

COMMENT

DANGER IN THE DMCA SAFE HARBORS: THE NEED TO NARROW WHAT CONSTITUTES RED FLAG KNOWLEDGE

INTRODUCTION

In 1998 Congress enacted the Digital Millennium Copyright Act (“DMCA”) in order to “provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online.”¹ The DMCA safe harbors protect Internet and online service providers such as YouTube from secondary copyright infringement liability.² The DMCA, however, does not provide full protection as certain caveats greatly reduce the safe harbor protection, disqualifying a service provider from protection if it is “aware of facts or circumstances from which infringing activity is apparent.”³ Courts and commentators refer to this level of awareness as “red flag” knowledge.⁴ If the service provider obtains red flag knowledge of infringing activity, it must act “expeditiously to remove, or disable access to, the material,” or be subject to liability.⁵ As the DMCA currently stands, the red flag knowledge provision constricts safe harbor protection to the point where online service providers are being held liable when they have actively attempted to comply with the statute. Because compliance with the law in its current form is so difficult, the open accessibility of video-sharing websites is in jeopardy.

1. S. REP. NO. 105-190, at 2 (1998).

2. *See* 17 U.S.C. § 512 (2012).

3. *Id.* § 512(e)(1)(A)(ii).

4. *See, e.g.,* *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (defining “red flag” knowledge).

5. § 512(e)(1)(A)(iii).

Since the DMCA was enacted, “certain common activities of service providers” have evolved with the rising popularity of video-sharing websites, such as YouTube and Vimeo.⁶ Large scale copyright infringement is active on these websites, and the music industry continues to take action.⁷ In the past, record labels have successfully sued peer-to-peer networks such as Napster for copyright infringement in an effort to fight the effect that the digitization of music has had on the industry’s revenue.⁸ In recent years, record labels have sued video-sharing websites for vicarious and contributory copyright infringement, and, in many instances, for storing users’ *original content* that only features copyrighted music as the soundtrack.⁹ Record companies argue that these service providers must be disqualified from safe harbor protection because they have red flag knowledge of infringement in these videos.¹⁰

Video-sharing websites are asserting their safe harbor protection by demonstrating that they lacked awareness of facts or circumstances suggesting infringing activity in these videos.¹¹ Service providers have had trouble asserting this defense when there is evidence that their employees have watched a specific infringing video that contains a popular song, causing courts to determine that by watching a video that contains a popular song, the service provider has obtained red flag knowledge because it is clear that the user who uploaded the video has infringed.¹² This determination by the courts makes compliance difficult because it is hard for service providers to determine if “infringing activity is

6. S. REP. NO. 105-190, at 19.

7. See, e.g., *Viacom*, 676 F.3d at 33 (“The class plaintiffs similarly claim that Credit Suisse, acting as financial advisor to Google, estimated that more than 60% of YouTube’s content was ‘premium’ copyrighted content—and that only 10% of the premium content was authorized.”).

8. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–21 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001) (involving suits brought against peer-to-peer networks).

9. See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 542 (S.D.N.Y. 2013) (involving suits brought against video-sharing websites). “Original content” is content created entirely by the user.

10. See § 512(c)(1)(A)(ii); *Capitol Records*, 972 F. Supp. 2d at 542.

11. See, e.g., *Capitol Records*, 972 F. Supp. 2d at 542–43 (“[T]hey argue . . . the infringing nature of the videos was not ‘objectively obvious to a reasonable person,’ as . . . required to support a finding of red flag knowledge.”) (internal quotations omitted).

12. See, e.g., *id.* at 549.

apparent” when they only watch the video. A video could very easily be fair use, which is a defense to copyright infringement that cannot be easily determined by simply viewing the video.¹³

The current state of the DMCA makes compliance very difficult in this situation. To ease compliance with the DMCA, Congress needs to enact legislation which declares that awareness of material that contains any original content, even if the material also contains what appears to be the use of another’s copyright, does not amount to “aware[ness] of facts or circumstances from which infringing activity is apparent.”¹⁴ This expansion of the DMCA safe harbors would better protect service providers who are currently attempting to comply with the statute, but are finding it incredibly difficult to manage. Both YouTube and Vimeo condemn copyright infringement, and Vimeo in particular has actively attempted to deter copyright infringement on its own accord; however, Vimeo has still found itself potentially liable because the narrow DMCA safe harbors make compliance a very difficult task.¹⁵

This comment considers recent cases interpreting the DMCA and urges Congress to expand the protection of service providers through the DMCA safe harbors. The comment proceeds in six parts. Part I explains contributory and vicarious liability, the applicable sections of the DMCA to this comment, and the fair use doctrine. Part II provides a brief overview of video-sharing websites. It further observes the impact that video-sharing websites have had on digital media, focusing on the impact on the music industry. Part III looks at the recent cases interpreting the DMCA’s red flag exception to safe harbor protection, as well as a case that demonstrates some ramifications of over-enforcement by copyright holders. Part IV examines the problem with the current interpretation of the red flag provision that leads to service providers’ greater exposure to liability. Part V argues that Congress needs to enact legislation declaring that awareness of mate-

13. See § 107 (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”); see also H.R. REP. NO. 105-551, pt. 2, at 57–58 (1998) (discussing the nonobviousness of fair use and other copyright infringement defenses with regard to photographs); *infra* Part I.C.

