2008

Legal Strategies to Profit from Peer Production

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LEGAL STRATEGIES TO PROFIT FROM PEER PRODUCTION

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I. A SOCIAL PHENOMENON

The phrase "creative consumers" used to be an oxymoron. Conventional wisdom was that creators create while consumers consume. In the eyes of many people, there was a clear division between these actors and activities. During the 1990s, near the dawn of the Internet era, international and domestic policies were formulated with business models built with these distinctions in mind.

The Internet has changed dramatically since that time. Though digital distribution was becoming a reality in the late 20th century, the World Wide Web did not really enter mainstream consciousness until near the turn of the 21st century. Some of its most popular applications were previously unimagined. As of March 2008 Wikipedia explains "Web 2.0" as a phrase describing web-based communities and services that aim to facilitate creativity, collaboration and sharing among users. Wikipedia is a good example of such services, though "wikis" are just the tip of the iceberg. Blogging, podcasting, syndicating content, social bookmarking and similar activities represent the emergence of a new social phenomenon. Whether talking about "user-generated content," "user-created content," "social media," "user-centred innovation,"[1] "community-created content"[2] or "commons-based peer production,"[3] at the heart of the phenomenon is a decentralized

* University of Ottawa, Faculty of Law. Thanks to Adrienne Moir and Derek Loewen for their research and editorial assistance, to anonymous peer reviewers for their helpful comments, and to the Law Foundation of Ontario for funding this research. A previous version of this article was presented at The Canadian Institute's conference on "Protecting Digital Content Rights & Investments" (Toronto, March 22-23, 2007).

1. Eric von Hippel, *Democratizing Innovation* (Cambridge, Mass., The MIT Press, 2005), p. 1.
2. Herkko Hietanen, Ville Oksanen and Mikko Välimäki, *Community Created Content: Law, Business and Policy* (Helsinki, Turre Legal, 2007).

system of creativity that depends on peer production rather than hierarchically assigned actions.[4]

Leading venture capitalists, industry analysts and academic researchers have identified an entire economy of innovation generated by creative consumers. The implications for society are profound. Yale law professor Yochai Benkler observes that a networked rather than industrial information economy

> holds great practical promise: as a dimension of individual freedom; as a platform for better democratic participation; as a medium to foster a more critical and self-reflective culture; and . . . as a mechanism to achieve improvements in human development everywhere.[5]

Lawrence Lessig treats this "second economy" as distinct from and complementary to the traditional one based on *quid pro quo* transactions.[6] Yet there seems to be increasing convergence between the two economies. Commercial entities are scrambling to capitalize on the sharing economy. Two famous examples include the US$580 million purchase of MySpace by News Corp. and Google's acquisition of YouTube for US$1.65 billion. On a related note, an empirical study commissioned by the European Union concluded that open-source software is worth €12 billion per annum to the European economy.[7] Firms are realizing that there are big dollars at stake and are jumping aboard the bandwagon of peer-produced content.

The overlap of the commercial and sharing economies has caused tensions. There is no bright line between pirated and peer-produced content. Some of the material available on sites such as YouTube is blatantly copyright-infringing and directly competes with copyright owners' offerings on their websites, at digital download retailers and through television broadcasts or DVD video recordings. Other material incorporates copyright-protected content into derivative or transformative works, such as music or video mashups, music parodies or soundtracks added to personal home movies. And still more material is genuinely creative in the very strictest sense of the word, as is the case with many independent films, music videos or

3. Yochai Benkler, *The Wealth of Networks* (New Haven, Yale University Press, 2006), p. 60.
4. *Ibid.*, at p. 62.
5. *Ibid.*, at p. 2.
6. Lawrence Lessig, "On the Economies of Culture", *Lessig Blog* (September 28, 2006), online: Lessig Blog <http://www.lessig.org/blog>.
7. Rishab Aiyer Ghosh, "Economic impact of open source software on innovation and the competitiveness of the Information and Communications Technology (ICT) sector in the EU" (November 20, 2006), online: EUROPA European Commission, <http://ec.europa.eu> at p. 10.

other works created by professionals and amateurs alike. Separating this spectrum of content is not an easy task.

It does not help matters that many of the firms operating in this environment suffer from a sort of schizophrenia. For example, News Corp. is a traditional media company that produces and distributes content like the hit television series "24." Its acquisition of MySpace marked its entry into the foray of social networking. Viacom filed a billion-dollar lawsuit in the United States against YouTube for failing to stop users from uploading content from Paramount Pictures, MTV, Comedy Central and other subsidiaries. Yet Viacom relies on the same safe harbours that protect YouTube to operate its own video-sharing sites, iFilm and AtomFilms. Sony is trying to protect its interests in music, film, television and video games, while at the same time Universal Music has sued Sony-owned Grouper.com.

Moreover, conventional media conglomerates now share common interests with many consumers who are also creators, and consequently, intellectual property rights-holders. Many professional artists and producers endorse the same services fans use to share music and are developing methods to monetize consumers' activities.

With YouTube introducing sites in different jurisdictions around the world, including Canada, these issues have truly gone global. Recently one of India's largest record labels, Super Cassettes Industries Limited, obtained an interim injunction from the Delhi High Court restraining YouTube and Google from posting any of its copyright-protected works.[8] Of course, the international implications are not limited to just one or even a few companies. The networked information economy is literally a worldwide web of overlapping interests.

In this article, I analyze legal strategies for profiting from peer-produced content. The term "profit," as I use it here, is meant broadly to connote both direct and indirect financial returns as well as social, cultural and democratic gains achievable through systems of peer-production. Economic considerations are important, of course, but I show how the issues go beyond mere dollars and cents. I address multiple stakeholders' perspectives and consider implications for both the traditional and sharing economies.

So I begin by exploring legal liabilities associated with peer-produced content. I then examine the safe harbours that exist in many countries' intellectual property laws. Given legal ambiguities,

8. Nyay Bhushan, "YouTube Served India Court Order", Billboard.biz (November 9, 2007), online: Billboard.biz, <http://www.billboard.biz>; order available at <http://courtnic.nic.in/>.

litigation over these safe harbours is risky for everyone involved. Consequently, I present some of the alternative strategies laid out in cutting-edge business management literature. Most of these strategies involve cooperation between incumbent copyrights-holders, innovative entrepreneurs and independent peer producers. I therefore explore some of the nuances of negotiations for permission to exploit both professionally and peer-produced copyright-protected content. I address various sorts of licensing possibilities, including mega-deals between powerhouse players, voluntary collective blanket licences and initiatives like the Creative Commons. In the end, I propose some strategies for better integrating and streamlining safe harbour and licensing systems as well as developing best practices in the public interest.

