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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

User-Generated Content Services and Copyright

by Francisco Javier Cabrera Blázquez

EDITORIAL

There is a lot to learn about the Internet, especially for those generations who still grew up without broadband connections and Wi-Fi technology. Let's take the example of DailyMotion, a video hosting service website. Whether deliberately or accidentally, its name does not only point to its ever changing pools of content and users but it also symbolises a technology that develops at great speed and sets its users into motion. It invites active participation from those who used to be passive customers. To be blunt, services such as DailyMotion depend on consumers' contribution – that is, on user-generated content (UGC) that circulates globally via a French-based service carrying an English name in order to reach the widest possible audience.

New models for two-way distribution of content over the Internet, confront us with new shades of familiar copyright questions such as: what are the legal restrictions for putting content online? Where does piracy start? Who is the pirate? This IRIS *plus* looks at the EU and US American copyright framework concerning UGC and how it has translated into case law. Suspecting that neither the pending revision of the relevant EU e-commerce Directive nor further court decisions might settle the matter entirely, the article also explores other options for improving the relationship between UGC providers and copyright owners. Enjoy reading and meeting DailyMotion and other living examples for continous legal education!

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1. Introduction

New technologies allow people to become producers of their own content (e.g., videos, music, podcasts and blogs). Internet host providers put at their disposal easy, inexpensive ways of bringing this content to the public. In particular so-called User-Generated Content (UGC) services such as Google Video,[1] YouTube,[2] DailyMotion,[3] MySpace[4] or Flickr[5] allow people easily to upload and share video clips, photos or music on dedicated platforms. These services derive income from advertisements posted on their websites.

Most amateurs just want to share their photos and videos with friends, but the global nature of the Internet allows them to reach virtually anybody in the world. For example, a photographer may put his pictures on a photography website to make them available to his friends and relatives.[6] A musician may sign up for a video-sharing site to make his musical works available to a large public.[7] In these cases they only have to give an e-mail address and account name, the country they come from, and date of birth (however, this information remains unchecked), and they can start uploading content. With a little luck, they can even become famous! It is no longer uncommon to see unknown amateur artists become widely popular through their page in MySpace[8] or YouTube.[9] These platforms are also used by professional people to generate a wider audience.[10]

These developments bring a wealth of content to a larger than ever public. According to the European Commission's ICT Progress Report,[11] more than half of all Europeans have become regular Internet users and 80% of them have broadband connection. And according to media reports, with the advent of a new, incredibly fast Internet (10,000 times faster than a typical broadband connection!), Internet users will be able to send, for example, the entire Rolling Stones back catalogue from Britain to Japan in less than two seconds. David Britton, professor of physics at Glasgow University and a leading figure in developing this speedy Internet, the so-called "grid project", states that "[W]ith this kind of computing power, future generations will have the ability to collaborate and communicate in ways older people like me cannot even imagine".[12]

This near-science-fiction scenario heralds a future world of unlimited communication and knowledge sharing. But the Rolling Stones' music company (like many other rightsholders) probably won't share the joy. For them, ease of communication means, above all, ease of infringing their copyrights.

2. User-*uploaded* Content?

Times have changed. In the old days of rock and roll, members of a rock concert audience would light their cigarette lighters for special songs. Nowadays they rather hold up their cell phones to record parts of the show with their built-in video cameras. Some of these bootlegged videos are uploaded to UGC platforms the day after the rock concert, and their quality is sometimes astonishing. For those who indulge in nostalgia, the same UGC service may also offer the favourite TV show of their childhood. For those who look for more recent content, it is also usual to find last evening's TV show as well. For free.

"User-generated" does not necessarily mean that the content was actually created by the user. UGC services provide the means of uploading content in order to make it available to the public. The uploaded content is not checked before it is published; hence users can upload whatever they like, no matter whether it is self-created content or the work of somebody else and, in the latter case, irrespective of whether or not they hold the rights for the work. In other words, the ease of uploading content has a downside: whenever users of UGC services upload copyright protected television shows, films or music without being licensed to do so, they infringe the rights and interests of authors, performing artists and producers on a potentially global scale.

Most people uploading on UGC services are not trained as lawyers and therefore may not be expected to know the intricacies of copyright law. Many of them, however, do not even care whether or not they are infringing copyrights. Nonetheless, they are primarily responsible for the content they make available to the public and can be held liable for direct copyright infringement. This is not disputed. The hotly debated issue is rather whether or not a service provider may also be liable for copyright violations caused by the users of his service? In the end, UGC service providers gain an advantage (at least in an indirect way) from the fact that interesting copyrighted material is being offered on their platforms because it helps them build a wider audience. And a wider audience means more revenue from advertisements published on their platforms. *Cui prodest scelus, is fecit*, goes the old Latin saying. The culprit is the one who profits from the crime. Or should this not be valid for UGC?

UGC service providers consider that they only offer a hosting service and therefore only users are responsible for the content they upload. Moreover, a certain number of measures introduced by UGC service providers are aimed at removing infringing content whenever it comes to their knowledge. UGC service providers claim to lack any prior knowledge of the content and they do not actively monitor content made available through their website. All this is *prima facie* in line with applicable legislation in Europe and the United States, which provides for a limitation of liability for host providers when they do not have actual knowledge of infringement and remove content promptly after obtaining such knowledge.[13]

Rightsholders (at least some big media companies) think differently: they maintain that UGC service providers are publishers of the content available on their platforms. Consequently, UGC service providers should be held directly responsible for any infringement of copyright caused by users.

