plaintiff’s failure to show substantial similarity on this factor, the court, nonetheless, found infringement due to the other existing factors. Nat’l Comics Pub. v. Fawcett Pubs., 191 F.2d 594, 603 (2d Cir. 1951). The court further emphasized a balancing of factors test by stating that “a plagiarist can never excuse his wrong by showing how much he did not plagiarize.” Id.} by analyzing its shape, color, and accessories.\footnote{In Unlimited Monkey Business, the court analyzed all the different components that create Superman’s costume; the “blue, skin-tight suit with a yellow five-sided shield on the chest, emblazoned with the red letter ‘S’; a red cape, trunks, and boots; and a gold belt.” DC Comics Inc., 598 F. Supp. at 122. See also Nat’l Comics Pub., 93 F. Supp. at 355 (using Superman’s costume as a factor in determining copying).} For the most popular superheroes the name alone conjures discrete images and background information about that superhero which is, in itself, copyrightable.\footnote{For example, when someone hears the name, “Superman” this is typically associated with a blue shirt, a red cape, and the ability to fly. See e.g. DCU Comics, http://www.dccomics.com/dcu/comics/?cm=10918. Similarly, the name “Spiderman” is associated with a red suited “webslinger.” See e.g. Spider-Man (Peter Parker): Marvel Universe, http://www.marvel.com/universe/Spider-Man.} Similarly, a superhero’s particular powers can distinguish the superhero from an ordinary person or another superhero. As such, the courts recognized that a superhero’s powers define elements of the individual character.\footnote{Warner Bros. Inc., 720 F.2d at 242-43 (using a comparison of Superman and Hinkley’s powers as a factor in its decision); Nat’l Comics Pub., 93 F. Supp. at 355 (using in its analysis, the various “feats” each of the superhero’s could perform).} Finally, the courts analyze the plots of the stories that surround the superhero, including both the character’s history and adventures.\footnote{See, e.g., Detective Comics, 111 F.2d at 433 (“Each at times conceals his strength beneath ordinary clothing but after removing his cloak stand revealed in full panoply in a skintight acrobatic costume.”).}
The courts have spent over seventy years determining which aspects of a superhero deserve copyright protection and under what circumstances that protection has been breached.\(^{70}\) While not spelled out with precision in the case history, the underlying logic governing the decisions is to first find a character worthy of copyright protection, balance the four factors stated above, and then decide the degree of infringement.

**PART VI - A CASE FOR SECONDARY INFRINGEMENT THROUGH USER-GENERATED CONTENT:**

*Marvel v. NCSoft*

**A. Background of the Case**

_Marvel v. NCSoft_ is one of the first cases directly addressing UGC. It centered on three companies: (1) Marvel Enterprises, an entertainment company that holds copyrights for over five-thousand characters;\(^{71}\) (2) the NCSoft Corporation;\(^{72}\) and (3) Cryptic Studios.\(^{73}\) The latter two companies are computer software companies responsible for the creation of virtual online worlds.

In 2004, NCSoft Corporation and Cryptic Studios (referred to collectively as “NCSoft”) created a new “massively multiplayer online role-playing game” (“MMORPG”),\(^{74}\) City of Heroes.\(^{75}\) MMORPGs are computer-created worlds in which live users interact and work in real

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\(^{74}\) “MMORPGs are online role-playing multiplayer games which allow thousands of gamers to play in the game's evolving virtual world at the same time via the Internet.” What is MMORPG?, http://www.webopedia.com/TERM/M/MMORPG.html.

time with other live users to accomplish various tasks.\textsuperscript{76} In City of Heroes users utilize NCSoft’s servers to create superheroes, and, in collaboration with other users, vanquish virtual evil.\textsuperscript{77} Using NCSoft’s character creation system, users generate their superhero’s name, powers, and origin from a predetermined list,\textsuperscript{78} and design their superhero’s costume.\textsuperscript{79}