II. LEGAL LIABILITIES

To appreciate potential legal strategies, it is helpful to understand something about the nature of the issues firms face in respect of peer production business models. A core concern is the degree to which firms that exploit peer-produced content might be liable for users' behaviour. For example, to what extent are firms liable for users' defamatory statements? Criminal activities? Copyright infringements? Though all are relevant questions, the last of these topics — copyright infringement — has garnered the most mainstream attention and has the greatest potential commercial impact.[9]

Lawsuits against entities only indirectly involved in acts of copyright infringement are not new. In one of the most famous cases of this sort, Universal and a few other film and television studios sued the Sony Corporation over its Betamax technology.[10] A majority of the United States Supreme Court opined that: "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[11] Sony could not, therefore, be held responsible just because some customers used the Betamax to infringe copyright. This decision set the tone for decades of future copyright practices, and continues to be a leading authority in the United States.

9. For a discussion of other relevant laws, see *e.g.* Hietanen, *supra,* footnote 2, at pp. 24-30.
10. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (*Sony Betamax*).
11. *Ibid.*, at para. 39.

The rules have been refined in lawsuits against peer-to-peer (p2p) file sharing networks including Napster, Grokster, Morpheus, Kazaa and others. In 2001, the Ninth Circuit considered whether Napster was liable for contributory copyright infringement.[12] In its defence, one of Napster's arguments was that it, like Sony, was merely enabling fair uses of copyright-protected content, namely space-shifting. The court rejected this argument in part because Napster had the ability to ensure its users were not infringing copyright. Napster also argued that the safe harbour provisions in § 512 of the Digital Millenium Copyright Act (DMCA) sheltered it from liability. Though, for reasons explained below, that argument did not succeed on the facts of the case, the court noted that it "need not accept a blanket conclusion that § 512 . . . will never protect secondary infringers."[13]

Following the shutdown of Napster, other p2p networks sought to capture the tens of millions of displaced file sharers by marketing themselves as alternatives.[14] Soon after securing a massive user base, both Grokster and Streamcast were named as defendants in *MGM v. Grokster*.[15] Their technology was slightly different than Napster's, in that they relied on a decentralized rather than centralized network. The lower courts held that this distinction was significant.[16] Among other things, this impacted the degree of control the defendants had over users' behaviour. But the United States Supreme Court held that the defendants had not only provided users with the tools to infringe copyright, but also actively induced copyright infringement. According to the court, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[17] Given this finding, it was not necessary to reach a consensus on whether decentralized p2p networks have substantial non-infringing uses.

So there now seem to be three grounds on which to argue secondary liability in the United States: contributory, vicarious and inducing copyright infringement.[18] In the latest lawsuits of this sort, including those brought by members of the RIAA against Limewire[19] and by

12. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (*Napster*).
13. *Ibid.*
14. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 at p. 924, 125 S. Ct. 2764 (2005) (*Grokster*).
15. *Grokster, ibid.*
16. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F.Supp.2d 1029 at pp. 1040-1042 (C.D. Cal. 2003); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 at p. 1163 (C.A.9 Cal. 2004).
17. *Grokster, supra,* footnote 14, at p. 919.

Viacom against YouTube and Google,[20] plaintiffs have pleaded all of these bases for liability cumulatively and in the alternative. That is, of course, in addition to allegations of direct infringement.

In Canada, firms' potential liabilities are determined by different principles. Canadian law imposes liability for authorizing acts of infringement, but not for simply contributing to, benefiting from or inducing them. Australian law is also different than American law, in that it too incorporates the concept of authorization.[21] Imposing liability for authorization requires that a defendant explicitly or implicitly purport to approve infringing conduct, and is therefore arguably more difficult to establish than secondary liability under U.S. law. Despite the legal differences between U.S. and British-based systems, the Federal Court of Australia decided that the promoters of Kazaa were liable for authorizing copyright infringements.[22] It does not follow, however, that a Canadian court would reach the same result. Canadian courts might instead align with, for example, the Dutch court that dismissed an action against Kazaa.[23]

The leading Canadian case on liability for authorizing infringement is *CCH v. LSUC*.[24] In it the Chief Justice of Canada, writing for a unanimous Supreme Court, explicitly rejected the principles of Australian law upon which the Kazaa decision was based, saying: "[T]he [Australian] approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole."[25] Even if a defendant could be said to authorize users' activities, courts must presume they do so only insofar as it is in accordance with the law.[26] So to be held liable based

18. Alfred C. Yen, "Third Party Copyright Liability After Grokster" (2006), 91 Minn. L. Rev. 239.
19. *Arista Records LLC v. LimeWire LLC*, 06-CV-5936 (August 4, 2006) (complaint).
20. *Viacom International Inc. v. YouTube Inc.* (March 13, 2007) (pleading).
21. See, *e.g*., Graeme W. Austin, "Importing Kazaa — Exporting Grokster" (2006), 22 Santa Clara Comp. & High Tech. J. 577 and Jane C. Ginsburg and Sam Ricketson, "Inducers and Authorisers: A Comparison of the US Supreme Court's Grokster Decision and the Australian Federal Court's KaZaa Ruling" (2006), 11 Media & Arts L. Rev 1.
22. *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.* , [2005] FCA 1242.
23. *Vereniging Buma, Stichting Stemra v. KaZaa BV* (unreported, December 19, 2003, Supreme Court of the Netherlands, Case No. C02/186HR (Hoge Raad). See also Gert-Jan Van Bergh, "Case Comment Netherlands Copyright — File Sharing Service" (2002), 13 Ent. L.R. 77; and Alex Morrison, "Case Comment: Kazaa BV v. Buma and Stemra" (2002), 24 E.I.P.R. 130.
24. (2004), 236 D.L.R. (4th) 395, [2004] 1 S.C.R. 339, 30 C.P.R. (4th) 1 (*CCH v. LSUC*).
25. *Ibid*., at para. 41.

on conventional principles of Canadian copyright law the alleged authorizer must sanction, countenance and approve the infringement.[27]

III. SAFE HARBOURS

One might expect that firms exploiting peer-produced content would face similar legal liabilities as the hardware and software manufacturers mentioned above. Though these enterprises potentially profit from the copyright-infringing activities of their customers and may be able to control customers' behaviour, the law draws an important distinction. Firms that actually host or transmit copyright-infringing content are treated differently than firms that facilitate infringement by, for example, indexing content or connecting peers, and than those that profit from infringing content in other ways.