3. War or Peace?

It could be argued that videos posted on UGCs are short in length and poor in quality, and therefore cannot damage rightsholders' economic interests, but rather become a means of promoting their content. Rightsholders who choose not to act against these acts of infringement may benefit from this free publicity and further use UGC services as a platform for self-promotion.

Rightsholders who prefer to control their content and be remunerated for any use made of it have two options: to litigate or to license.

Obviously, the user who uploads copyrighted material is the primary infringer. However, prosecuting individual users is an expensive and complicated proposition, not least of all because they are part of a large anonymous crowd. Suing individuals for uploading content to UGC platforms is expensive, time-consuming and may not bring much in return.

If a rightsholder shies away from the burden of suing individual users, he may ask a UGC service provider to remove the infringing content. This does not, however, necessarily guarantee an end to the illegal use of the content because copies of the same content may be posted by other users. France has just witnessed a recent example of this: after the website of the French newspaper Le Parisien showed the French President Nicolas Sarkozy having a verbal clash with a visitor of the *Salon de l'Agriculture*, copies of the video were posted on DailyMotion. Le Parisien, who held the rights to the video in question, asked DailyMotion to remove it (DailyMotion obliged while Le Parisien kept it on its own website). Thereafter, multiple copies of the video were posted on different UGC services, this time without even mentioning Le Parisien as the video's source – an obvious protest against the copyright holder's demands on DailyMotion.[14]

It is much easier to sue the host provider for direct infringement of copyright: at least the host provider is identifiable and makes substantial profits from users' activities. But even more importantly, it leads to a tangible result even if the content resurfaces again on this or other UGC service providers' portals.

Such a lawsuit would mainly aim at courts classifying UGC service providers as publishers of content and not host providers. This would make them directly responsible for the content uploaded by users. Big media companies in particular are resorting to this type of litigation in order to protect their copyrights. Just to name two prominent examples: in France, the private broadcaster TF1 has recently announced its litigation against YouTube and DailyMotion for copyright infringement.[15] In the US, YouTube is also facing a copyright infringement claim from entertainment group Viacom.[16]

Licensing content to UGC service providers can be another source of revenue for rightsholders, but in many cases rightsholders are afraid of losing control over management of their copyrighted works. It should be noted that in some cases litigation may simply be a way of obtaining a better bargaining position for licensing deals. Indeed, for both sides their bargaining power will depend on the extent to which UGC service providers can rely on legal norms limiting their liability.

This article presents a general view on copyright infringement caused through UGC services. Firstly, it examines the legal position of UGCs and their liability regime. To this end, the article analyses jurisprudence from France and the United States. Secondly, it discusses different solutions to this issue, including filtering, licensing and legislative intervention. Finally, some thoughts are put forward regarding the future of audiovisual distribution on the Internet.

3.1 Litigation

At the core of the legal controversy lies the question of how the law qualifies UGC service providers: are they host providers or rather publishers of content? The UGC service provider simply offers the technical means of publishing content but does not decide upon which content is being published. At a first glance, it seems that UGCs are host providers, but certain characteristics of their services make the qualification less obvious. But even if UCGs were to be considered as host providers, subsequent questions would arise: what is the liability regime that applies to copyright infringements committed by users of the service who upload the content, and are UGCs secondarily liable for these acts of infringement?

Cases of copyright infringement on p2p networks show that whenever service providers have some form of control over users' activities they may be held liable for users' infringing acts. The best-known example of this is Napster. Without the support services provided by Napster, users could not have engaged in the unauthorised reproduction of copyrighted material through its network. Merely supplying the means to accomplish an infringing activity would not have amounted to contributory infringement. However, because Napster's central servers operated the index of files, Napster had actual knowledge of the infringing activities on its network but had neglected to prevent the unauthorised copying of music files. Therefore, the court concluded that Napster materially contributed to the infringing activity.

This lesson was well learned by developers of new p2p software. These software programmes create networks that are decentralised (that is, they operate without central servers or centralised indexes of files). They are different from Napster in that they lack actual knowledge of how customers will use their software when delivering it. The software distributors claim not to participate in the process of searching or exchanging files within the network. Moreover, they maintain that they neither receive any information about search activities nor know of such activities. However, even if they may not be held liable for merely distributing an infringement enabling product, they are not necessarily free of responsibility. Indeed they may be held liable if their words or actions actively promote or encourage infringement.[17]

UGC service providers too learned their lesson. They rely on rules limiting liability for host providers in order to build their business model which entices individual users to "generate" content and to offer it on their platforms. Moreover, they warn users that uploading copyrighted works is not allowed on their sites, so that they cannot be accused of inducing infringement.

This chapter discuss some examples of French case law and presents briefly the Viacom lawsuit against YouTube and Google pending in the United States.

3.1.1 Europe

3.1.1.1 Legal Framework

The liability of intermediaries on the Internet is regulated at European level by the so-called e-commerce Directive.[18] Articles 12-14 limit liability for information society services in three cases:

- mere conduit (Art. 12)[19]
- caching (Art. 13)[20]
- hosting (Art. 14)

According to Art. 14 of the e-commerce Directive, a host provider is an information society service that consists of the storage of information provided by a recipient of the service. Such a service is not liable for the information stored by the user, provided that:

- the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

- the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

The limitation of liability does not apply when the user of the service acts under the authority or the control of the provider.