14. § 512(c)(1)(A)(ii).

15. See *infra* Parts II.A, III.B.

rial that contains any original content, even if the material also contains what appears to be the use of another's copyright, does not amount to "aware[ness] of facts or circumstances from which infringing activity is apparent."¹⁶ Finally, this comment concludes by explaining how this revision will affect service providers and copyright owners, and why this change is necessary.

I. SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT AND THE PROTECTIONS AVAILABLE

A. *Secondary Liability*

In order to receive copyright protection, the author's work must meet two threshold requirements: originality and fixation.¹⁷ These threshold requirements are set out in 17 U.S.C. § 102(a), which states: "Copyright protection subsists . . . in *original* works of authorship *fixed* in any tangible medium of expression . . ."¹⁸ Once these two requirements are met, copyright protection secures exclusive rights in the work for the copyright owner.¹⁹ These rights include the right to reproduction, preparation of derivative works, distribution to the public, public performance, and public display.²⁰ When someone violates one of these exclusive rights, that

16. § 512(e)(1)(A)(ii).

17. *See id.* § 102(a).

18. *Id.* (emphasis added).

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citations omitted). If the work is original, it receives protection once it is fixed. *See* § 102(a). A work is "fixed . . . when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *See id.* § 101 (defining "fixed").

19. § 102(a); *see id.* § 106. Exclusive rights are not secured if the work falls under one of the categories listed in § 102(b), which copyright law has specifically excluded from protection. *Id.* § 102(b).

20. § 106.

person has directly infringed the author's copyright.²¹ In order to prove direct infringement, the author must demonstrate that: (1) the author owned the copyright in the allegedly infringing material and that (2) the alleged infringer violated one of the § 106 rights granted to the copyright holder or author.²²

However, sometimes there are multiple entities involved in infringement. Frequently, a separate entity provides to the direct infringer the device or ability to copy the work, and it is difficult for the author to enforce his rights in the protected work against the direct infringer.²³ The author of the infringed copyright can sue the entity that provides the means to infringe under the doctrine of secondary liability.²⁴ Secondary liability is split into two doctrines: contributory infringement and vicarious infringement.²⁵

When an entity intentionally induces or encourages direct infringement, that entity can be held liable for contributory infringement.²⁶ However, this doctrine is limited. Whenever a product that induces direct infringement is capable of a substantial noninfringing use, the distributor of that product cannot be held contributorily liable for a third party's infringing use of that product unless the distributor's object is promoting the product's use to infringe the copyright.²⁷ When an entity profits from the direct infringement of another and has the ability to control the direct infringer's activity, that entity can be held liable for vicarious infringement.²⁸ The theory of vicarious liability was developed out of the agency principle of respondeat superior—that an employer

21. *Id.* § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 . . . is an infringer of the copyright or right of the author, as the case may be."); see *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007) (using the term "direct infringement").

22. *Perfect 10*, 508 F.3d at 1159 (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)).

23. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005).

24. See *id.* at 930.

25. See *id.* ("Although the Copyright Act does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law.") (citations omitted) (internal quotation marks omitted).

26. *Id.*

27. *Id.* at 936–37; see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

28. See *Grokster*, 545 U.S. at 930; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996).

can be held liable for the actions of its employee.²⁹ Nevertheless, in copyright law, vicarious liability extends beyond the employer-employee relationship if the defendant directly profits from the direct infringement and has the right and ability to control the direct infringer's activity.³⁰

B. *The DMCA Safe Harbors*

In 1998 Congress recognized that with the growth of the Internet, Internet service providers had become subject to copyright infringement liability, with several cases approaching the issue from the standpoint of contributory and vicarious infringement.³¹ Instead of statutorily altering the existing copyright laws, Congress created "safe harbors" for Internet service providers in order to protect those providers from liability when users of their service directly infringed copyrighted material.³² Congress accomplished this through Title II of the Digital Millennium Copyright Act, codified at 17 U.S.C. § 512.³³ In the bill's legislative history, Congress noted that

Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's [sic] to the introduction of the VCR in the 1980's [sic]. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.³⁴

With the passing of the DMCA in 1998, Congress provided protection against copyright liability for Internet service providers to make them "safe places to disseminate" copyrighted materials.³⁵

The DMCA defines "service provider" as "a provider of online services or network access, or the operator of facilities therefor."³⁶

29. *Fonovisa*, 76 F.3d at 262.

30. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (citations omitted).

31. *See* S. REP. NO. 105-190, at 19 (1998).

32. *Id.*

33. *Id.* at 2; *see* U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: COPYRIGHT OFFICE SUMMARY 8 (1998) ("Title II of the DMCA adds a new section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online service providers.").

34. S. REP. NO. 105-190, at 2.

35. *Id.*

36. 17 U.S.C. § 512(k)(1)(B) (2012).