Hosts and intermediaries are less likely to be liable, due to the availability of safe harbour provisions in the intellectual property laws of most countries. If this seems anomalous, consider Columbia law professor Tim Wu's colourful analogy. Wu explains that if the Internet were a red-light district, Napster would be the pimp while YouTube would be the hotel.[28] Statutory safe harbours protect only the latter. Section 512(c) of the DMCA, s. 2.4(1)(b) of Canada's Copyright Act[29] and roughly equivalent provisions in most other jurisdictions may provide firms hosting peer-produced content with legal immunity against claims of copyright infringement.

Under the U.S. provision, firms operate according to a "notice-and-takedown" system. A service provider hosting allegedly infringing material at the direction of users is not liable for infringement if it responds expeditiously to a notification to remove or disable access to the material.[30] To get immunity, the service provider must not have actual knowledge of the infringement or be aware of circumstances from which the infringement is apparent.[31] Some commentators argue that it is nearly impossible for rights-holders to establish either actual knowledge or an awareness of infringing activity.[32] Viacom, on the other hand,

26. *Ibid.*, at para. 38.
27. *Ibid.*
28. Tim Wu, "Does YouTube Really Have Legal Problems?", *Slate* (October 26, 2006), online: Slate, <http://www.slate.com>.
29. R.S.C. 1985, c. C-42.
30. Digital Millenium Copyright Act, 17 U.S.C. §512(c)(1).
31. *Ibid.*, §512(c)(1)(A).
32. See Jason C. Breen, "YouTube or YouLose? Can YouTube Survive a Copyright

alleged that infringement is obviously apparent to even the most casual visitor to YouTube.[33] Routinely receiving notifications of alleged infringements might contribute to the circumstances that create the requisite awareness. "Red flags" could also include search tags using well-known trademarks and other terms reasonably associated with infringing content.[34]

Moreover, § 512 does not exempt providers from liability if they receive financial benefits directly from the infringement.[35] Courts have not considered what constitutes a direct as opposed to an indirect benefit, but generating revenues from advertisements placed alongside infringing content could put a service provider in a precarious position. A direct financial benefit might also exist in circumstances where infringing content attracts traffic to a website. So far the DMCA'S safe harbours remain relatively untested in the context of firms hosting peer-produced content.

A Canadian safe harbour is found in s. 2.4(1)(b) of the Copyright Act. It provides that persons who only supply "the means of telecommunication necessary for another person to so communicate" are not themselves parties to the communication. The leading case on point is *SOCAN v. Canadian Association of Internet Providers*, in which the Supreme Court of Canada considered whether Internet service providers were liable to pay a tariff (SOCAN's Tariff 22) for the online communication of musical works.[36] The court held they were not. An intermediary falls within the safe harbour so long as it "confines itself to providing 'a conduit' for information communicated by others."[37] The use of techniques to improve the efficiency of communications, such as caching, does not affect intermediaries' legal liability.[38]

Unlike the U.S. provision, however, the Canadian safe harbour does not apply to activities other than communication. An intermediary might still be liable for reproductions that occur when

Infringement Lawsuit?" (2007), online: Bepress, <http://law.bepress.com> at p. 16; see also Phillip Kunz, "Whose Tube? — A Contributory Copyright Infringement Analysis of the Pending Lawsuit, Robert Tur v. Youtube Inc." (2006), 17 DePaul-LCA J. Art and Ent. L. and Pol'y 167. See also Alexis Allen, "Battling in the Name of Balance: Evaluating Solutions to Copyright Conflict in Viacom International v. YouTube" (2007), B.Y.U. L. Rev. 1023 at p. 1047.

33. *Viacom v. YouTube, supra,* footnote 20, at para. 36.
34. *Ibid.*
35. Digital Millenium Copyright Act, 17 U.S.C. §512(c)(1)(B).
36. (2004), 240 D.L.R. (4th) 193, [2004] 2 S.C.R. 427 *sub nom. SOCAN v. Assoc. Canadienne des Fournisseurs Internet*, 32 C.P.R. (4th) 1 (*SOCAN v. CAIP*).
37. *Ibid.*, at para. 92.
38. *Ibid.*, at para. 115.

content is cached. Or, an intermediary might be held to authorize the infringing acts of its customers.

SOCAN v. CAIP also dealt with that question. The court found that "when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute . . . an authority to download copyrighted material as opposed to non-copyrighted material."[39] However, Justice Binnie's *obiter dicta* suggests that copyright liability may exist if a service provider has notice of infringing material on its system and "fails to take remedial action."[40] What sort of remedial action might be required? Well, the court hinted that upon notice of infringing content, the host might be required to "take it down".[41]

Canadian legislators might have adopted a different approach. In 2005, Bill C-60 was introduced to reform parts of Canadian copyright law. Though the bill died before passing into law, it would have established a "notice-and-notice" system. That means a firm notified of alleged infringement could have escaped liability by forwarding the notice to its customer.[42] Though less strict than a "notice-and-takedown" or "notice-and-termination" regime, it has been reported to be nonetheless effective.[43] The bill also would have immunized network services from all liability for caching, including communications *and* reproductions.[44]

Safe harbour provisions are not unique to the U.S. and Canada. Australia also exempts service providers from liability for contributory copyright infringement if they comply with a notice-and-takedown scheme.[45] Asian nations like Singapore and Japan have similar provisions.[46] In Europe, a directive on certain legal aspects of information society services (2000/31/EC) governs the matter.[47] However, in that directive no specific notice-and-takedown scheme is provided beyond a declaration that one must exist. It is left