Notwithstanding this rule, a court or administrative authority may require a service provider to terminate or prevent an infringement if foreseen by the legal system of the Member State in question. Member States may also establish procedures for the removal or disabling of access to information.

Art. 15 of the e-commerce Directive prohibits Member States from imposing a general obligation on information society services to monitor the information which they transmit or store, or to request that providers actively seek out facts or circumstances indicating illegal activity.[21]

The rules contained in the e-commerce Directive could be summarised as follows: the host provider is not liable for user-uploaded content as long as it does not have actual knowledge of any illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent. If the host provider obtains such knowledge or awareness, he has to act expeditiously to remove the information or to disable access to it. Unfortunately, the Directive uses but does not clarify terms such as "actual knowledge", "awareness", "being apparent" or "general obligation". These require further interpretation because the Directive does not clarify any of them. Member States have to further develop the general concept in the context of their national legislation.

In France, the Act on confidence in the digital economy (Lcen)[22] basically reproduces the relevant rules of the e-commerce Directive thus leaving the final word with the judiciary. The following case law from France illustrates how long a haul the definition of the relevant terms is.

3.1.1.2 French Case Law

French courts have so far delivered a number of interesting decisions on the liability of UGC service providers. Whereas in most cases they recognise UGC service providers as host providers *(hébergeurs)*, two recent decisions of the *Tribunal de grande instance de Paris* (Regional Court of Paris) show that the legal qualification of UGCs become less certain in cases where the service provided goes beyond the mere storage of information uploaded by a user (e.g. by imposing a certain structure on users' pages or by including advertisements). Regarding the liability regime for UGC services, French courts implicitly state that it would be disproportionate to place on rightsholders the burden of constantly monitoring repeated infringements while UGC service providers reap profits from them. Although the decisions mentioned hereunder do not follow a single line of interpretation, they show that the provisions of the e-commerce Directive are rather unclear when applied to UGC services.

The decisions of the *Tribunal de grand instance Paris* (Regional Court of Paris – TGI) in the cases Lafesse and Joyeux Noël are particularly striking.

In the first case, the French comedian known as "Lafesse" sued the French branch of MySpace[23] for copyright infringement of the comedian's filmed sketches that had been made available on the MySpace site. MySpace defines itself as "a social networking service that allows members to create unique personal profiles online in order to find and communicate with old and new friends". The users are therefore responsible for the content included on their private pages. However, the TGI Paris decided in a summary procedure[24] that MySpace is the editor/publisher of users' pages because it imposes a predetermined presentation for users' pages and includes advertisements from which it draws profit.

In the second case, the filmmaker, the producer and the distributor of the film "Joyeux Noël" sued the UGC service DailyMotion for copyright infringement and parasitic conduct.[25] In its decision,[26] the Tribunal de grande instance of Paris stated that DailyMotion's business model required the availability of well-known works in order to build an audience and attract advertising revenues. The architecture of the site and the technical means put in place by DailyMotion were aimed at showing Internet users that they were able to access all sorts of video material without distinction and DailyMotion allowed users to upload copyrighted material without any restrictions. Therefore, DailyMotion should be considered as having had knowledge of facts and circumstances which should have caused DailyMotion to expect that copyrighted videos were being put online without the rightsholders' authorisation. The court added that, although the Lcen does not impose a general obligation of monitoring third-party content, service providers cannot invoke limitation of liability in cases where they induce or generate the infringing activities. Since Dailymotion deliberately provided users with the means of infringing copyright, it was incumbent upon the service to carry out an *a priori* check on the content hosted on its servers. This had not been done until rightsholders notified DailyMotion, therefore the UGC service had become liable for copyright infringement at the moment the infringing content had been uploaded.

The decision in the *Joyeux Noël* case has been widely discussed and sometimes criticised for misinterpreting the prohibition of imposing a general obligation of monitoring content introduced by the e-commerce Directive and the Lcen.[27] Concerning the MySpace case, a recent report[28] of the French Parliament has warned against the "temptation" to classify host providers as editors of content.[29]

Other French courts have accepted the view that UGC service providers act as mere host providers. Since the provider is not liable unless he/she has actual knowledge of copyright breaches, rightsholders have to notify service providers of concrete cases of infringement. Whenever a host provider obtains such knowledge or awareness, it has to remove or to disable access to the infringing files. However, what happens when (after removal) users of the service upload again the same copyrighted work? If rightsholders were under an obligation to notify every single infringement for removal of the file, this situation could obviously reproduce itself *ad infinitum*, making the whole process cumbersome, sometimes counterproductive[30] and (in many cases) fruitless for the rightsholders.

The e-commerce Directive seems to imply that the infringement concerns a concrete piece of information and requires knowledge of the exact location of the file. The Lcen provides for an optional notification procedure which sheds some light on the issue. Art. 6-I-5 Lcen states that knowledge of infringement is considered as acquired by the host provider when the rightsholder notifies it of a number of details concerning the infringement, including amongst others the description of the rights infringed and the precise location of the infringing file. This seems to speak in favour of a new notification for each concrete case of infringement.