Following City of Heroes’s release, in one of the first instances of UGC, users began to create their own avatar\textsuperscript{80} heroes.\textsuperscript{81} However, users soon began to use the game’s character creation system to develop their own versions of copyright-protected characters,\textsuperscript{82} characters similar to those which Marvel held a copyright.\textsuperscript{83} As a result, on November 10, 2004, Marvel filed for an injunction against NCSoft on the grounds of trademark and secondary copyright infringement.\textsuperscript{84}

Soon after this suit was filed, the judge of the Central District Court of California found no likelihood of consumer confusion about the avatars and quickly rejected Marvel’s trademark infringement claim.\textsuperscript{85} However, the copyright infringement claim remained\textsuperscript{86} leading to NCSoft and Marvel settling the suit out of court.\textsuperscript{87}

\textsuperscript{76} See Devon Welles, \textit{A call for new worlds: the future of MMORPG}, Ars Technica (Aug. 4, 2004), available at http://arstechnica.com/gaming/news/2004/08/gars-08032004.ars. These games can be as expansive as imagined, and often provide users with an ever expanding universe to play in. \textit{See id.}


\textsuperscript{79} Id. ¶ 16.

\textsuperscript{80} The created superhero in City of Heroes constitutes a users avatar in that online world.

\textsuperscript{81} Id. ¶ 16.

\textsuperscript{82} Id. ¶ 16.

\textsuperscript{83} Id. ¶ 16.

\textsuperscript{84} \textit{Marvel Enters., Inc. v. NCSoft Corp.}, No. CV 04-9253RGKPLAX, 2005 WL 878090, at *4 (C.D. Cal. March 9, 2005) (stating that “there is no likelihood of confusion” and agreeing with defendant’s claims that allegedly trademarked items are “obviously not a reproduction”).

\textsuperscript{85} \textit{Marvel Enters., Inc. v. NCSoft Corp.}, No. CV 04-9253RGKPLAX, 2005 WL 878090, at *4 (C.D. Cal. March 9, 2005) (stating that “there is no likelihood of confusion” and agreeing with defendant’s claims that allegedly trademarked items are “obviously not a reproduction”).
B. Applying Secondary Infringement to NCSoft

Had a decision ensued, the case of Marvel v. NCSoft could have further elaborated on the secondary infringement liability of a UGC provider, particularly had the court held NCSoft liable.

1. Existence of Direct Infringement By a Primary Infringer

If the case had gone to trial, Marvel would have been required to prove contributory infringement and vicarious liability by first showing a direct infringement of its copyright by a primary infringer.88 Because the defendant in secondary infringement suits, in this case NCSoft, is not the primary copyright infringer,89 Marvel sought direct infringement by a user of the NCSoft’s product. Proof of direct copying could be inferred through circumstantial evidence of, (1) the infringer’s access to, and (2) substantial similarity with, the plaintiff’s work.90

NCSoft did not challenge the first prong of the direct copying, access to Marvel’s work,91 but did assert that the characters in City of Heroes and Marvel’s catalogue were not substantially