39. *Ibid.*, at para. 123.
40. *Ibid.*, at para. 124.
41. *Ibid.*, at para. 127.
42. Bill C-60, An Act to amend the Copyright Act, 1st Sess., 38th Parl., 2005, cl. 29 (first reading June 20, 2005).
43. "E-mail warnings deter Canadians from illegal file sharing", *CBC News* (February 15, 2007), online: CBC News, <http://www.cbc.ca>.
44. Bill C-60, *supra,* footnote 42, cl. 20.
45. Copyright Act 1968 (Cth.) Part V Div 2AA.
46. Copyright Act 1987 (Cap.63), ss. 193A to 193DA; Copyright Act 1970, online: Copyright Research and Information Centre, <http://www.cric.or.jp/cric_e/clj/clj.html>.
47. EC Directive 2000/31/Ec of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] O.J. L 178/1.

up to individual European Member States to work out the details.[48]

IV. FAIR USE/DEALING

Hosts, intermediaries and other facilitators might also attempt to rely on rights of fair dealing or fair use. These principles, however, are notoriously uncertain. It is unclear how, if at all, they might apply to firms dealing with peer-produced content.

It is likely that at least some people producing allegedly infringing content could validly claim a defence of fair use. In particular, American copyright law allows wide berth for parodies and other transformative uses.[49] This type of material comprises some of the most socially and culturally valuable content generated through peer production.

Canadian law, however, is not as flexible in this regard. Courts in Canada seem unable to appreciate the principles of freedom of expression that should help illuminate the boundary between copyright infringement and fair dealings. In the most famous Canadian case on point, *Michelin v. CAW-Canada*,[50] the Federal Court refused to follow the precedent set by the U.S. Supreme Court in *Campbell v. Acuff-Rose*.[51] Instead, the court held that parody was not a form of "criticism" and so could not fit within the pigeonholes of Canada's fair dealing provisions.[52] Scholars have criticized this ridiculous interpretation.[53] I would like to suggest it is no longer an authoritative statement of the law, following the Supreme Court's decision in *CCH v. LSUC* requiring a "large and liberal" interpretation of the categories of permissible fair dealings.[54] Sadly, however, recent jurisprudence shows that courts are ignoring the Supreme Court's message.[55]

Still, it is true that the Canadian law of fair dealing is in some ways more progressive than its American counterpart. Fair dealing in

48. *Ibid.*, at p. 13.
49. See *e.g. Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).
50. [1997] 2 F.C. 306, 71 C.P.R. (3d) 348 *sub nom. Cie Generale des Établissements Michelin-Michelin & Cie v. CAW-Canada* (T.D.).
51. *Campbell v. Acuff-Rose Music*, *supra*, footnote 49.
52. Copyright Act, R.S.C. 1985, c. C-42, s. 29.1.
53. See, *e.g.*, David Fewer, "Constitutionalizing Copyright" (1997), 55 U.T. Fac. L. Rev. 175 and Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process" in M. Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto, Irwin Law, 2006), ch. 5.
54. *CCH v. LSUC*, *supra*, footnote 24, at para. 51.
55. *Corporation Sun Media c. Syndicat canadien de la fonction publique*, 2007 QCCS 2943.

Canada is not characterized as an exception or a defence, but, according to our Supreme Court, a "user right."[56] This right, moreover, is available not only to individual users but also to those who facilitate fair dealings. Fair dealing facilitators, as I will call them, are within their rights to establish practices and policies within a system of dealing that can be shown to be fair.

Thus, a library is allowed to systematically provide patrons with copies of copyright-protected materials, if a policy is in place to set appropriate limits on that activity.[57] Similarly, the Copyright Board of Canada has recently held that online music services need not pay licence fees to offer prospective customers 30-second song samples, because customers would be dealing fairly with the works in researching potential purchases.[58]

In the United States, by contrast, it has been held that one entity is not entitled to invoke other parties' fair use rights.[59] So, for example, a company called MP3.com was unable to offer customers an online music storage locker from which they could access songs on CDs they had already purchased. This ruling would seem to leave little room for a service dealing with copyright-infringing content uploaded by users, at least against a claim for primary (as opposed to secondary) infringement.

V. RISKS AND UNCERTAINTIES

Despite the availability of safe harbours and potential fair dealing defences, considerable legal ambiguity surrounds firms that deal with peer-produced content. If the discussion above did not make this evident, real lawsuits in the United States against video sharing sites such as Grouper and YouTube should provide ample evidence of uncertainties. Even assuming YouTube is able to find some shelter within the DMCA's safe harbours, it may only be protected against claims for contributing to users' infringements. Viacom also alleged that YouTube directly infringes copyright by reproducing, performing and displaying the videos that users upload.[60] Unless it could be established that those activities constitute "transitory digital network communications"[61] or are infringements that occur "by

56. *CCH v. LSUC*, *supra*, footnote 24, at para. 48.
57. *CCH v. LSUC*, *ibid*., at para. 73.
58. Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works (October 18, 2007), online: Copyright Board of Canada <http://www.cb-cda.gc.ca>.
59. *UMG Recordings, Inc. v. MP3. com, Inc*., 92 F.Supp.2d 349 (S.D. N.Y. 2000).
60. *Viacom v. YouTube*, *supra,* footnote 20, at paras. 46-63.

reason of the storage at the direction of a user,"[62] the safe harbour might not be available.

Likewise, if a lawsuit of this sort were to be brought in Canada, it is unclear whether and how s. 2.4(1)(b) would apply. As mentioned, Canada's safe harbour protects intermediaries from liability for communicating copyright-protected works to the public, but not for reproductions, public performances or perhaps most importantly, authorizing copyright infringement. Under Canadian law, sites that host peer-produced content could be on shakier ground.

Ambiguities arise in practically every jurisdiction where such provisions exist. Though liability does not always follow from litigation, the mere threat of a lawsuit is often enough cause for concern. The risks and expenses for all parties make this an unattractive strategy to pursue. Lawsuits might be used to gain leverage in licensing negotiations, as Viacom has arguably done *vis-à-vis* YouTube, but there are preferable options available.

