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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ROBERT TUR d/b/a LOS ANGELES )  
NEWS SERVICE, )

CV 06-4436 FMC (AJWx)

Plaintiff,

ORDER DENYING DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT UNDER SECTION  
512(C) OF THE DMCA

vs.

YOUTUBE, INC.

#82

Defendant.

This matter is before the Court on Defendant's Motion for Partial Summary Judgment Under Section 512(c) of the DMCA (docket no. 28), filed on January 8, 2007. The Motion came on regularly for hearing before the Court on June 18, 2007. The parties were in possession of the Court's Tentative Ruling. Upon consideration of the parties' submissions, brief by amicus, the arguments of counsel, and the case file, the Court hereby DENIES Defendant's Motion.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff Robert Tur ("Plaintiff" or "Tur") is an award-winning helicopter pilot and journalist who does business under the name Los Angeles News Service ("LANS"). (Pl.'s Stmt. of Genuine Issues ¶ 19; Def.'s Stmt. of Genuine Issues ¶ 1.) LANS licenses and sells news video, videotapes, photographs, and

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1 other products used by other news operations for all media, including television,  
2 cable, motion pictures, the Internet, and print media. (Def.'s Stmt. of Genuine  
3 Issues ¶ 3.) Tur owns copyrights in certain videotaped footage of newsworthy  
4 events which took place in the early 1990s, including footage of the beating of  
5 truck driver Reginald Denny at the commencement of the infamous 1992 Los  
6 Angeles riots. (Decl. of Tur ¶ 4; Def.'s Stmt. of Genuine Issues ¶ 5.)

7 Defendant YouTube, Inc. ("Defendant" or "YouTube") operates a website  
8 where users may post audio-visual content for viewing via "streaming." (Def.'s  
9 Stmt. of Genuine Issues ¶ 4.)<sup>1</sup> The website currently contains more than ten  
10 million video clips and is accessed by tens of millions of users a month. (Decl.  
11 of Chen ¶ 3; Pl.'s Stmt. of Genuine Issues ¶ 2.) YouTube does not charge its  
12 users to upload or view clips. (Decl. of Chen ¶ 3, Pl.'s Stmt. of Genuine Issues ¶  
13 4.)

14 On July 14, 2006, Tur filed this action for copyright infringement and  
15 unfair competition against YouTube, claiming that clips of his copyrighted video  
16 footage had been uploaded to the website and viewed by and/or distributed to the  
17 public without his authorization. Tur seeks both damages and injunctive relief.  
18 YouTube filed its Answer on October 11, 2006.

19 YouTube seeks a determination that it qualifies for safe harbor protection  
20 under the Digital Millennium Copyright Act ("DMCA") codified at 17 U.S.C. §  
21 512(c), based on what it purports to be its definitive ability to satisfy all of the  
22 requirements of the statutory scheme.

### 23 STANDARD OF LAW

24 Summary judgment is appropriate if there is no genuine issue of material

25 \_\_\_\_\_  
26 <sup>1</sup>As YouTube's founder explains, this content includes home-made footage of all sorts,  
27 from stand-up routines to video diaries, delivery-room footage, amateur musical performances,  
and eyewitness footage from Hurricane Katrina and the Iraq War. Decl. of Chen at ¶ 6 .

1 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.  
2 P. 56(c). The moving party bears the initial responsibility of informing the court  
3 of the basis of its motion, and identifying those portions of “pleadings,  
4 depositions, answers to interrogatories, and admissions on file, together with the  
5 affidavits, if any,” which it believes demonstrate the absence of a genuine issue  
6 of material fact.” *Celotex Corp v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91  
7 L. Ed. 2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). Where the nonmoving  
8 party will have the burden of proof at trial, the movant can prevail merely by  
9 pointing out that there is an absence of evidence to support the nonmoving  
10 party’s case. *See id.*; *see also Nissan Fire & Marine Ins. Co. v. Fritz*  
11 *Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (“In order to carry its  
12 burden of production, the moving party must either produce evidence negating an  
13 essential element of the nonmoving party’s claim or defense or show that the  
14 nonmoving party does not have enough evidence of an essential element to carry  
15 its burden of persuasion at trial.”). If the moving party meets its initial burden,  
16 the nonmoving party must then set forth, by affidavit or as otherwise provided in  
17 Rule 56, “specific facts showing that there is a genuine issue for trial.” Fed. R.  
18 Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct.  
19 2505, 91 L. Ed. 2d 202 (1986).