Footnote continued from previous page
86 Id. at *3 (looking to Sony and Napster to determine that a valid complaint for contributory infringement and vicarious liability exists, stating that “[Marvel has] clearly pled a causal connection between the alleged infringement by game users, and a financial benefit to [NCSoft]”).
88 The prima facie case for either contributory, or vicarious, copyright infringement requires the existence of a direct infringement. See supra IV.A (defining the criteria of contributory infringement and vicarious liability). Without the direct infringement, no damages could exist and no claim could follow.
89 The entire premise of secondary infringement is that, while the defendant themselves did not commit the infringement, their actions led to the infringement. See supra IV.A.
90 “Copying may be shown by circumstantial evidence of access and substantial similarity of both the general ideas and expression between the copyrighted work and the allegedly infringing work.” Apple Comp., Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994) (citing Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1472 (9th Cir. 1992) (emphasis added)). See also Langman Fabrics v. Graff California Wear, Inc., 160 F.3d 106, 115 (2d Cir. 1998) (discussing the need for the plaintiff to show only access and substantial similarity); 4 Melville Nimmer and David Nimmer, Nimmer on Copyright § 13.01[B] (1998) (“It is generally not possible to establish copying as a factual matter by direct evidence, as it is rare that the plaintiff has available a witness to the physical act of copying. . . . Therefore, copying is ordinarily established indirectly by the plaintiff's proof of access and ‘substantial’ similarity.”).
91 Due to the expansive array of magazines, comic books, and movies containing Marvel superheroes, Marvel.com Help Page, http://www.marvel.com/company/index.htm (last visited Feb. 2, 2009) (Marvel has “a proven library of over 5,000 characters featured in a variety of media over seventy years . . . including feature films, consumer
similar. However, Marvel cited eleven examples of direct infringement in NCSoft’s City of Heroes, including infringement of Marvel Superheroes’ names, powers, and costumes. Since the eleven examples met three of the four factors used in superhero copyright decisions, it is likely that direct infringement by a primary infringer occurred in this case.

While direct infringement likely occurred, ultimately a decision relating to the substantial similarity of characters, in particular superheroes, must be done on a case-by-case basis by a fact finder. Consequently, for the purposes of the subsequent sections of this paper, a presumption of direct infringement by a primary infringer is made.

2. Finding Secondary Infringement

NCSoft’s liability for contributory infringement and vicarious liability, like Napster’s, grows from its reliance on a centralized server-based system and its financial benefit from copyrighted content.

a. Contributory Infringement

To prove its case against NCSoft for contributory infringement, Marvel was required to show that direct infringement by a third-party occurred and that NCSoft “[1] with knowledge

Footnote continued from previous page
products, toys, video games, animated television, direct-to-DVD and online.”), the argument of lack of access is an untenable one. As such, NCSoft did not bother to raise it. See Mot. Of Def.’s to Dismiss Pl.’s Second Am. Compl., Marvel Enters. v. NCSoft Corp., No. 04CV9253, 2005 WL 4748150, at 8-13 (C.D. Cal. Feb. 7, 2005) (failing to raise the issue of lack of access to Marvel’s work). See id. (stating that “a simple visit to Marvel’s web site shows that its claims of similarity are far overstated”). See Compl. ¶¶ 24-29

Marvel cites to the misuse of copyrighted superheroes names such as “The Hulk,” and “Wolverine.” Id. Marvel cites to the powers of regeneration, claws, and mutant origins. Id.

Marvel claimed that NCSoft copied costumes such as those of “Captain America” and “Wolverine.” Id. See Detective Comics v. Bruns Publs., 111 F.2d 432, 434 (2d Cir. 1940).

See discussion of A&M Records, Inc. v. Napster, Inc. supra IV.B.

“City of Heroes can only be played online and only by way of [NCSoft’s] servers.” Compl. ¶ 39.

Users of City of Heroes pay NCSoft $14.95 each month to access the service. Compl. ¶ 48. This creates a financial benefit to NCSoft if that access includes copyrighted material.

Addressed infra V.B.1.
of the infringing activity, [2] induce[d], cause[d] or materially contribute[d] to the infringing conduct of [one of its users].”102

Demonstrating NCSoft’s knowledge of the infringing action only required proving NCSoft’s constructive knowledge of the action, not actual knowledge.103 Following the Ninth Circuit Court’s holding in Napster, constructive knowledge by a network’s administrator exists when infringing content exists on the administrator’s network.104 As such, NCSoft, the network administrator of City of Heroes,105 had constructive knowledge of the users’ infringing content. Furthermore, NCSoft monitored the City of Heroes discussion boards,106 a venue where copyrighted characters are discussed,107 substantiating a greater presumption of NCSoft’s constructive knowledge of infringing activity in City of Heroes. Therefore, due to its administration of its network and actions regarding infringing content, NCSoft fulfilled the first prong of contributory copyright infringement.