VI. STRATEGIC RESPONSES

Eric von Hippel of the MIT Sloan School of Management has been studying user-centred innovation for decades. His research reveals trends with physical goods ranging from surfboards to surgical equipment, as well as with software and information goods. In all kinds of industries, "users are the first to develop many and perhaps most new industrial and consumer products."[63] There are several ways that manufacturers can adapt to users' encroachments on their traditional business activities.[64] Von Hippel explains that firms might produce user-developed innovations for general commercial sale, sell kits of product-design tools and/or product platforms, or sell products that are complementary to user-developed innovations.

Nearly a decade ago, Eric Raymond presented another taxonomy of for- and not-for profit business models that capture the value of open source software.[65] Recently, Hietanen, Oksanen and Välimäki developed Raymond's work to examine specific business models where commercial licensors use open-content licences for financial profit. These models include the "loss leader;" "sell services;" "free the content, sell the platform;" "sell the product, let users enhance it;" "wrap open content with commercials" and "sell the product, let

61. Digital Millenium Copyright Act, 17 U.S.C. § 512(a).
62. Digital Millenium Copyright Act, 17 U.S.C. § 512(c)(1).
63. von Hippel, *supra,* footnote 1, at p. 2.
64. von Hippel, *ibid.*, at pp. 14-15.
65. Eric Raymond, *The Cathedral & the Bazaar: Musings on Linux and Open Source by an Accidental Revolutionary* (Cambridge, Mass., O'Reilly, 1999), pp. 137-90.

users advertise it."[66] Chris Anderson, editor-in-chief of *Wired* magazine and author of the hit book, *The Long Tail*,[67] is the latest commentator to explain how "free" can be the future of business by citing similar business models.[68]

Of course, firms might oppose rather than adapt to consumers' encroachments on their traditional business models. Cutting-edge business literature sets forth a matrix of possible strategic responses to creative consumers. The authors of a recent study on managerial approaches reveal that a firm's attitude toward consumer innovation can be either positive or negative while its actions can be either active or passive.[69] Differentiating on these two axes, the authors classify firms into four categories, depending on whether they discourage, resist, encourage or enable creative consumers. Firms that discourage creativity have a negative attitude, which they assert only passively. Resisting firms, by contrast, share a negative attitude but take active steps to restrain consumer creativity. A positive attitude differentiates firms that encourage or enable consumer creativity, but only enablers act overtly to facilitate consumers' behaviour.

There are numerous examples of firms that fit each of these paradigms.[70] Nintendo was not happy when Gameboy users turned their consoles into musical instruments, but did not do much about it. Sony, however, strongly resisted consumers' efforts to tinker with its Aibo electronic pets and used the DMCA's anti-tinkering provisions[71] to back up its threats. Voice-over-Internet-protocol pioneer Skype was pleased when users adapted its software to synchronize podcasts with voice-over-Internet-protocol (VOIP) broadcasts, though the company did not modify its program to enable the activity. The BBC, on the other hand, actively enables consumer creativity through its "Creative Archive" project. Bands like the Barenaked Ladies are also building success by embracing peer-production. They have, for example, enabled fan remixes by selling the raw tracks behind their recordings, encouraged fans to capture and share concerts and released music videos incorporating social media "celebrities."

There is no single strategy that suits all firms dealing with peer-

66. Hietanen, *supra,* footnote 2, at pp. 78-101.
67. Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (Hyperion, New York, 2006).
68. Chris Anderson, "Free: Why $0.00 Is the Future of Business", *Wired* 16:03 (March 2008), p. 140.
69. Pierre R. Berthon *et al.*, "When Customers Get Clever: Managerial Approaches to Dealing with Creative Consumers" (2007), 50 Business Horizons 39 at pp. 44-45.
70. Most of the examples cited here are discussed in Pierre R. Berthon *et al.*, *ibid.*
71. Digital Millenium Copyright Act, 17 U.S.C. § 1201.

produced content. Nevertheless, the models identified by von Hippel and others, and implemented by the likes of the Barenaked Ladies and the BBC, offer significant and generally underappreciated benefits to all stakeholders. Discouraging or resisting consumers' creativity can be ineffective and, in some cases, counterproductive. Even merely encouraging consumer creativity, as opposed to enabling it, may leave revenue-generating opportunities untapped.

Obviously, one of the primary challenges firms face is to balance competing sentiments and strategies. The typical tension is between the publicity viral marketing provides and the control needed to monetize momentum. Should content producers discourage, resist, encourage or enable consumers who would post, remix or share copyright-protected content? Is it possible to stop consumers from posting, for example, entire episodes of a television program while licensing them to share mashups of certain clips? Can one be done without destroying the forum in which the other takes place?

One of the advantages of most countries' safe harbour provisions is that they allow copyright owners some of the best of both worlds. Safe harbours do not provide absolute immunity for hosts, intermediaries or other facilitators. Instead, content owners can tolerate certain uses of their works while prohibiting others. When consumers' behaviour becomes cause for discomfort, copyright owners can issue notifications to hosts of the alleged infringements. Whether there is a notice-and-notice or notice-and-takedown system in place, the result will likely be the prompt removal of the allegedly infringing content.

Unfortunately, many firms find it difficult to take advantage of the flexibilities offered under safe harbour schemes. For large corporate copyright-holders, notifications might be ineffective. Though the specifically identified infringing work may be removed, another copy of the same work may reappear within days or hours. The game of whack-a-mole can be tedious and time-consuming. It can be costly too, as many jurisdictions require copyright-holders to compensate for the expenses associated with the takedown notification.

Recipients of such notifications might also find it onerous to comply with their legal obligations. Some large firms partially automate this process with web forms or e-mail templates. But the smaller the host or service provider, the more difficult the task is. And although in some contexts automation might reduce the frequency of mistakes, where value judgments are appropriate, automation can be highly problematic.[72]

72. Fred von Lohmann, "YouTube's Copyright Filter: New Hurdle for Fair Use?" (October 15, 2007), online: Deeplinks Blog, <http://www.eff.org/deeplinks>.

That point pertains to a deeper flaw of notice-and-takedown schemes in particular. Given the lack of judicial or quasi-judicial oversight, unsubstantiated notifications might be issued resulting in the unwarranted removal of non-infringing content. Preliminary empirical evidence suggests there may be serious problems with the notice-and-takedown process, though the data is insufficient to draw firm conclusions.[73] In at least one case, DMCA abuse has given rise to legal action.[74] But litigation is not likely a long-term solution to deter dubious notification practices.

