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8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

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

CV 06-4436 FMC (AJWx)

11)
 12 Plaintiff,)

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

13 vs.)

14 YOUTUBE, INC.)

#82

15 Defendant.)
 16)
 17)

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

24 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

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

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

YOUTUBE, INC.

Defendant.

CV 06-4436 FMC (AJWx)

ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT UNDER SECTION
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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

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.)¹ 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 ¹As 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).² 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

24
25 ²The 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
27

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.

17
18 **IT IS SO ORDERED.**

19 June 20, 2007

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