The actions of NCSoft added further credence to the infringement of Marvel’s copyright by fulfilling the second prong of contributory infringement: material contribution. The Circuit Court’s holding in Napster states that, when a computer system operator learns of infringing

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103 “[A] finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place.” Sony, 464 U.S. at 487. See Gershwin Pub. Corp., 443 F.2d at 1162 (finding a “performer has been held jointly and severally liable as a ‘vicarious’ infringer, even though he has no actual knowledge that copyright monopoly is being impaired”); see also Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963)
104 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001). (stating that “[t]he district court found that Napster had both actual and constructive knowledge that its users exchanged copyrighted music”).
105 Since “City of Heroes can only be played online and only by way of [NCSoft’s] servers,” Compl. ¶ 39, NCSoft represents the administrator and storage site for City of Heroes.
106 On these discussion boards, users can post images of their superheroes, and discuss superhero origins and powers. See id. ¶ 39; City of Heroes Official Forums, http://boards.cityofheroes.com/ubbthreads.php (last visited Feb. 25, 2009).
107 See id. ¶ 39.
content and fails to remove it, the operator contributes to the infringement. Since NCSoft did not prevent the uploading of, or engage in the removal of, the user-created superheroes that infringed on Marvel’s copyrighted superhero names, powers, costumes, or origins, NCSoft contributed to the infringement of Marvel’s copyright. NCSoft also facilitated the infringement by creating and providing its users with the tools used to create the infringing content. Finally, NCSoft engaged in the storage and copying of infringing content on its servers. Through these practices, NCSoft established the means for users to craft infringing content, and materially contributed to the infringing conduct by ignoring the infringing material’s existence and copying the material when requested. Thus, NCSoft fulfilled the second prong of contributory copyright infringement.

Because NCSoft fulfilled the two prongs of contributory copyright infringement, NCSoft is liable for the unauthorized violations of Marvel’s copyrights.

b. Vicarious Liability

After establishing that direct infringement by a third-party occurred, NCSoft’s vicarious liability for Marvel’s copyright required that Marvel show that NCSoft “[1] ha[d] the

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108 *Napster*, 239 F.3d at 1021 (stating that “if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement”).

109 Users of City of Heroes created avatars named “Wolverine,” “The Thing,” and “The Incredible Hulk” each with their copyright associated powers, costumes, and origins, none of which were prohibited by NCSoft, or removed. See Compl. ¶¶ 15-20, 40, 43.

110 Compl. ¶ 18, 39 (discussing the character creation tools for City of Heroes that are accessible to any subscribing user).

111 When a user accesses City of Heroes through NCSoft’s servers, NCSoft transmits copies of other user generated superheroes to the requesting user regardless of whether the copies infringe on pre-existing copyrights. Compl. ¶ 41.

112 Addressed *infra* V.B.1.
right and ability to control the infringer's acts and [2] receive[d] a direct financial benefit from the infringement.”

As the network administrator of City of Heroes, NCSoft regulated users’ accounts and interactions with the game, including the ability to monitor, alter, and delete users’ accounts and any copyright infringing material. Since NCSoft can control the acts of infringing users, NCSoft satisfied the first prong of vicarious copyright infringement.