VII. LICENCE AGREEMENTS

Properly implemented licensing practices can address many, though not all, of the concerns raised above. It must be acknowledged that there are those who are skeptical about the possibilities of a licensed peer-production system. One famous naysayer is media mogul, basketball franchise owner and part-time copyright commentator Mark Cuban. Cuban was quoted in the *New York Times* as saying about YouTube: "It is absolutely reminiscent of Napster. It's nice that they say 'it's different this time,' but it's not."[75] He argued that it would be too complex and unworkable to strike deals with copyright owners because there are so many parties with potential claims.[76]

The evidence suggests that Cuban is wrong. In fact, YouTube has been signing content distribution agreements at the rate of roughly 200 per quarter, recently inking deals with the likes of the NBA, CBS, the BBC, Warner Music Group and many others.[77] My colleague Michael Geist argued that, though there are clear parallels between Napster and YouTube, YouTube's acquisition by Google and the subsequent flurry of licensing agreements "may foreshadow a reversal, with the industry at long last ready to embrace the remarkable commercial potential of the internet."[78]

There are, no doubt, challenges associated with negotiating

73. Jennifer Urban and Laura Quilter, "Efficient Process or Chilling Effects — Takedown Notices under Section 512 of the Digital Millennium Copyright Act" (2005-2006), 22 Santa Clara Computer & High Tech. L.J. 621.

74. *Diehl v. Crook*, 06-CV-6800 SBA (N.D. Cal. 2007) (complaint).

75. Saul Hansell, "YouTube's Video Poker", *The New York Times* (September 30, 2006), online: The New York Times, <http://www.nytimes.com>.

76. *Ibid.*

77. Miguel Helft, "Google Courts Small YouTube Deals, and Very Soon, a Larger One", *The New York Times* (March 2, 2007), online: The New York Times, <http://www.nytimes.com>.

78. Michael Geist, "YouTube can avoid 'Napster's fate'", *BBC News* (October 16, 2006), online: BBC News <http://news.bbc.co.uk>.

licensing agreements, as troubled talks between YouTube and Viacom demonstrate. Dissecting these challenges requires us to revisit the spectrum of peer-produced content residing on social networking, video sharing and other Web 2.0 sites. Different licensing techniques might be appropriate for different sorts of content.

For mainstream music, movies and television programs posted in their entirety, large-scale agreements might be reached with conglomerates representing multiple subsidiary labels, studios or networks. Another option for dealing with such content might be collective blanket licensing, either on a voluntary or compulsory basis. Collective blanket licensing could also work well to enable the creation of a wide range of derivative works. For many other creative works, individual creators might enter into express agreements, though the host or provider will normally stipulate take-it-or-leave-it licensing terms through click-wrap contracts.[79] In some circumstances, Creative Commons[80] or similar licences might be appropriate. Following "best practices" in respect of peer-produced content can help to minimize the risk of problems *ex ante*. The following discussion explores some of the nuances of each of these licensing strategies.

The biggest deals would be done between disruptive innovators with deep pockets and powerful entertainment industry incumbents. There are typically several aspects to these sorts of agreements. The host service might receive conditional immunity from liability for copyright infringement or, in some cases, express permission to distribute copyright-protected content. The copyright owner might receive a share of revenues, normally generated through advertising alongside licensed content, as well as assurances that steps will be taken to curtail certain types of copyright infringement.

A likely condition of hosts' copyright immunity is the use of automated fingerprinting and filtering technologies. Vendors like Audible Magic and Gracenote make software that can identify and block music. Video and audiovisual works are more difficult to deal with, but techniques are being developed to tackle that issue too. Already services MySpace, iMesh and YouTube are implementing these kinds of technologies.

Because of the costs of compliance with the conditions likely to be imposed by copyright-holders, these mega-deals are available only to

79. A click-wrap contract is a contract of adhesion in which (fictional) consent to be bound by certain terms is provided by clicking on an icon stating, for example, "I agree."
80. See *infra*, footnote 85, and accompanying text.

a limited subset of firms. While YouTube and MySpace might have the resources to negotiate licensing agreements, smaller start-up companies probably will not. Nor will it be easy for new or niche services to convince rights-holders it is financially worthwhile to do a deal. And when tactics escalate to include litigation as a bargaining strategy, the stakes become too high for all but a few firms. Similarly, independent or small-scale rights holders may have difficulty transacting with the large number of services that may be using their content. Inefficiencies in these contexts can undermine the bargaining process and perhaps lead to market failure.

So for the classes of firms that can not feasibly do one-on-one mega-deals, other alternatives ought to be considered. Collective blanket licensing is one such option. A few scholars have advocated for a compulsory licence and levy scheme to permit sharing of music and video online.[81] A compulsory system would be extremely controversial and, in my view, nearly impossible to implement or at least to implement well.[82] A far less contentious and more realistic option would be to utilize voluntary collective blanket licensing systems to address this issue.

Though compulsory and voluntary systems might appear similar in terms of practical administration, there are key differences. Compulsory systems are more likely to be opposed by rights-holders, and therefore, more likely to violate international copyright treaties. Voluntary systems would, on the other hand, comply fully with international obligations. And because a voluntary system could only exist with the co-operation of all stakeholders, there would be incentives to ensure it is designed and administered as efficiently as possible.

Several voluntary systems are already in place in Canada, Europe, Asia and even the United States. Indeed, they may already apply to firms that deal with different sorts of peer-produced content. For

81. See *e.g.* Terry Fisher, *Promises to Keep* (Stanford, Stanford University Press, 2004), c. 6; Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003), 17 Harv. J. L. & Tech. 1; John Davidson, *Rethinking Private Copying in the Digital Age: An Analysis of the Canadian Approach to Music* (LL.M. Thesis, University of Toronto Faculty of Law, 2001) [unpublished]; Peter Eckersley, "Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?" (2004), 18 Harvard J.L. & Tech. 85.