A recent decision of the TGI Paris has dealt with this problem.[31] Plaintiffs (again the above mentioned comedian "Lafesse" together with other rightsholders) argued that DailyMotion is an editor and not a host provider since it decides on the size of files and modifies them by reencoding them. On top of that, DailyMotion makes editorial choices by imposing a certain architecture on the site and by publishing third-party

advertising for a profit. According to the court, the Lcen defines editors as those who decide on which content is to be made available to the public. Therefore, only the selection of content is an editorial decision. The modification of files done by DailyMotion is a simple technical operation and has no impact on the choice of content as such. The architecture of the site does not have an impact on the choice of content either. Besides, the Lcen does not forbid host providers to make money by publishing third-party advertisements as long as the advertisers do not decide on the content posted by users. However, the court enjoined DailyMotion to prevent further distribution of the works in question, so that DailyMotion will not be able to rely on the limitation of liability for host providers for further postings of the same content.

Two other recent decisions, while confirming the principle of no general obligation of monitoring content, have also introduced an obligation of monitoring *a priori* subsequent infringements of a particular work.

In the first case the plaintiff was the producer of a documentary film named *Les enfants perdus de tranquility Bay* ("Tranquility Bay" in its international version).[32] In the second case the plaintiffs were the producer and the distributor of a documentary film named *Le monde selon Bush* (The World according to Bush).[33] In both cases the films at stake had been made available by users of the UGC site Google Video,[34] were removed by Google after notification by the plaintiffs, but soon thereafter were again made available on the site. Therefore, the rightsholders sued Google for copyright infringement.

In both cases the court accepted the view that Google Video acts as a host provider and is therefore protected from liability by Art. 6-I-2 Lcen.

However, in the *Tranquility Bay* case the court decided that this limitation of liability applied only to the period between the first uploading of the infringing file by a user and the first removal of the file by the host provider. Any subsequent upload of the same copyrighted work engaged the liability of the host provider, because after having acquired knowledge of the infringing nature of the distribution of the film in question, the host provider was under an obligation to put in place any measure necessary to prevent any further illegal distribution of the film. According to the court, it makes no difference whether a different user subsequently uploads the film because the copyrights infringed are the same in all cases.

In the *Monde selon Bush* case the court followed the same line of argument, stating that the limitation of liability of Art. 6-I-2 Lcen has to be construed in a restrictive way, so that third party rights are not infringed. Even if French law does not recognise a general obligation of monitoring content, the court stated that ISPs have "a somewhat special obligation" of monitoring from the moment at which they acquire knowledge of the infringing content. Given that the film was still available on Google Video after the plaintiffs' notification, the court considered that the film had been made available to the public with the knowledge of the defendants. The court also stated that the defendants could not invoke a defence of technical impossibility of monitoring content on their site, since they actually use sophisticated technical means to trace down and block illegal content (e.g videos with paedophile content, inciting to hatred or glorifying crimes against humanity).

It has to be noted that these judgments have not set a binding precedent. Most probably we will have to wait until the *Cour de Cassation* (French supreme court) pronounces on one of these cases in order to have a final decision on this matter. Nevertheless, some lessons can already be learned: first of all, both the e-commerce Directive and the Lcen give rise to legal uncertainty and may need review. French courts seem to imply that a literal interpretation of the e-commerce Directive places too heavy a burden on the shoulders of rightsholders. Accordingly, judges may deem it necessary to go beyond a literal interpretation of the law especially in cases where bad faith or unjust enrichment seem obvious. Valgaeren and Roland consider that such judicial decisions *"appear to be "backwards", i.e. starting from a conviction that the platform provider should be held liable (which appears to be more definite if it derives revenues from the activity) and then crafting a "legal" reasoning to do so"*.[35] It could also be argued that the courts are applying common sense to legal norms that were adopted without having in mind UGC services.

3.1.2. United States - The Viacom Case

As in previous Internet copyright conundrums like Napster or Grokster, the fate of UGCs may be decided on the other side of the Atlantic, in a one billion dollar dispute between the US media conglomerate Viacom[36] and Google, the owner of YouTube. Viacom's complaint[37] seeks a declaration that YouTube's conduct wilfully infringes Plaintiffs' copyrights, a permanent injunction requiring the use of reasonable methodologies to prevent or limit infringement of Plaintiffs' copyrights, and statutory damages for YouTube's past and present wilful infringement, or actual damages plus profits, of at least USD one billion.

Viacom states that Google and YouTube have "sought its fortunes" by "brazenly exploiting the infringing potential of digital technology", harnessing technology to "wilfully infringe copyrights on a huge scale" and "profiting from the illegal conduct of others as well". Defendants "know and intend that much of the content on the YouTube site consists of unlicensed infringing copies of copyrighted works" and that they "actively engage in, promote and induce this infringement".

Viacom alleges that a vast amount of YouTube content consists of infringing copies of Plaintiffs' copyrighted works (including "SpongeBob SquarePants," "The Daily Show with Jon Stewart," "The Colbert Report," "South Park," "Ren & Stimpy," "MTV Unplugged," "An Inconvenient Truth," "Mean Girls"). Plaintiffs also accuse YouTube of preventing copyright owners from finding on the YouTube site all of the infringing works from which YouTube profits. Furthermore they claim that YouTube has deliberately chosen not to take reasonable precautions in order to prevent infringement on its site and deliberately withheld the application of available copyright protection measures in order to coerce rightsholders into granting YouTube licenses on favourable terms. Plaintiffs state further that YouTube has also implemented features that prevent copyright owners from finding infringing videos by searching the YouTube site, thereby hindering Plaintiffs' attempts to locate infringing videos in order to protect their rights.