To prove that NCSoft profited from the infringing content, Marvel needed only to demonstrate that the availability of infringing content acted as a draw for users: it did not need to show that realized of income due to the infringing content occurred. This made proving infringement easier for Marvel because “there is no requirement that the draw be substantial,” only that “a causal relationship [exists] between the infringing activity and any financial benefit [NCSoft] reaps, regardless of how substantial the benefit.” Through City of Heroes, NCSoft received a financial benefit from a monthly fee of $14.95 paid by each user. While the receipt

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114 Since “City of Heroes can only be played online and only by way of [NCSoft’s] servers,” Compl. ¶ 39, NCSoft represents the administrator and storage site for City of Heroes.
116 NCSoft’s terms of service for City of Heroes addresses NCSoft’s rights to alter and delete accounts as needed. City of Heroes User Agreement, available at http://www.plaync.com/help/eula_coh.html (stating that “NC Interactive reserves the right, in its sole discretion, to (1) delete or alter any Character Name or (2) terminate any license granted herein, for any reason whatsoever, including, without limitation, any suspected or actual infringement of any trademark or trade name right, copyright, or other proprietary right.” Also stating that “[a]ny violation of this term or rules of conduct may, in the sole discretion of NC Interactive, lead to the temporary removal of the character’s ability to communicate, the Account being suspended for a set period of time, or lead to permanent Account closure.”).
117 “Where the availability of infringing material acts as ‘draw’ for customers,” financial benefit can be found. Ellison v. Robertson, 357 F.3d 1072, 1078 (9th Cir. 2004).
118 Id. at 1079.
119 Id.
120 Compl. ¶ 48. This fee, paid by over 180,000 users of City of Heroes, Compl. ¶ 49, provides NCSoft monthly revenues of nearly $2.7 million.
of this monthly fee alone fails to establish a benefit from infringing content,\(^\text{121}\) if the ability to create a copyrighted superhero draws any paying users, NCSoft benefits. Since copyrighted superheroes were found in City of Heroes,\(^\text{122}\) some paying users were drawn to NCSoft’s products and paid NCSoft the monthly fee with the intent to violate superhero copyrights. Thus, NCSoft benefited financially from the copyrighted material, substantiating the second prong of vicarious copyright infringement.

By possessing the ability to control and monitor, and profiting from Marvel’s copyrights, NCSoft is vicariously liable for copyright infringement.

In conclusion, NCSoft’s character creation system enabled UGC superheroes to populate the City of Heroes. At the same time, this system also created contributory infringement and vicarious liability for NCSoft by enabling its users to create and maintain superheroes on NCSoft’s site that substantially resembled Marvel’s copyrighted characters.

**PART VII - FINDING HARMONY BETWEEN COPYRIGHT AND USER-GENERATED CONTENT**

Examining the way in which *Marvel* might have been decided, had it had gone to trial, helps assess the likely outcomes for pending and future copyright infringement suits brought against other UGC sites, for instance, *Viacom v. YouTube*\.\(^\text{123}\) NCSoft’s failure to regulate UGC on its networks represents just one example of the growing epidemic of copyright infringement in cyberspace. The continued growth of UGC sites demands more thorough and continuous monitoring of UGC sites that contain potentially copyrighted material.

\(^{121}\) “[R]ecieving a one-time set-up fee and flat periodic payments for service . . . would not [ordinarily] constitute receiving a ‘financial benefit attributable to the infringing activity.’” *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (citing S. Rep. 105-190, at 44).


A. The Future of Piracy Through User-Generated Content: YouTube As a Model

YouTube represents a leading source for UGC worldwide acting as a poster-child for UGC and serving as a model for problems with, and the potential regulation of, all UGC sites.

1. YouTube’s Course for a Marvel Iceberg

YouTube provides an open and notorious venue for infringing content routinely uploaded by users, such as songs embedded in videos, clips from television shows, and even full-length movies. Like most UGC sites, YouTube falls into some of the same secondary liability traps as NCSoft due to its technological structure and the profits associated with its provision of copyrighted content.

its users. The maintenance of UGC on these servers, without which infringement could not occur, leads to the conclusion that YouTube materially contributes to unlawful copying. Like NCSoft, YouTube constructively knows of the infringing content uploaded by users through their servers. Further, while YouTube’s terms of service empower its administrators to control and supervise the content on its servers, similar to NCSoft, YouTube fails to remove infringing content from its servers. Finally, both NCSoft and YouTube profit from infringing content, whether through increased subscriptions for NCSoft or increased advertising revenue for YouTube. From these similarities, YouTube becomes liable for contributory infringement and vicarious liability in the same ways as NCSoft.