20 The substantive law governing a claim determines whether a fact is  
21 material. *T.W. Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630  
22 (9th Cir. 1987); *see also Long v. County of Los Angeles*, 442 F.3d 1178, 1185  
23 (9th Cir. 2006) (“Material facts are those which may affect the outcome of the  
24 case.”) (internal citations omitted). In judging evidence at the summary  
25 judgment stage, the Court does not make credibility determinations or weigh  
26 conflicting evidence and draws all reasonable inferences in the light most

1 favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31; *see also*  
 2 *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995). The evidence  
 3 presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Mere  
 4 disagreement or the bald assertion that a genuine issue of material fact exists  
 5 does not preclude the use of summary judgment. *Harper v. Wallingford*, 877  
 6 F.2d 728, 731 (9th Cir. 1989).

## 7 DISCUSSION

### 8 I. The DMCA and Congressional "Safe Harbors"

9 Title II of the DMCA, also known as the Online Copyright Infringement  
 10 Liability Limitation Act ("OCILLA"), was enacted in 1998 "to facilitate  
 11 cooperation among Internet service providers and copyright owners 'to detect and  
 12 deal with copyright infringements that take place in the digital networked  
 13 environment.'" *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)  
 14 (quoting S. Rep. 105-190, at 20 (1998); H.R. Rep. 105-551, pt. 2, at 49 (1998)).  
 15 It provides for four distinct "safe harbors," under which the liability of an online  
 16 service provider may be strictly limited to prospective injunctive relief, in the  
 17 form of blocking ongoing access to the infringing content. 17 U.S.C. §§ 512 (a)-  
 18 (d), (j).<sup>2</sup> As the Ninth and other judicial circuits have recently noted, the  
 19 OCILLA does not purport to create separate standards for assessing claims of  
 20 copyright infringement against online entities, but rather provides a partial  
 21 defense thereto upon a showing that all of the statutory prerequisites (discussed  
 22 below) are met. *See Ellison*, 357 F.3d at 1077 ("Far short of adopting enhanced  
 23 or wholly new standards to evaluate claims of copyright infringement against

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24  
 25 <sup>2</sup>The four "safe harbor" provisions are directed to (1) transitory digital network  
 26 communications, 17 U.S.C. § 512(a); (2) system caching, 17 U.S.C. § 512(b); (3) information  
 27 residing on systems or networks at the direction of users, 17 U.S.C. §512(c); (4) information  
 location tools, 17 U.S.C. §512(d).

1 online service providers, Congress provided that OCILLA's 'limitations of  
2 liability apply if the provider is found to be liable *under existing principles of*  
3 *law.*'") (quoting S. Rep. 105-190, at 19) (emphasis in *Ellison*)); *CoStar Group,*  
4 *Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) ("The DMCA has merely  
5 added a second step to assessing infringement liability for Internet service  
6 providers, after it is determined whether they are infringers in the first place under  
7 the preexisting Copyright Act.").