This definition is broad, and courts have interpreted “service provider” to cover a wide variety of online platforms, including, but not limited to, peer-to-peer networks, drop-boxes, video-service providers, MP3 sharing websites, and BitTorrent sites.³⁷

The DMCA provides “safe harbors” for service providers.³⁸ In particular, § 512(c) provides that “[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider,” subject to certain exceptions.³⁹ One of these exceptions is a knowledge exception, which requires that the service provider not have *actual* knowledge that there is infringing material on its network in order to qualify for safe harbor protection.⁴⁰ The other exception that greatly reduces the safe harbor protection imputes knowledge in the absence of *actual* knowledge. The statute imputes knowledge if the service provider is “aware of facts or circumstances from which infringing activity is apparent.”⁴¹ The common name for this type of knowledge is “red flag” knowledge.⁴² Copyright owners may also issue a takedown notice to service providers, notifying them of infringing material on their network.⁴³ If the service provider obtains actual knowledge, “red flag knowledge,” or notification of infringing material, it must act “expeditiously” to remove the material or disable access to it.⁴⁴

The DMCA also includes a provision under § 512(m) ensuring “[n]othing in this section shall be construed to condition the applicability of [the safe harbors] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity”⁴⁵ If service providers had to seek out infringing activity in order to maintain protection, there would be no point in

37. See Edward McCoyd, *Internet Piracy Developments: Recent Case Law, Voluntary Collaborative Solutions, and Proposals for Additional Remedies*, 25 N.Y. ST. B.A. ENT., ARTS & SPORTS L.J. 43, 43–46 (2014).

38. S. REP. NO. 105-190, at 19 (using the term “safe harbors” to define the protections offered by the DMCA).

39. § 512(c)(1).

40. *Id.* § 512(c)(1)(A)(i).

41. *Id.* § 512(c)(1)(A)(ii).

42. See S. REP. NO. 105-190, at 44.

43. See § 512(c)(3).

44. See *id.* §§ 512(c)(1)(A)(iii), (c)(1)(C).

45. *Id.* § 512(m).

the existence of the DMCA safe harbors, because service providers would already be forced to remove the content that the safe harbors were designed to absolve liability. With courts implementing common law doctrine, this provision is an important protection for service providers.⁴⁶

Another important provision in the DMCA that enhances protection for service providers is § 512(f), which states:

Any person who knowingly materially misrepresents under this section . . . that material or activity is infringing . . . shall be liable for damages . . . incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing⁴⁷

Section 512(f) gives the user of a service provider a cause of action against a copyright owner who knowingly and falsely claims that the user has infringed on the owner's copyright in order to have the service provider remove the user's work.⁴⁸ This helps keep copyright owners honest by exposing them to liability if they demand service providers to remove works that are not infringing.⁴⁹

C. Fair Use

The fair use doctrine permits one to use another's copyrighted work without the copyright owner's consent if certain conditions are satisfied.⁵⁰ Fair use allows authors to develop new ideas that build on earlier ones, avoiding rigid application of the copyright statute when these new works borrow from earlier works.⁵¹ The fair use doctrine developed out of the awareness that "there are,

46. *See* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) ("Section 512(m) is explicit: DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider. For that reason, § 512(m) is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring. . . . Because the statute does not speak directly to the willful blindness doctrine, § 512(m) limits—but does not abrogate—the doctrine." (quotation marks omitted)).

47. § 512(f).

48. *See, e.g.,* *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673, at *6–7 (N.D. Cal. Jan. 24, 2013).

49. *See, e.g., id.*

50. *See* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).

51. *See id.*

and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.”⁵²

Congress eventually codified the fair use doctrine at 17 U.S.C. § 107, essentially adopting Justice Joseph Story’s interpretation of the doctrine.⁵³ According to Justice Story, to determine fair use, one must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”⁵⁴ Under the codification of fair use in 17 U.S.C. § 107, the nonexclusive factors to be considered in determining if a work is fair use are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵⁵

However, the codification of fair use was not intended to rigidify the doctrine.⁵⁶ Application of the doctrine is very flexible and is determined on a case-by-case basis.⁵⁷ This flexibility is good for defendants because the doctrine can cover many different situations. However, this flexibility can cause problems for a defendant who will not know whether a judge will later rule that his work does not constitute fair use, in the event of an infringement suit.⁵⁸ The unpredictability of fair use makes it difficult to rely on from an *ex ante* perspective in deciding whether one should obtain a license or whether a service provider should remove a work from its website. It is not until after the plaintiff in a copyright suit proves the elements of infringement that the defendant may

52. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

53. *Id.* at 576.

54. *Id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

55. 17 U.S.C. § 107 (2012).

56. *See Campbell*, 510 U.S. at 577 (“[Fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

57. *See id.*

58. *See Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (“[Fair use] is entirely equitable and is so flexible as virtually to defy definition.”).

attempt to avoid liability by arguing that its use of the copyrighted work falls within the fair use doctrine.⁵⁹

II. VIDEO-SHARING WEBSITES AND THEIR IMPACT

A. *How Video-Sharing Websites Function*

In February 2005, Chad Hurley, Steve Chen, and Jawed Karim launched YouTube, one of the most popular websites on the Internet today.⁶⁰ Although it was not the first video-sharing website,⁶¹ YouTube's easy-to-use uploading platform caused its popularity to rise at an astounding rate.⁶² Since the launch of YouTube, other video-sharing websites such as Vimeo have also become widely successful.⁶³

Today, in order for users to post a video on a video-sharing website, a user simply has to create an account, free of charge, and then upload whatever video the user chooses. With YouTube, this is as simple as dragging and dropping the video on the page with the user's mouse.⁶⁴

Video-sharing websites allow anyone with a camera and a computer to video-record a segment and upload it for the world to see. Users can create their own videos entirely from scratch or they can compile their own content with copyrighted works. Because the service provider does not screen videos at the upload stage, users also have the ability to upload movies, music videos, television shows, sports broadcasts, and any other type of copyrighted material, even though video-sharing websites frown upon this type of behavior.⁶⁵ Once the user uploads the video, anyone

59. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

60. Laura Fitzpatrick, *Brief History of YouTube*, TIME (May 31, 2010), <http://content.time.com/time/magazine/article/0,9171,1990787,00.html>, [<http://perma.cc/QNZ4-HM2W>].