Due to YouTube’s secondary copyright infringement liability, uncertainty for the future of UGC exists, requiring a new solution for the conflict of UGC and copyright.

2. Common Problems Facing YouTube and, In-Turn, UGC

YouTube has already tried unsuccessfully to combat the growth of infringing content on its site. It altered its terms of service warning users not to upload infringing content and instructing them on ways to recognize potentially infringing content. However, this action proved ineffective since the upload of infringing content continues to increase. Next,

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134 Id. ¶ 75.
135 Id. ¶¶ 35, 83.
136 YouTube profits from an increased user base stemming from the copyrighted material stored on its servers. Id. ¶¶ 37-38, 85.
137 YouTube’s terms of service state that “[p]osting copyright-infringing content can lead to the termination of your account, and possibly monetary damages if a copyright owner decides to take legal action.” Copyright Tips, http://www.youtube.com/t/howto_copyright (last visited Mar. 6, 2009).
YouTube initiated a system of automated takedowns\textsuperscript{140} of copyrighted material. Unfortunately, not only did this system prove unable to eliminate all copyrighted content,\textsuperscript{141} but it was more restrictive than the DMCA fair-use.\textsuperscript{142} Similarly, a recent court decision, \textit{Lenz v. Univ. Music Corp}, held that automated takedown notices violated fair-use laws,\textsuperscript{143} drawing the legality of YouTube’s automated system into question. These failures led to a pending billion-dollar law suit against YouTube for copyright infringement by copyright holders.\textsuperscript{144}

As the usage and number of uploads of videos to YouTube continues to grow,\textsuperscript{145} this problem may only get worse for copyright holders and YouTube alike:\textsuperscript{146} calling for identification and implementation of a new solution to the copyright infringement dilemma.

\textbf{3. Inability of Current Solutions To Fix UGC}

Previously suggested methods, outlined below, attempted to solve the UGC-copyright conflict through existing statutes, as well as technological, litigious, and legislative processes. However, these attempts lacked either the correct balance between the interests of UGC sites, their users, and copyright holders, and, or, failed on their face.

An existing statute, the 1998 Digital Millennium Copyright Act (“DMCA”) grants legal safe-harbor to a UGC site for copyrighted content when uploaded by a user, provided that the

\textsuperscript{140} Define takedown.  
\textsuperscript{141} In April 2007, YouTube began work on an automated filter designed to appease copyright holders by taking down any infringing content. Andy Greenberg, \textit{YouTube's Filter Fails to Please}, Forbes, Oct. 18, 2007, available at http://www.forbes.com/2007/10/18/google-viacom-video-tech-cx_ag_1018youtube.html. However, this filter failed to appease all the concerns of copyright holders. \textit{Id.}
\textsuperscript{143} A California District Court recently ruled that a copyright holder must engage in a full good faith evaluation of potentially infringing content for possible fair-use exceptions before sending a take-down notice. \textit{Lenz v. Univ. Music Corp.}, 572 F. Supp. 2d 1150, 1155-56 (N.D. Cal. 2008). A California District Court recently ruled that a copyright holder must engage in a full good faith evaluation of potentially infringing content for possible fair-use exceptions before sending a take-down notice. \textit{Lenz v. Universal Music Corp.}, 572 F. Supp. 2d 1150, 1155-56 (N.D. Cal. 2008).
\textsuperscript{145} \textit{See supra note 139}.  
site responds to proper orders to take-down the infringing content.\footnote{147} As such, copyright holders use take-down notices to compel UGC sites to remove infringing content. However, due to UGC sites’ monitoring of uploading content questions exist as to whether UGC sites may legally exercise the DMCA safe-harbor\footnote{148} possibly eliminating UGC sites’ incentive to comply with the notice.