According to Google, YouTube is protected by the "safe harbor" provisions introduced by the Digital Millennium Copyright Act (DMCA) to establish limitations on service providers' liability relating to material online.[38]

The safe harbor provisions of the DMCA are far more detailed and stricter than those of its European counterpart, the e-commerce Directive. The DMCA describes a service provider as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received" (17 U.S.C. section 512 (k) (1)). YouTube must meet a number of tests to qualify for protection from liability under the safe harbor. First of all, YouTube must not have actual knowledge of specific infringing material that is available through its service, and not be aware of circum-

stances from which infringing activity is apparent. This is very similar to the regulation included in the e-commerce Directive. However, according to a report from the US Senate,[39] a host provider would not qualify for the safe harbor if he had turned a blind eye to "red flags" of obvious infringement:

> "if the service provider becomes aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The 'red flag' test has both a subjective and an objective element. In determining whether the service provider was aware of a 'red flag,' the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a 'red flag' — in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances — an objective standard should be used.

This "red flag" test could be decisive in the Viacom case. It remains to be seen whether the courts consider that the many obvious cases of infringing activity on YouTube amount to a "red flag". Previous case law shows that general knowledge that infringing activity may be taking place does not amount to a red flag.[40]

As an additional requirement, YouTube must not receive a financial benefit directly attributable to the infringing activity, if the service provider has the right and ability to control the activity.

Furthermore, YouTube has to comply with notice and take-down procedures, and is obliged to adopt and implement a termination policy for repeat infringers and make it known to its users. Furthermore, it has to accommodate standard technical measures that are used by copyright owners to identify or protect copyrighted works. These measures must have been developed pursuant to a broad consensus of copyright owners and service providers, have to be available on reasonable and nondiscriminatory terms and must not impose substantial costs on service providers or substantial burdens on their systems or networks.

In the end, US judges will have to answer the same legal questions as their European colleagues: is YouTube a host provider? And if answered in the affirmative, should YouTube be held responsible for users' infringements of copyright?

As under European law, a more fundamental question poses itself: can UGC service providers, who benefit at least indirectly from acts of infringement, just sit and do nothing but reap the profits?

Michael Fricklas, general counsel of Viacom, obviously cannot agree with that stance: *"Putting the burden* [of monitoring infringement] *on the owners of creative works would require every copyright owner, big and small, to patrol the Web continually on an ever-burgeoning number of sites. That's hardly a workable or equitable solution.* [...] *Under the law, the obligation is right where it belongs: on the people who derive a benefit from the creative works and are in the position to keep infringement out of their businesses".*[41] Michael Kwun, Managing Counsel for Google, thinks differently: Rightsholders *"want to shirk the responsibility Congress gave them"* to *"identify infringing material they want removed". "Placing that burden on hosting platforms would turn the DMCA on its head".*[42]

The stakes are high, and some commentators feel that Viacom has resorted to litigation with the aim of having sanctioned by the courts an interpretation of the DMCA that would go beyond the letter of the law. As Lawrence Lessig puts it, lawyers *"get two bites at the copyright policy-making apple, one in Congress and one in the courts. But in Congress, you need hundreds of votes. In the courts, you need just five".*[43] Indeed, as we have seen in the French case law, courts tend to strike a balance between a strict application of the law and a more "common sense" approach. Other commentators are not so sure that the DMCA safe harbor protects YouTube from liability after all.[44]

In any event, a final decision in this case will shape the future not only of YouTube, but of UGC business models on a global scale.

3.2 Other Options

3.2.1. Licensing

UGC service providers need content. Big media need public attention. Usually the most popular content is in the hands of big media. UGC services attract millions of people. Anyone can do the maths. UGC service providers and content owners seem doomed to understand each other, but do they risk being uneasy bedfellows?

In fact, not all major content owners are at odds with YouTube: Google's UGC service provider has already struck partnership deals with a long list of content providers, including CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA and The Sundance Channel.[45] In Europe there are examples of license agreements between UGCs and collecting societies: e.g. in Germany between the music collecting society *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA) and Youtube,[46] in France between DailyMotion and the *Société Civile des Producteurs de Phonogrammes en France* (SPPF),[47] as well as further agreements with content owners. This list is not exhaustive, but has the merit of showing that cooperation between all involved parties is possible.

3.2.2. Filtering

In its Communication on Creative Content Online in the Single Market,[48] the European Commission launches a number of actions to support the development of innovative business models and the deployment of cross-border delivery of diverse online creative content services. Four main, horizontal challenges which merit action at EU-level are identified:

- Availability of creative content;
- Multi-territory licensing for creative content;
- Interoperability and transparency of Digital Rights Management systems (DRMs);
- Legal offers and piracy.

The Communication also lists some policy/regulatory issues for consultation. Concerning legal offers and piracy, the Commission amongst other things asks interested parties whether they consider that applying filtering measures would be an effective way of preventing online copyright infringements.