61. See Andy Plesser, *First Video Sharing Site Paved the Way for YouTube—ShareYourWorld.com Was There First to Launch Ten Years Back*, BEET.TV (July 7, 2007, 1:50 PM), <http://www.beet.tv/2007/07/first-video-sha.html>, [<http://perma.cc/7KPP-N8B9>].

62. See Fitzpatrick, *supra* note 60.

63. See *Top 15 Most Popular Video Websites*, EBIZMBA, (Sept. 18, 2014), <http://ebizmba.com/articles/video-websites>, [<http://perma.cc/6THX-QJMH>].

64. See *Upload*, YOUTUBE, <http://www.youtube.com/upload>, [<http://perma.cc/EY8G-C9FU>] [hereinafter *YouTube Upload*] (last visited Nov. 24, 2014).

65. See, e.g., *id.*; see also Amir Efrati, *Reappearing on YouTube: Illegal Movie Uploads*, WALL ST. J. (Feb. 8, 2013, 5:04 AM), <http://online.wsj.com/news/articles/SB10001424127887324906004578290321884631206>, [<http://perma.cc/A349-KJVJ>]. YouTube has re-

with access to the video-sharing website can watch it.⁶⁶ One important aspect of video-sharing websites such as YouTube and Vimeo is that even though the videos are available to all, most cannot be downloaded or copied for further distribution.⁶⁷ The only access users have to most videos is to watch them at the specific URL address that the video-sharing website assigns to each video.

When uploading a video to YouTube, YouTube provides a message that states: “By submitting your videos to YouTube, you acknowledge that you agree to YouTube’s Terms of Service and Community Guidelines. Please be sure not to violate others’ copyright or privacy rights.”⁶⁸ Moreover, Vimeo provides a message which is more demanding, requiring actual creation of the video and not just permission, stating:

“Please follow these rules:

1. Upload only videos *you created yourself*.
2. Certain types of content are not allowed on Vimeo.
3. Commercial and business videos can only be uploaded with Vimeo PRO.”⁶⁹

Both websites allow the user to click a link that takes them to the full terms of service.⁷⁰ Even though these sites display their terms of service and warnings against copyright infringement, the uploading of these videos is instantaneous, not allowing any time for an initial screen by the service provider to determine the

cently implemented an automatic screening process that scans for recognizable music and can prevent the user from uploading the video. See Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013, 10:00 AM), <http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/>, [http://perma.cc/EFK3-JYVV].

66. As long as the user does not set the privacy mode of the video to “Private,” which restricts access to only certain users designated by the uploader. See *Video Privacy Settings*, YOUTUBE, <https://support.google.com/youtube/answer/157177?hl=en>, [http://perma.cc/HQP5-4QMR] (last visited Nov. 24, 2014).

67. See, e.g., *Download YouTube Videos*, YOUTUBE, <https://support.google.com/youtube/answer/56100?hl=en>, [http://perma.cc/D9P4-75F8] (last visited Nov. 24, 2014) (“In general, downloading videos that other people have posted on YouTube is not allowed.”). Some Video-sharing websites do provide an option to allow other users to download the video file, however it is not standard and is uncommon.

68. *YouTube Upload*, *supra* note 64.

69. *Upload Your Video*, VIMEO, <http://www.vimeo.com/upload>, [http://perma.cc/GCV9-TYTH] (last visited Nov. 24, 2014) (emphasis added).

70. See *id.*; *YouTube Upload*, *supra* note 64.

user's compliance.⁷¹ By agreeing to the Terms of Service, users agree that they are not infringing any copyrights and that the service provider reserves the right to remove videos without prior notice.⁷² Both YouTube and Vimeo also provide pages containing information on the copyright infringement notification process for copyright owners who wish to have any infringing works removed from the service providers' websites.⁷³

B. *The Impact of Video Service Providers*

The widespread availability of content on video-sharing websites and the ease of uploading and searching capabilities have led to users disseminating video content on a massive scale.⁷⁴ Many YouTube users have gained fame and fortune by generating millions of hits on their videos.⁷⁵ Some users have enough viewers that they maintain a steady income by consistently uploading videos to their channel, gaining money through advertisement revenue.⁷⁶ Eric Schmidt, the CEO of Google, recognized

71. YouTube has developed technology to recognize some popular songs. However, in many videos, such as videos constituting fair use, the section of the song used may not be long or the song may not be detectable by the software. *See How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=2778544, [<http://perma.cc/Z74W-ZF83>] (last visited Nov. 24, 2014).

72. *See, e.g., Terms of Service*, YOUTUBE (June 9, 2010), <http://www.youtube.com/terms>, [<http://perma.cc/VEB-6PMD>] (last visited Nov. 24, 2014) ("You [(the user)] further agree that Content you submit to the Service will not contain third party copyrighted material, or material that is subject to other third party proprietary rights, unless you have permission from the rightful owner of the material or you are otherwise legally entitled to post the material and to grant YouTube all of the license rights granted herein. . . . YouTube reserves the right to remove Content without prior notice.").