A primary technological option attempted to cure the UGC-copyright issue through the use of automated take-down notices sent by copyright holders to UGC sites. Under the DMCA, in order to remove copyrighted content from UGC sites, copyright holders must send take-down notices for each piece of infringing content.\footnote{149} However, the volume of uploaded content to UGC sites prevents copyright holders from manually patrolling these sites,\footnote{150} forcing them to rely on automated processes. Consequently, some copyright holders use computer algorithms to analyze UGC sites for copyrighted material and, when found, send that UGC site a mechanically-generated DMCA take-down notice.\footnote{151} This system allows copyright holders to automatically request the removal of unauthorized content from UGC sites. However, some

\footnote{147} 17 U.S.C. § 512(c)(1) (“A service provider shall not be liable for . . . equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider . . . upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”).

\footnote{148} When regarding the liability of UGC sites, “the law is undeveloped as to whether Section 512 can provide a safe harbor for direct infringement liability.” J B Meisel, \textit{Entry into the Market for Online Distribution of Digital Content: Economic and Legal Ramifications}, 5:1 SCRIPTed 50, 64 (2008), available at http://www.law.ed.ac.uk/ahrc/script-ed/vol5-1/meisel.asp; \textit{see also} Io Group v. Veoh Networks, 586 F. Supp. 2d 1132 (N.D. Cal., 2008) (holding a site liable for content that raises “red-flags” and denying the DMCA safe-harbor in such circumstances).

\footnote{149} See Hendrickson v. Amazon.Com, 298 F.Supp.2d 914 (C.D. Cal. 2003) (finding that a take-down notice only applies to the copyright infringing version at issue, not any subsequent versions).

\footnote{150} A British company that monitors for infringing content on UGC sites issues millions of take-down notices each month showing the impossibility of any one copyright holder to properly monitor their copyrights. \textit{Artists Get Royalties from YouTube Clips}, Comcorp, Sept. 8, 2007, available at http://www.comcorp.com/articles/news/artists-get-royalties-from-youtube-clips/.

courts find that this automated process violates fair use, making this option unreliable, and perhaps, unlawful.

A litigious recourse provides an alternative method. However, legal recourse requires significant time and effort by copyright holders in monitoring UGC sites for instances of infringement content. Furthermore, after identifying infringing content, legal action often takes months, even years, to resolve. Finally, removing infringing content fails to prevent its re-uploading to the same UGC site rendering a court’s decision moot. Thus, a litigious method of resolution most often proves both time-consuming and impractical.

Finally, legislative action would likely also fail to alleviate the problem. Legislated options to the UGC-copyright problem would most likely either provide more protection to UGC sites and impinge on the rights of copyright holders, or overprotect copyright holders at the significant expense of UGC sites. Consequently, a balanced solution lies beyond the realms of the judicial and legislative branches of government, possibly residing in the executive branch.

Since existing solutions to prevent the uploading of copyrighted content to UGC sites seem unlikely to succeed, and the number of lawsuits against UGC sites for copyrighted content continues to grow, few options remain. The remaining options are either for UGC sites to cease providing a free realm for consumers, or for another new method of resolution to be identified and instituted.

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152 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1155-56 (N.D. Cal. 2008), see discussion of case supra note 143. Because fair-use analysis occurs on a case-by-case basis, *id.* at 1154, an automated process proves in violation of the District Court’s decision.
154 This would require UGC sites to limit user uploaded content to the point that each piece of content is individually analyzed, or the UGC sites to cease providing UGC features.
B. Revenue-Based Reapportionment

Since the heart of the problem is the unjustified income that UGC sites derive from another’s copyrighted content, an administrative solution might be to reallocate the unjustified income to the copyright holder. To achieve this reallocation, a federal agency, such as the Federal Communications Commission, could conduct an annual audit of UGC site content to determine the proportion of copyrighted content hosted relative to the content as a whole. The federal agency would then determine and reallocate an appropriate sum from the UGC site’s annual revenue to the original copyright holders. Thus, the federal agency pays the proper owner and leaves the UGC site’s revenue based exclusively on non-copyrighted content.