Could "the answer to the machine be in the machine" after all?[49] Could automatic filtering solve this problem?

That is at least what the current trend seems to be. Major copyright holders and UGC service providers have agreed on a set of collaborative principles[50] to protect the interests of both rightsholders and UGC service providers.[51] The principles call for a number of constructive and cooperative efforts by both parties based on filtering technology, including the following:

- Implementation of state of the art filtering technology;
- Upgrading technology when commercially reasonable;
- Cooperating to ensure that the technology is implemented in a manner that effectively balances legitimate interests, including fair use;
- Cooperation in developing procedures for promptly addressing claims that content was blocked in error;
- Regularly using the technology to remove infringing content that was uploaded before the technology could block it;
- Identification and removal of links to sites that are clearly dedicated to, and predominantly used for, the dissemination of infringing content.

In France, rightsholders in the audiovisual, cinema and music sectors, Internet access providers (IAPs) and public authorities have recently signed an agreement on cultural works and on combating piracy on the Internet.[52] As part of the agreement, host providers have undertaken to assess, select and promote systems for marking content (fingerprinting and watermarking) in collaboration with rightsholders.

As a result of these agreements, DailyMotion has recently announced[53] that it will use Signature,[54] a technology developed by the French *Institut national de l'Audiovisuel* (Ina), together with audio fingerprinting technology developed by Audible Magic.[55] This technology requires amongst other things that content owners provide DailyMotion with fingerprinted copies of the works they do not want to see included on DailyMotion.

YouTube is not part of any of the agreements mentioned supra but has also announced the introduction of similar technology and uses audio filtering tools developed by Audible Magic.[56] This move may have an impact on the Viacom lawsuit, even if the plaintiffs are not completely happy about this filtering solution. In fact, rightsholders are not sure whether the system actually works and do not like the idea of having to provide fingerprinted copies of their works to Google.[57]

But automatic filtering of content may also have unwanted negative effects, for example, blocking content that is actually legal because a copyright exception applies to that particular case.[58] This is a concern for the signatories of the *Fair Use Principles for User Generated Video Content*,[59] a group of university bodies and associations dealing with freedom of speech on the Internet.[60] These principles are "meant to provide concrete steps that they can and should take to minimize the unnecessary, collateral damage to fair use as they move forward with those efforts". As an example of possible fair use problems, the Electronic Frontier Foundation (one of the signatories) proposes on its website a *"Test Suite" of Fair Use Examples for Service Providers and Content Owners*. This is a set of video examples that illustrate how some user-generated content may be improperly blocked by automatic filtering of content based on fingerprinting.[61] Their view is that such videos should not be filtered out automatically, and that additional human review would be necessary in such cases. Moreover, human beings are not infallible in this field: Viacom had to admit recently that it made a mistake when asking Youtube to remove a parody clip that was allowed under the fair use doctrine. Viacom has also set up an "email hotline" for those who have their clips removed without merit.[62]

Moreover, it is not clear yet whether these filters will actually work, especially with older audiovisual content, or whether they can be circumvented by users (as happened with many DRMs solutions).[63] Only time will tell.

3.2.3. Legislative intervention: revision of the DMCA/e-commerce directive?

The case law mentioned supra illustrates that the provisions of the e-commerce Directive are not clear enough to deal with new business models. The Parliamentary Report on the application of the Lcen mentioned *supra* stated that the evolution of hosting activities requires urgent legislative intervention to clarify the liability regime of host providers. For its part, the French government is preparing a public hearing on digital issues towards the end of May 2008, and the legal uncertainties surrounding host providers could be part of the discussions.[64] But since the Lcen is a transposition of the e-commerce Directive, it is most likely that such a clarification of the liability regime of host providers will have to wait until the e-commerce Directive is revised. And that may take some time!

The DMCA has not been tested in courts yet, but it is known that major rightsholders are not very satisfied with the current legal setting.

4. In Search of a Common (Sense) Approach?

Only fifteen years ago, the European Organization for Nuclear Research (CERN) put in the public domain proprietary software that enabled the creation of the world wide web,[65] a groundbreaking development that has changed the way we communicate, inform and entertain ourselves. Now we have entered the so-called web 2.0,[66] the web of Wikipedia, blogs, the web of user-generated content. As incredible as it may appear, YouTube was founded just three years ago, and in such a short period of time, together with other UGC services, it has revolutionised the way we enjoy and share audiovisual content.

However, the creative revolution heralded by the web 2.0 cannot be led at the expense of creative people.

It is never a good idea to throw out the baby with the bath water. This applies to both rightsholders and UGC service providers. A disregard for the rights of creative people can discourage creativity, but overzealous protection of copyrighted works can also be detrimental to rightsholders.

Litigation is sometimes necessary, but it is not the only option. A new, commonly agreed approach might allow rightsholders to control which content is available on UGC services without placing on anybody an unreasonably heavy burden.

In other words, the future of content distribution requires a common approach that makes sense to all parties involved. Paraphrasing Philip Marlowe, let's hope that common sense does not speak too late.