73. *See Vimeo DMCA (Copyright) Notifications and Counter-Notifications Process*, VIMEO, <http://www.vimeo.com/dmca>, [<http://perma.cc/JR99-H2KL>] (last visited Nov. 24, 2014); *Submit a Copyright Takedown Notice*, YOUTUBE, <https://support.google.com/youtube/answer/2807622?hl=en>, [<http://perma.cc/Q4A4-X7J7>] (last visited Nov. 24, 2014).

74. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012) ("By March 2010 . . . site traffic on YouTube had soared to more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute.").

75. Julie Lamb, *Fame and Fortune: The Power of YouTube*, SOCIAL MEDIA DELIVERED (Jan. 3, 2012), <http://www.socialmediadelivered.com/2012/01/03/fame-and-fortune-the-power-of-youtube-2/>, [<http://perma.cc/XFA5-KPLF>] ("What do Justin Bieber, Colbie Caillat, Soulja Boy, and Sean Kingston all have in common? Aside from being celebrities/singers, they all started out simply by posting amateur videos of themselves on the Internet, and after developing a large following online, were fortunate enough to 'get discovered' by important people in the music industry.").

76. *See* Henry Hanks, *YouTubers' 'Please Subscribe' Can Earn Them Fame, Money*, CNN (Oct. 21, 2013, 6:05 PM), <http://www.cnn.com/2013/10/21/showbiz/youtube-famous-american-journey-irpt/>, [<http://perma.cc/URH4-XUDC>] ("That living is made through

YouTube's effect on broadcast media, stating that "[n]ot only has YouTube created the largest online video community in the world, it's shaping the way video is produced, distributed, and monetized."⁷⁷ Although not as popular as YouTube, Vimeo distinguishes itself with its emphasis on personal creativity.⁷⁸ On Vimeo's "Community Guidelines" page, Vimeo asks that the user only upload videos created by the user, specifically stating that the excuse, "[s]o-and-so gave me permission' does not mean you created it."⁷⁹

Even though these video-sharing websites pride themselves on promoting original content, users can still easily get away with posting infringing material. With the vast amount of content available and the instantaneous uploading capabilities provided by video-sharing websites, copyright infringement is inevitable and difficult to police.⁸⁰ Such copyright infringement has hurt the music industry, and the music industry has fought back.⁸¹

Record labels have a history of suing online entities and users that frustrate the status quo of the music distribution business.⁸²

Google's AdSense program, which allows users to open their YouTube accounts to advertisers, after which Google selects the highest bidder. YouTubers get a cut of the profits. Some, according to Socialblade.com, earn millions of dollars a year.").

77. Danielle Sacks, *How YouTube's Global Platform is Redefining the Entertainment Business*, FAST CO. (Jan. 31, 2011, 10:00 AM), available at <http://www.fastcompany.com/1715183/how-youtubes-global-platform-redefining-entertainment-business>, [http://perma.cc/6YCD-YHLF].

78. *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 542 (S.D.N.Y. 2013) ("Vimeo distinguishes itself from other video-sharing sites by requiring users to have created, or at least have participated in the creation of, the videos they upload.").

79. *Help Center / Vimeo Guidelines*, VIMEO, <http://www.vimeo.com/help/guidelines>, [http://perma.cc/8DB5-CP4F] (last visited Nov. 24, 2014).

80. Service providers have no statutory duty to monitor for infringing material. See 17 U.S.C. § 512(m) (2012). Rather, copyright owners must sift through the videos themselves to locate infringing material. See *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673, at *1 (N.D. Cal. Jan. 24, 2013) ("Universal monitored YouTube regularly for unauthorized use of Prince's works. . . . [Universal] entered the titles of the most popular Prince songs into the YouTube search field, reviewing each returned video to determine whether it used one or more of the songs in an unauthorized or infringing manner.").

81. See Eliot Van Buskirk, *Is YouTube Bad for Music?*, WIRED (Jan. 21, 2011, 10:41 AM), <http://www.wired.com/business/2011/01/is-youtube-bad-for-music/>, [http://perma.Cc/BZ99-RQ43] ("YouTube's strength as a free music source might be hurting music subscriptions and, by extension, artists by offering users a free place to hear just about any song they want—the same core function for which Rhapsody hopes you'll pay \$10 a month.").

82. *E.g.*, Courtney Macavinta, *Recording Industry Sues Music Start-Up, Cites Black Market*, CNET NEWS (Dec. 7, 1999, 7:45 PM), http://news.cnet.com/Recording-industry-sues-music-start-up,-cites-black-market/2100-1023_3-234092.html, [http://perma.cc/L9CM-

Some of the more infamous cases include the successful copyright infringement claims against peer-to-peer networks such as Napster.⁸³ Record labels even went as far as suing individual users of these programs in order to set an example for other peer-to-peer network users.⁸⁴ With the rise in video-sharing websites, a new threat to the music industry arose, and the lawsuits followed.⁸⁵ Like peer-to-peer networks, video-sharing websites have been involved in facilitating the infringement of copyrighted music by displaying music videos and user-created videos that feature copyrighted music uploaded by someone other than the copyright owner.⁸⁶ In some ways, the music industry has found the ability to work with video-sharing websites, particularly in dealing with the infringement of copyrighted music videos;⁸⁷ however, music existing on video-sharing websites via artists' music videos is only a fraction of the music that appears on these sites. Much of the music that appears on video-sharing websites is in the form of a soundtrack to user-generated content or as music playing in the background of a video. This could include a home video with a song added as a soundtrack in post-production editing, or a home

HLR2] ("In a lawsuit filed in U.S. District Court in Northern California, the Recording Industry Association of America charges start-up Napster with violating federal and state laws through contributory and vicarious copyright infringement" (internal quotation marks omitted)).

83. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

84. See Levi Pulkkinen, *Downloaders Face the Music as Record Industry Sues*, SEATTLE P-I (May 13, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Downloaders-face-the-music-as-record-industry-sues-1237270.php>, [<http://perma.cc/B7WV-KPZM>] ("After big wins against online music-sharing networks, recording industry leaders are now turning their copyright infringement fight toward individual residents.").

85. *E.g.*, *UMG Recordings, Inc. v. Shelter Capital Partners, LLC* 718 F.3d 1006, 1011 (9th Cir. 2013) ("Although Veoh has implemented various procedures to prevent copyright infringement through its system, users of Veoh's service have in the past been able, without UMG's authorization, to download videos containing songs for which UMG owns the copyright. UMG responded by filing suit against Veoh for direct and secondary copyright infringement.").

86. See, *e.g.*, *Harvard Baseball 2012 Call Me Maybe Cover*, YOUTUBE, <http://www.youtube.com/watch?v=eEWVwgDnuzE>, [<http://perma.cc/YHN2-KWMQ>] [hereinafter *Harvard Baseball*] (last visited Nov. 24, 2014) (featuring the copyrighted music of Carly Rae Jepsen).

87. See Eliot Van Buskirk, *Google, Universal to Launch Music Hub 'Vevo'*, WIRED (Apr. 9, 2009, 12:51 PM), <http://www.wired.com/2009/04/vevo-is-real/>, [<http://perma.cc/QQ92-H983>] (explaining how Universal Music Group and Google collaborated to create "Vevo," a video-sharing platform that is embedded in YouTube so that the labels under Universal's umbrella can receive ad revenue).

video with a song playing in the room. This is the type of content that has led to contributory copyright infringement litigation over the red flag knowledge provision of the DMCA.⁸⁸

III. THE MUSIC INDUSTRY'S FIGHT AGAINST VIDEO-SHARING WEBSITES

A. *Red Flag Knowledge Under Viacom International v. YouTube*

Since the inception of video-sharing websites, copyright infringement has been an issue. A recent landmark case involved media conglomerate Viacom International suing YouTube for contributory copyright infringement, resulting in an appeal to the Second Circuit.⁸⁹ Although Viacom sued YouTube over video content and not music copyrights,⁹⁰ the decision by the Second Circuit has been influential for service providers seeking protection under the DMCA.

The opinion in *Viacom International v. YouTube* has been influential in interpreting and distinguishing between the two knowledge requirements under § 512(c)(1)(A)(i) and § 512(c)(1)(A)(ii) of the DMCA. The court distinguished the DMCA's knowledge provision from the red flag provision in order to make sure that the red flag provision still had teeth and was "not swallowed up by the actual knowledge provision."⁹¹ The court in *Viacom* interpreted the red flag provision as "turn[ing] on whether the provider was subjectively aware of facts that would have made the specific infringement '*objectively*' obvious to a reasonable person."⁹² The court further emphasized that "[t]he red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor."⁹³ The court also noted that

88. See, e.g., *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 542–44 (S.D.N.Y. 2013) (involving user-uploaded videos that contained copyrighted music).

89. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28–30 (2d Cir. 2012).

90. See *id.* at 28–29, 32–33.

91. *Id.* at 31 ("The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard.")

92. *Id.* (emphasis added).

93. *Id.*

the actual knowledge and red flag provisions only apply to specific instances of infringement and not to general awareness of infringing activity.⁹⁴

B. *Music Industry Success in Capitol Records v. Vimeo*

In December 2009, Capitol Records filed suit against Vimeo, asserting claims for contributory and vicarious copyright infringement,⁹⁵ for hosting videos that contained music to which Capitol Records owned the copyrights.⁹⁶ In an order from September 2013, the court concluded that “a triable issue existed as to whether [Vimeo] had satisfied the Safe Harbor elements . . . [for a set of videos] with which Vimeo’s employees had interacted, because the Safe Harbor requires that service providers not be ‘aware of facts or circumstances from which infringing activity is apparent.’”⁹⁷ The videos involved in this litigation were not music videos; these videos consisted of original video content with copyrighted music being played as the soundtrack or in the background.⁹⁸

Because the videos involved in the litigation had “some original elements,” Vimeo asserted in a motion for reconsideration in December 2013 that, assuming their employees watched the particular videos, evidence of that alone was not enough to impute red flag knowledge on Vimeo in order to hold them liable.⁹⁹ Following the interpretation that red flag knowledge “turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person,”¹⁰⁰ Vimeo argued that the infringing nature of these videos was “not ‘obvious’ because each video contain[ed] some original elements and their creators thus [had] at least a colorable defense that they made ‘fair use’ of the copyrighted material.”¹⁰¹ Vimeo further argued that courts “should not put service providers in

94. *Id.*

95. *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 537, 542 (S.D.N.Y. 2013).