82. See *e.g.* Jeremy de Beer, "The Role of Levies in Canada's Digital Music Market" (2005), 4 C.J.L.T. 153; Jeremy de Beer, "Locks and Levies" (2006), 84 Denv. U.L. Rev. 143; S.J. Liebowitz, "Alternative Copyright Systems: The Problems with a Compulsory License" (2004), online: Society for Economic Research on Copyright Issues, <http://www.serci.org>; Robert P. Merges, "Compulsory Licensing vs. the Three 'Golden Oldies' Property Rights, Contracts, and Markets" (January 15, 2004), online: The CATO Institute, <http://www.cato.org>.

example, the Copyright Board of Canada just approved a tariff payable by "online music services" on account of music publishers' reproduction rights.[83] By adhering to the standard terms of this tariff, sites that offer permanent or tethered downloads of music might clear at least one of the necessary copyrights. A complementary tariff, Tariff 22, has been approved in respect of the communication of musical works.[84] Together these two tariffs could cover the necessary rights to use musical works.

Such services would, of course, also have to clear a plethora of other rights. In Canada, performers and sound recording makers (usually record labels) also have multiple rights. Each may ask for remuneration for the communication of their respective performances or sound recordings. Do not forget that permission is required to reproduce master recordings, which must be obtained separately from the record labels. And while in practice performers often assign their rights to the labels, that is not necessarily the case, so still more negotiations might be necessary.

So collective blanket licensing is really only a piecemeal solution. The copyrights clearance process can be even more complex where audiovisual works such as films or television programs are involved. It should be pointed out, however, individual mega-licensing deals are also only one piece of the puzzle. In an era of fragmented copyrights, negotiations with multiple parties are usually necessary no matter what the context.

There is at least one other licensing system worth mentioning, as it is widely used with certain forms of peer-produced content. The Creative Commons organization describes itself as providing free tools (*i.e.* copyright licences) that let authors, scientists, artists and educators easily mark their creative work with the freedoms they want it to carry.[85] In short, it promotes a "some rights reserved" model.

Creative Commons licences are especially well suited to non-commercial contexts where peers produce content for reasons other than financial reward. The system is also valuable for striking a balance between capturing buzz and keeping control. Licences

83. Statement of Royalties to be Collected by CMRRA/SODRAC Inc. for the Reproduction of Music Works in Canada, by Online Music Services in 2005, 2006 and 2007 (March 16, 2007), online: Copyright Board of Canada, <http://www.cb-cda.gc.ca>.
84. Statement of Royalties to be Collected by SOCAN for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-musical Works (October 18, 2007), online: Copyright Board of Canada, <http://www.cb-cda.gc.ca>.
85. See <http://creativecommons.org/>.

permitting sharing but requiring attribution can be key to business models built on indirect revenue generating strategies like those explained above. It is not surprising, therefore, that in the world of Web 2.0, numerous popular services, such as the digital photography hub Flikr and audiovisual sharing site Blip.tv, offer peer-produced content through Creative Commons licences.

VIII. CONCLUSIONS AND CHALLENGES FOR THE FUTURE

There are several challenges that must be overcome to make each of these licensing schemes workable in the context of peer-produced content. One concern is about the compatibility of each strategy with the others. Take for example the relationship between collecting societies and open-content licensing initiatives such as the Creative Commons. The policy and practice of many collectives is to require members to assign copyright to the collective. This renders authors unable to offer their works independently through Creative Commons licences, even where the terms would in principle be compatible with the collective's mandate.[86] The practice of extended collective licensing, whereby a collective society can be deemed to represent even authors who are not members of that society, could lead to further challenges in this regard.[87] This could, for example, make it difficult for licensees to choose to use only pre-cleared or Creative Commons content.[88]

To resolve potential incompatibilities, Hietanen, Oksanen and Välimäki argue both institutions must adapt:

> Creative Commons must clarify its licenses and modify them to fit the automatic licensing scheme of the collecting societies. The collecting societies on their behalf have to open their paternalistic administration systems to reflect the changed motivations of rights owners and the new business models they are using.[89]

Access Copyright, a Canadian collective that administers

86. Hietanen, *supra*, footnote 2, at p. 110.
87. Hietanen, *ibid.,* at p. 110; but compare Daniel Gervais, "Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation", Study Prepared for the Department of Canadian Heritage (June 2003), online: Department of Canadian Heritage, <http://www.pch.gc.ca>.
88. A Spanish court has held that a bar playing Creative Commons-licensed music was nevertheless liable to pay royalties to the relevant collective society, though the case seemed to turn on the fact that the defendant played both CC-licensed music *and* non-CC-licensed music. Rec. 3008/2005, No. de sentencia: 612/2005, Jurisdiccioìn: Civil La Ley Juris: 2164413/2005 (November 29, 2005), online: <http://www.interiuris.com/blog>.
89. Hietanen, *supra,* footnote 2, at p. 113.

reprography rights, has made some progress in this regard. In 2006, the Creative Commons Canada and Access Copyright partnered to announce a public domain registry.[90] The collective's website at least links to the Creative Commons and other organizations like the Open Content Alliance. There is, however, still very far to go to integrate the two licensing systems.

None of the licencing strategies described above are a panacea for the problems facing both industrial information economy incumbents and innovators of the networked sharing economy. Importantly, therefore, there is a complex, symbiotic and cyclical relationship between licensing practices and safe harbours.

Safe harbours may seem to simply protect services built on intellectual property infringement, but they also serve a deeper purpose that is ultimately beneficial to both rights-holders and society at large. Safe harbours incubate innovators. Even from a purely commercial point of view, the trend-setters represent a tremendous opportunity waiting to be exploited. After relying on legal safe harbours to reach a certain stage of maturity, innovators are ripe for the sorts of mega-licensing deals seen recently.

Incumbents will not likely be pleased to concede ground to, let alone cooperate with, disruptors. But as licensing revenues escalate, disruptive business models become entrenched as the new norm and collaboration becomes inevitable. And at the point where these businesses begin to wield worrying degrees of leverage in negotiations, another crop of innovators emerges within safe harbours to challenge the status quo and start the cycle anew.

There are other concerns about mega-licensing deals. In addition to the fact that deals are often available only to large-scale players like YouTube or MySpace, there are deeper problems with some of the terms of these deals. The fingerprinting and filtering technologies usually mandated as part of the agreement are unable to distinguish infringing from non-infringing material. Fair use and fair dealing are notoriously contextual concepts, and assessments of substantiality require both a qualitative and quantitative analysis. Machines cannot make such determinations (yet). Ultimately, however, these concerns are less relevant to would-be licensees trying to strike lucrative deals with content owners than they are to the users whose rights are also affected. The mega-licensing may therefore prejudice the public interest in the long run.