1) http://video.google.com/
2) http://www.youtube.com/
3) http://www.dailymotion.com/
4) http://www.myspace.com/
5) http://www.flickr.com/
6) See e.g. http://www.flickr.com/photos/23067764@N05/
7) See e.g. http://www.dailymotion.com/AbendKomponist/
8) See e.g. *Soko, 22 ans, pas encore de disque mais phénomène mondial de la chanson*, available at: http://www.lemonde.fr/culture/article/2008/04/10/soko-22-ans-pas-encore-de-disque-mais-phenomene-mondial-de-la-chanson_1033118_3246.html?xtor=RSS-651865
9) For example, YouTube gives yearly awards to the best-voted videos on the site. See http://www.youtube.com/ytawards07winners
10) Again, MySpace is a good example. YouTube and DailyMotion have special channels for professional producers of audiovisual content. See e.g. Macha Séry, *Séance cinéma pour les meilleures créations de Dailymotion*, available at: http://www.lemonde.fr/cinema/article/2008/04/07/seance-cinema-pour-les-meilleures-creations-de-dailymotion_1031859_3476.html#ens_id=1026204
11) *More than 250 million Europeans regularly use Internet, says Commission's ICT Progress Report*, Press release of the European Commission IP/08/605, 18 April 2008, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/605&format=HTML&aged=0&language=EN&guiLanguage=en