96. *Id.*

97. *Id.* (quoting 17 U.S.C. § 512(c)(1)(A)(ii) (2012)).

98. *Id.* at 545–46.

99. *Id.* at 545.

100. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

101. *Capitol Records*, 972 F. Supp. 2d at 545.

the difficult position of having to decide which uses of a copyrighted work are infringing” and which are not.¹⁰²

In response to Vimeo’s argument, the court found that evidence of infringement was not objectively obvious in two of the twenty videos at issue, because these two videos played only short clips of songs in the middle of the videos.¹⁰³ As for the other eighteen videos, the court found that “a reasonable juror could . . . find that the infringing activity in each video was ‘objectively’ obvious to a reasonable person.”¹⁰⁴ The court did not explain the contents of each video, but provided several as examples. One example was a video that lasted forty-eight seconds, “during the entirety of which the song ‘Stacy’s Mom’ by the artist ‘Fountains of Wayne’ plays while the lyrics appear against a blue background.”¹⁰⁵ Another video was titled “Christina Aguilera—Genie in a Bottle,” featuring a full length, live performance of the artist.¹⁰⁶ The final class of videos was what the court described as “lip-dubs,” which showed individuals performing everyday activities while lip syncing the words to a copyrighted song playing in the background of the video.¹⁰⁷

The court further rebutted Vimeo’s argument, claiming that it “threatens to collapse the distinction between ‘actual’ and ‘red flag’ knowledge, rendering the latter superfluous.”¹⁰⁸ The court also briefly addressed Vimeo’s argument that Vimeo had no way of telling whether some of these users had permission to use the song. The court stated:

102. *Id.* at 546.

103. *Id.*

104. *Id.* (quoting *Viacom*, 676 F.3d at 31). As for the other eighteen videos, the court found that “a reasonable juror could . . . find that the infringing activity in each video was ‘objectively obvious to a reasonable person.’” *Id.* (internal quotations omitted).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 547.

Red flag knowledge, under [Vimeo’s] construction of the statute, would seemingly require not only the upload of an unaltered, copyrighted work but also some reliable indication that the user did not have permission to upload the work, in order to negate potential legal defenses to copyright infringement. But such evidence would be practically indistinguishable from proof of actual knowledge—that is, that the provider actually or “subjectively” knew of specific infringement.

Id. at 547–48 (citations omitted).

Here, the copyrighted songs were an integral part of the videos: the videos played the songs essentially unmodified and in their entirety, and the length of the video corresponded to the length of the song. A jury could conclude, based on these circumstances, that it would have been “objectively’ obvious to a reasonable person” that the individual users did not have permission to use the well-known songs in their videos.¹⁰⁹

Finally, the court stated: “Even for those videos that contain an *original* visual image set to the unaltered infringing music, for purposes of the ‘red flag’ inquiry, the Court finds no legally significant difference between the upload of a full-length and unedited copyrighted film and the upload of a full-length and unedited copyrighted song.”¹¹⁰ The court did not elaborate on what types of “original visual image[s]” set to infringing music would be “objectively obvious” infringing activity, but rather decided that using a whole song, set to any image, is always “objectively obvious” to the viewer as infringing.¹¹¹ Whether the image was of “lyrics appear[ing] against a blue background” or a compilation of original, extravagant user-generated footage did not matter to the court.¹¹² If the song is full-length, the content will give rise to red flag knowledge.¹¹³

C. *The Issue of Fair Use Under Lenz v. Universal Music Corp.*

In the Northern District of California, the case of *Lenz v. Universal Music* demonstrates the blowback that the music industry can experience when it issues a takedown order for a video featuring some original content.¹¹⁴ Although not a case between the music industry and a video-sharing website, *Lenz* offers an example as to the consequences that a copyright owner may experience when it orders a website to remove a video without considering the fair use doctrine.¹¹⁵

109. *Id.* at 547 (quoting *Viacom*, 676 F.3d at 31).

110. *Id.* at 548 (emphasis added).

111. *See id.*

112. *See id.* at 546.

113. *See id.* at 548.

114. *See Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673, at *6 (N.D. Cal. Jan. 24, 2013); *see also* 17 U.S.C. § 512(c)(3) (2012) (outlining the elements of notification).

115. *See Lenz*, 2013 WL 271673, at *6; *see supra* Part I.C.