C. Benefits of Revenue-Based Reapportionment

Reapportionment not only eliminates the fiscal inequality associated with unjustified-income, but also creates several benefits to adversarial parties while generating economic efficiencies and public gain. The benefits include: (1) striking an appropriate balance among the interests of copyright holders, UGC sites, and public interests; (2) proper compensation for work; (3) savings realized by avoiding the costs of litigation; and (4) elimination of excess costs to all parties involved.

155 Due to its heavy emphasis on communications, and possessing a bureau dedicated to regulation and enforcement, see About the Federal Communications Commission, http://www.fcc.gov/aboutus.html (last visited Apr. 21, 2009), the Federal Communications Commission seems aptly situated to administer this solution.

156 Only content registered through the Copyright office would be included in a search for copyrighted material since registration provides notice to both the UGC site and the agency analyzing UGC sites.

157 Registration of the copyright at the Copyright office would be required for the copyright holder to be compensated since “no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a).

158 Thus if UGC Site A hosted copyrighted content, and such content constituted 25% of all views for UGC Site A, 25% of UGC Site A’s revenue would be removed and transferred to the copyright holders. For example, if YouTube is found to have infringing content equal to 20% of its total content. Thus, if YouTube earns revenues of $100, $20 will be removed from YouTube and transferred to the copyright holders whose copyrighted material existed on YouTube’s site.
Copyright holders would receive financial and time-saving benefits from reapportionment. The designated federal agency, as opposed to the copyright holders, would patrol the UGC sites for misuse of copyrights, affording copyright holders more time to create new copyrightable products. Similarly, copyright holders would also receive relatively quick financial compensation to copyright holders without lengthy and expensive legal recourse. Finally, while copyright holders would lose the right to refuse use of their content, they would receive both financial compensation and public exposure, leading to increased demand for their works.

UGC sites would also reap significant benefits. Despite UGC sites’ complaints about the loss of revenue, revenue from illegal copyright use would have been lost through legal actions. Under revenue-based reapportionment, UGC sites would be free from costly legal actions, and would no longer have to spend money on technologies to remove infringing content. UGC sites would be free to engage in providing a repository for user created content without concerns of legal intrusion.

Finally, the public would benefit from the protection of their content on UGC sites. No longer would public users fear removal of their content due to possible infringing content. Similarly, since uploaded content remains on the UGC site regardless of its actual fair-use, arguments addressing whether content on UGC sites constitutes fair-use would disappear allowing users to upload content with confidence.

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159 The copyright act affords the copyright holder the exclusive right to control the reproduction of their work. 17 U.S.C. § 106.
160 For example, songs played on the radio often result in greater sales of the associated albums.
161 See, e.g., Arango, supra note 143; see also Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (plaintiff faced the removal of an uploaded video of her baby dancing due to the presence of a copyrighted song in the background of the video).
162 See, e.g., supra note 161.
Revenue-based reapportionment solves the problems created with UGC and ensures that all interests are protected. Through revenue-based reapportionment, copyright holders would be properly compensated for their work while UGC sites could continue to offer their services to users, and the public would retain a service on which they now depend.

**PART VIII - CONCLUSION**

UGC continues to develop. Eventually a judicial decision in a case similar to *Marvel* most likely will determine the future of UGC sites and copyright law. Judging by the facts in *Marvel*, this outcome likely will fall in favor of copyright holders, and may damage the continued operability of UGC sites. Until that time, the federal government has the opportunity to intervene in a way that ensures the future of UGC sites, copyright law, and public interest. UGC sites and copyright holders might still live in harmony on the internet: the opportunity still exists. If the government acts correctly, this new technology could avoid possible harm and instead fulfill its role as the technology of the next revolution.