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90. Press Release, "Access Copyright and Creative Commons Canada Announce Public Domain Registry: Ground-breaking project will feature globally searchable catalogue of Canadian culture", *Access Copyright* (March 3, 2006), online: Access Copyright <http://www.accesscopyright.ca>.

Rights-holders are also likely to be concerned about the reliability of fingerprinting and filtering technologies. This is one part of firms' digital rights management (DRM) strategies. Such strategies usually involve three prongs: technological protection measures (TPMS), end user licence agreements (EULAS) and rights management information (RMI). It is important to differentiate between these elements of the overall strategy.So long as privacy concerns are adequately addressed, tools for managing RMI are far less controversial than restrictive TPMS or lopsided EULAS. Indeed, fully capitalizing on creative consumers may require firms to abandon restrictive TPMS altogether and modify the terms of their EULAS. At the same time, however, maintaining reliable RMI is crucial for success.

Stakeholders' ideological differences about the merits or demerits of TPMS can be overcome by focusing on privacy-sensitive RMI practices and clearly drafted EULAS. Both the "Free/Libre Open Source Software" (FLOSS) project and the Creative Commons movement, for instance, are based entirely on specific sorts of EULAS and RMI. Yes, the Creative Commons *is* a DRM system. Most peer-production initiatives could not exist without one.

A nuanced understanding of this point will help firms avoid the divisive rhetoric often associated with DRM. The lesson to be learned is that consumers appreciate the need for, and are willing and able to accept aspects of, DRM strategies that are implemented fairly. That means, in many cases, there is zero incentive to tamper with or circumvent RMI tools. Efforts to introduce legal reforms to prohibit tampering are therefore unnecessary. In an environment evolving as rapidly as today's networked information economy is, such reforms are likely to lead to unanticipated consequences that may be difficult if not impossible to reverse. With little upside, reforms are not worth this risk.

This leads to an important question about which institutions, if any, ought to intervene in this dynamic environment. In a *New York Times* editorial, Lessig recently wrote about a reversal in American copyright policymaking.[91] Instead of the United States Supreme Court deferring to Congress to make new copyright laws, as it did in the *Sony Betamax*[92] and *Eldred*[93] cases, it has lately had no trouble tweaking the common law to fit new technologies, as it did in the *Grokster* case.[94] There is a risk that compromises made by Congress

91. Lawrence Lessig, "Make Way for Copyright Chaos", *The New York Times* (March 18, 2007), online: <http://www.nytimes.com>.
92. *Supra,* footnote 10.
93. *Eldred v. Ashcroft, Attorney General*, 537 U.S. 186 (2002).
94. *Supra,* footnote 14.

or other legislative bodies reflect special rather than public interests.[95] There is a similar risk that public interests will be overlooked during private bargaining processes. But judicial policymaking also carries costs. As Jamie Boyle pointed out, it may seem fair for YouTube to spend some of its $1.65B windfall monitoring its site for infringing content, but what about all the other repositories on the Internet?[96] Courts have difficulty drawing fine distinctions.

Regardless of which institution implements change first, the strategies discussed in this article require concessions from both sides of the copyright debate. Rights-holders will be required to relax legal and technological control over their creations and tolerate certain uses of their intellectual property. Distributors will have to accept the legitimacy of copyright concerns and perhaps pay for activities that should arguably be free.

This is already beginning to happen. A group of major stakeholders have agreed on a set of best practices. Companies including Disney, Fox, Viacom, CBS, NBC, Microsoft, MySpace and more have established "Principles for User Generated Content Services" in order (they say) to foster innovation, encourage creativity and thwart infringement.[97] The goals are to eliminate copyright infringement, encourage sharing or original and authorized content, accommodate fair uses of copyright-protected content and protect users' privacy rights. To those ends, stakeholders have agreed on issues involving, for example, identification and filtering technologies, good faith notifications of infringement claims, responsive takedowns and monitoring procedures.

In crafting these principles there appears to have been no consultation with a key group of stakeholders: the users and peers that populate these services with content. Though these people may have less financial stake than the multinational entertainment and technology companies mentioned above, they are heavily invested in the social, cultural and democratic potential of peer-production models. The failure to include individual citizens and their civil society representatives in the development appears to have led to a major shift in the policies previously embedded in laws.

95. Jessica Litman, *Digital Copyright* (Amherst, N.Y., Prometheus Books, 2001), pp. 46-47.
96. James Boyle, "Google and the rocks in the web's safe harbours", *The Financial Times* (March 16, 2007), online: <http://www.ft.com>.
97. "Principles for User Generated Content Services", online: <http://www.ugc-principles.com/>.

The principles just described would essentially replace the existing notice-and-takedown system with pre-post filtering to prevent uploading. Though the document pays lip service to fair use and privacy concerns, there is little meaningful protection for user rights. These concerns are dealt with more thoroughly in a separate document, "Fair Use Principles for User Generated Video Content", endorsed by leading civil society organizations and academic centres.[98] Their focus is on fleshing out the contours of fair dealing, incorporating the doctrine into any automatic filtering that could occur, preserving the minimal procedural safeguards that do exist in the DMCA, and providing redress mechanisms for those whose content is wrongly screened out by technologies or unjustifiably taken offline.

The democratic development of best practices in combination with progressive and cooperative business models that emphasize licensing over litigation would be a giant leap in the right direction. In this way, creators of all sorts would experience increased profits, distributors and other intermediaries would be able to build innovative business models, and society will benefit from a more democratic and participatory culture. Perhaps most importantly, this strategy for capitalizing on creative consumers in the traditional economy would minimize collateral damage upon those who wish to participate in the parallel sharing economy. And, in the long term, the public interest would perhaps be the greatest beneficiary of all.

98. "Fair Use Principles for User Generated Video Content", online: Washington College of Law, <http://www.wcl.american.edu>. Supporters include Public Knowledge, the Electronic Frontier Foundation, the American Civil Liberties Union of Northern California, American University's Center for Social Media at the School of Communications and Program on Information Justice and Intellectual Property at the Washington College of Law and the Berkman Center for Internet and Society at Harvard Law School.