12) Jonathan Leake, *Coming soon: superfast internet*, available at: http://www.timesonline.co.uk/tol/news/uk/science/article3689881.ece
13) For a detailed description of legislation concerning the liability of host providers see *infra*.
14) See *Le Parisien découvre la viralité*, available at: http://flipbook.blog.20minutes.fr/archive/2008/02/25/le-parisien-decouvre-la-viralite.html
15) See *TF1 réclame 100 millions d'euros de dommages à YouTube*, available at: http://www.zdnet.fr/actualites/internet/0,39020774,39380498,00.htm?xtor=EPR-106 and *TF1 veut régner sans partage*, available at: http://www.liberation.fr/actualite/ecrans/298133.FR.php
16) See *infra*.
17) In the Grokster case, the US Supreme Court introduced the doctrine of "inducement", a new basis for imposing liability on product and software providers whose end users commit copyright infringement. The Court defined inducement as "distribut[ing] 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". See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd, Case No. 04-480. (US Supreme Court 27 June 2005), available at: http://www.supremecourtus.gov/opinions/04pdf/04-480.pdf
18) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Official Journal L 178 , 17/07/2000 P. 0001 – 0016, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML
19) An information society service providing the transmission in a communication network of content provided for by the user of the service, or a service providing access to a communication network. Acts of mere conduit also include the automatic, intermediate and transient storage of the information transmitted when this takes place in order to carry out the transmission in the communication network.
20) Caching means the automatic, intermediate and temporary storage of information in a communication network, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request.
21) Member States are free to establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements (Art. 15.2 of the e-commerce Directive).
22) *Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique* (Act No. 2004-575 of 21 June 2004 on confidence in the digital economy - Lcen), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005789847&dateTexte=20080320
23) http://fr.myspace.com/
24) Decision of the *Tribunal de grande instance de Paris, Ordonnance de référé* of 22 June 2007, Jean Yves L. dit Lafesse v. Myspace, available at: http://www.legalis.net/jurisprudence-decision.php3?id_article=1965
25) The doctrine of parasitism is based on the principle of civil liability enshrined in Article 1382 of the French Code civil. It is related to the principle of unfair competition but does not require that the plaintiff and the defendant be in direct competition. See Xavier Linant de Bellfonds, op. cit., p 15.
26) Decision of the *Tribunal de grande instance de Paris* (3 e ch. sect. 2), 13 juillet 2007, C. Carion et Nord-Ouest Production c/ Dailymotion, available at: http://www.legalis.net/jurisprudence-decision.php3?id_article=1977
27) See e.g. Erik Valgaeren & Nicolas Roland, *YouTube and User-Generated Content Platform – New Kids on the Block?*, in IRIS Special, *Legal Aspects of Video on Demand*, European Audiovisual Observatory, 2007. See also Ronan Hardouin, *Observations sur les nouvelles obligations prétoriennes des hébergeurs*, available at: http://www.juriscom.net/documents/resp20071108.pdf
28) *Rapport d'information depose en application de l'article 86, alinéa 8, du Règlement par la Commission des affaires économiques, de l'environnement et du territoire sur la mise en application de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, et présenté par M. Jean Dionis du Séjour et Mme Corinne Erhel, Députés* (Report on the application of the Act No. 2004-575 of 21 June 2004 on confidence in the digital economy), available at: http://www.assemblee-nationale.fr/13/rap-info/i0627.asp
29) See also *infra* (legislative intervention).
30) See above *Le Parisien*.
31) Decision of the *Tribunal de grande instance de Paris, 3ème chambre - 1ère section*, 15 April 2008, Jean Yves Lafesse, Daniel L., Hervé L., David M., SARL L. Anonyme, SARL Editions Nouvelles Gilbert M. c/ SA Dailymotion, SA StudioCanal, SA Canal+, SASU TF1 Video, SARL Sacha Production, SAS Dune, available at: http://www.juriscom.net/documents/tgiparis20080415-Lafesse.pdf
32) Decision of the *Tribunal de grande instance de Paris*, 19 October 2007, SARL Zadig Production, Jean-Robert V. et Mathieu V. v. Sté Google Inc. et AFA, available at : http://www.juriscom.net/documents/tgiparis20071019.pdf
33) Decision of the *Tribunal de commerce de Paris (8ème ch.)*, 20 February 2008, Flach Film et autres v. Google France, Google Inc., available at: http://www.legalis.net/jurisprudence-decision.php3?id_article=2223
34) http://www.video.google.fr/
35) See Erik Valgaeren and Nicolas Roland, *YouTube and User-Generated Content Platform – New Kids on the Block?*, in *IRIS Special - Legal Aspects of Video on Demand*, European Audiovisual Observatory, 2007.
36) Viacom's brands include MTV Networks, BET Networks, Paramount Pictures, Paramount Home Entertainment and DreamWorks. See http://www.viacom.com/
37) United States District Court for the Southern District of New York, Complaint for Declaratory and Injunctive Relief and Damages (Viacom International Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, And Black Entertainment Television Llc, Plaintiffs, v. Youtube, Inc., Youtube, Llc, and Google Inc., Defendants), available at: http://online.wsj.com/public/resources/documents/ViacomYouTubeComplaint3-12-07.pdf
38) See 17 U.S.C. section 512, available at: http://www.law.cornell.edu/uscode/17/usc_sup_01_17.html
39) Report of the Senate Committee on the Judiciary, 11 May 1998, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_reports&docid=f:sr190.105.pdf
40) See Erik Valgaeren and Nicolas Roland, *op.cit.*
41) Michael Fricklas, *Our Case Against YouTube*, available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301451.html
42) Michael Kwun, *An End Run on Copyright Law*, available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032802057.html
43) See Lawrence Lessig, *Make Way for Copyright Chaos*, available at http://www.nytimes.com/2007/03/18/opinion/18lessig.html
44) See e.g Richard Neff and Kenneth Basin, *YouTube litigation: Google's tough DMCA tests*, available at: http://www.hollywoodreporter.com/hr/content_display/business/law/e3iec095f4fe618561a2bc8cc0f5c85bc54 (subscription to HollywoodReporter.com required)
45) See http://www.youtube.com/t/about
46) See *GEMA und YouTube erzielen entscheidende Einigung*, available at: http://www.gema.de/presse/pressemitteilungen/pressemitteilung/?tx_ttnews%5Btt_news%5D=668&tx_ttnews%5BbackPid%5D=73&cHash=d91e3a4737
47) See *Dailymotion : partenariat pour rémunérer les producteurs de contenus*, available at: http://www.vod-fr.com/133-dailymotion-partenariat-pour-rmunrer-les-producteurs-de-contenus.html
48) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market {SEC(2007) 1710} - COM(2007) 836 final, 3. January 2008, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0836:FIN:EN:PDF
49) See Charles Clark, *The Answer to the Machine is in the Machine*, in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague: Kluwer Law International, p. 139.
50) Principles for User Generated Content Services, available at: http://www.ugcprinciples.com/
51) The companies supporting these principles include CBS Corp., Dailymotion, Fox Entertainment Group, Microsoft Corp., MySpace, NBC Universal, Veoh Networks Inc., Viacom Inc. and The Walt Disney Company.
52) *Accord pour le développement et la protection des œuvres et programmes culturels sur les nouveaux réseaux*, available at: http://www.culture.gouv.fr/culture/actualites/conferen/albanel/accordolivennes.htm
53) See *Dailymotion : la technologie de filtrage Signature entre en scène*, available at: http://www.zdnet.fr/actualites/internet/0,39020774,39379059,00.htm
54) For more information on Signature see: http://www.ina.fr/sites/ina/medias/upload/to-know-ina/ina-signature.pdf
55) See http://www.audiblemagic.com/
56) See *No more copyrighted clips on YouTube*, available at: http://www.theage.com.au/news/World/No-more-copyrighted-clips-on-YouTube/2007/10/16/1192300732429.html
57) See Miguel Helft, *Google Takes Step on Video Copyrights*, available at: http://www.nytimes.com/2007/10/16/business/16video.html
58) See e.g. *YouTube's Copyright Filter: New Hurdle for Fair Use?*, available at: http://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use
59) Fair *Use Principles for User Generated Video Content*, available at: http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen
60) These principles have been endorsed by the Electronic Frontier Foundation, the Center for Social Media, School of Communications, American University, the Program on Information Justice and Intellectual Property, Washington College of Law, American University, Public Knowledge, the Berkman Center for Internet and Society at Harvard Law School, and the ACLU of Northern California.
61) See A *"Test Suite" of Fair Use Examples for Service Providers and Content Owners*, available at: http://www.eff.org/pages/UGC-test-suite
62) See Stephen Colbert *Parodies on YouTube = Legal*, available at: http://mashable.com/2007/04/23/stephen-colbert-parodies-on-youtube-legal/
63) See Francisco Javier Cabrera Blázquez, *Digital Rights Management systems (DRMs): Recent Developments in Europe*, IRIS *plus* 2007-1, European Audiovisual Observatory, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus1_2007.pdf.en
64) See Economie numérique : *Eric Besson prêt à rediscuter du statut des hébergeurs*, available at : http://www.zdnet.fr/actualites/internet/0,39020774,39380497,00.htm
65) See *Dr James Gillies, The World Wide Web turns 15 (again)*, available at: http://news.bbc.co.uk/2/hi/technology/7375703.stm
66) See http://en.wikipedia.org/wiki/Web_2.0