## 8 **II. YouTube's Motion**

9 YouTube's ultimate eligibility for "safe harbor" protection depends upon  
10 whether YouTube can prove that it satisfies certain threshold elements common  
11 to all of the safe harbor provisions of 17 U.S.C. § 512, as well as the specific  
12 elements of subsection (c). *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 481 F.3d  
13 751, 757 (9th Cir. 2007) ("To be eligible for any of the four safe harbors at §§  
14 512(a)-(d), a service provider must first meet the threshold conditions set out in §  
15 512(i) . . ."). Accordingly, YouTube must prove that:

- 16 (1) it has adopted and reasonably implemented a termination policy for  
17 subscribers and account holders who are repeat infringers, 17 U.S.C.  
18 § 521(i)(1)(A);
- 19 (2) accommodates and does not interfere with "standard technical  
20 measures" that copyright owners use to protect their works, 17  
21 U.S.C. § 512(i)(1)(B);
- 22 (3) its infringement is "by reason of the storage at the direction of a user  
23 of material that resides on a system or network controlled or operated  
24 by or for the service provider," 17 U.S.C. § 512(c)(1);
- 25 (4) it lacked actual knowledge of the infringing material or was not  
26 aware of facts or circumstances from which infringing activity was  
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1           apparent on its system or network and/or acted expeditiously to  
2           remove or disable access to the material upon obtaining such  
3           knowledge or awareness, 17 U.S.C. § 512(c)(1)(A)(i)-(iii);

4           (5) it did “not receive a financial benefit directly attributable to the  
5           infringing activity,” if it had “the right and ability to control such  
6           activity,” 17 U.S.C. § 512(c)(1)(B);

7           (6) it responded expeditiously to remove or disable access to infringing  
8           material upon notification from the copyright owner, 17 U.S.C. §  
9           512(c)(1)(C); and

10          (7) it has properly designated an agent to receive such notification, 17  
11          U.S.C. § 512(c)(2).

12           With regard to 17 U.S.C. § 512(c)(1)(B), YouTube maintains it does not  
13           receive a financial benefit directly attributable to the allegedly infringing activity  
14           and that it does not have the right or ability to control said activity. As the statute  
15           makes clear, a provider’s receipt of a financial benefit is only implicated where  
16           the provider also “has the right and ability to control the infringing activity.” 17  
17           U.S.C. § 512(c)(1)(B), *See Perfect 10, Inc. v. CCBill LLC.*, 2007 WL 1557475 at  
18           \*11. As such, if YouTube does not have the right and ability to control the  
19           alleged infringing activity, the Court need not engage in the “financial benefit  
20           analysis.”

21           The ‘right and ability to control’ infringing activity, as the concept is used  
22           in the DMCA, has been held to mean “something more” than just the ability of a  
23           service provider to remove or block access to materials posted on its website or  
24           stored in its system.” *Hendrickson v. Ebay, Inc.*, 165 F. Supp. 2d 1082, 1093 (C.  
25           D. Cal. 2001); *see also Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213F.Supp.2d  
26           1146, 1183 (C.D. Cal. 2002); *see also Corbis Corp. v. Amazon.com, Inc.*, 351  
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1 F.Supp.2d 1090 (W.D. Wash. 2004). Rather, the requirement presupposes some  
2 antecedent ability to limit or filter copyrighted material. *Fonavisa* at 263; see  
3 also *MGM, Inc. v. Grockster*, 545 U.S. 913, 926.

4 There is insufficient evidence regarding YouTube's knowledge and ability  
5 to exercise control over the infringing activity on its site. There is clearly a  
6 significant amount of maintenance and management that YouTube exerts over its  
7 website, but the nature and extent of that management is unclear. YouTube also  
8 asserts that while it is able to remove clips once they have been uploaded and  
9 flagged as infringing, its system does not have the technical capabilities needed to  
10 detect and prescreen allegedly infringing videotapes. However, there is  
11 insufficient evidence before the Court concerning the process undertaken by  
12 YouTube from the time a user submits a video clip to the point of display on the  
13 YouTube website. Thus, there is insufficient evidence from which the Court can  
14 determine YouTube's right and ability to control the infringing activity.

15 **III. CONCLUSION**

16 Accordingly, the Court DENIES YouTube's motion.

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18 **IT IS SO ORDERED.**

19 June 20, 2007



20  
21 FLORENCE-MARIE COOPER, Judge  
22 UNITED STATES DISTRICT COURT  
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