In *Lenz*, Stephanie Lenz filmed her young son in her kitchen “dancing” to the song “Let’s Go Crazy” by “Prince.”¹¹⁶ Lenz then uploaded the twenty-nine second video to YouTube, naming the video “Let’s Go Crazy #1.”¹¹⁷ Universal Music, the administrator of Prince’s copyrights, monitored YouTube for unauthorized use of Prince’s works and flagged the video for a removal list.¹¹⁸ Universal then sent this removal list to YouTube, which removed the video and notified Lenz of the removal.¹¹⁹ Lenz then sent YouTube a counter-notice, asserting that the video constituted fair use of “Let’s Go Crazy.”¹²⁰ Lenz then filed a complaint against Universal asserting misrepresentation pursuant to 17 U.S.C. § 512(f).¹²¹

Early in the litigation, the court determined that a copyright owner must consider fair use before proceeding with a takedown notice under the DMCA, or else the notification may lead to liability for misrepresentation under § 512(f).¹²² Later in the litigation, the court determined that “a copyright owner must make at least an initial assessment as to whether the fair use doctrine applies to the use in question in order to make a good faith representation that the use is not ‘authorized by law.’”¹²³ Such an assessment “must include at least some analysis of the legal import of the facts” because the question as to whether something constitutes fair use is a “legal judgment.”¹²⁴

IV. THE PROBLEM WITH THE COURTS’ INTERPRETATION OF THE RED FLAG PROVISION

With the courts’ current interpretation of the red flag provision, safe harbor protection is diminishing for video-sharing web-

116. *Lenz*, 2013 WL 271673, at *1.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at *2; see 17 U.S.C. § 512(f) (2012) (“Any person who knowingly materially misrepresents under this section . . . that material or activity is infringing . . . shall be liable for any damages . . .”).

122. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154–55 (N.D. Cal 2008) (“An allegation that a copyright owner acted in bad faith by issuing a takedown notice without proper consideration of the fair use doctrine thus is sufficient to state a misrepresentation claim pursuant to Section 512(f) of the DMCA.”).

123. *Lenz*, 2013 WL 271673, at *6.

124. *Id.* (quoting *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012)).

sites when agents of those websites view videos that present evidence of possible copyright infringement. Employees of websites like YouTube or Vimeo will inevitably come in contact with videos that infringe on some level, and in most litigation, these websites do not contest employee interaction with the videos in the suit.¹²⁵ However, just because someone has watched a video does not mean that he has gained knowledge that the work is infringing, nor has he necessarily become aware of facts that indicate that the work is infringing.¹²⁶

If a potentially infringing video features some creative original content,¹²⁷ video-sharing websites are forced to remove it to avoid liability because they do not know if the video will hold up under a fair use defense until a judge determines so in the event of litigation. Now, under *Capitol Records*, the judge will most likely not determine that the video is fair use.¹²⁸ Such an example would include a YouTube employee coming across the once-viral video created by members of the Harvard Baseball Team, who danced in their road-van to Carly Rae Jepsen's popular song "Call Me Maybe."¹²⁹ The audio of the video features the full length copyrighted song playing over the car radio, but the image solely consists of original content (video of the baseball team dancing), which in combination with other factors, leads to a colorable argument of fair use for the video.¹³⁰ If there was evidence of a YouTube employee having watched the video, the employee could

125. See, e.g., *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 542, 545 (S.D.N.Y. 2013) (involving videos that both parties agreed or assumed were watched by Vimeo employees).

126. See *id.* at 545; see also § 512(c)(1)(A).

127. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 351 (1991) ("[O]riginality requires independent creation plus a modicum of creativity As we have explained, originality is a constitutionally mandated prerequisite for copyright protection.").

128. See, e.g., *Capitol Records*, 972 F. Supp. 2d at 545–48.

129. See *Harvard Baseball*, *supra* note 86.

130. See *id.* This video provides a good example because a fair use analysis considering the four statutory factors under 17 U.S.C. § 107 could yield a determination in either direction. The "purpose and character of the use, including whether such use is of a commercial nature . . ." is a factor that could lean either way, as the creation of the video could have been just for fun and it is unclear if the uploader is receiving any ad revenue from YouTube. § 107(1). The fact that the video used the whole song weighs against a finding of fair use. See *id.* § 107(3). However, the fact that the "effect of the use upon the potential market for . . . the copyrighted work" could in fact be positive for its promotional characteristics weighs in favor of a finding of fair use. *Id.* § 107(4).

submit the video to his own fair use analysis to determine if the video is in fact infringing. However, the indeterminate nature of fair use makes the analysis very difficult.¹³¹ If the employee thinks the video constitutes fair use and therefore does not remove the video, but a judge disagrees when the record label sues YouTube for not removing it, YouTube would be liable. This is the state of the law under *Viacom International* and *Capitol Records*, where YouTube must remove that video to avoid liability when there is a good probability it is legal under the fair use doctrine.¹³² Many videos that consist of the fair use of popular media enrich the culture and inspire new works, yet when those videos are screened, they are likely to never be available to the public eye again.¹³³

If the copyright owner does its own fair use analysis “in order to make a good faith representation that the use is not ‘authorized by law’” under *Lenz*,¹³⁴ and proceeds to send a takedown notice to YouTube, then YouTube will have to remove the video to avoid liability under § 512(c)(1)(C).¹³⁵ However, the video creator can issue a counter-notice claiming fair use, creating an opportunity to get the video back up on the website.¹³⁶ Yet if YouTube takes the video down to avoid liability due to its belief that it has attained red flag knowledge under *Viacom International* and *Capitol Records*, the video creator has no avenue to restore the video, because YouTube reserves the right to take down any video

131. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“[Fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”) (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

132. See *supra* note 128 and accompanying text.

133. For example, the Harvard Baseball video caught national attention, receiving over seventeen million views and inspiring other users to submit their own works. *E.g.*, *WATCH: Harvard Baseball Guys Take On Carly Rae Jepsen’s ‘Call Me Maybe’*, HUFFINGTON POST (May 9, 2012, 4:54 PM), http://www.huffingtonpost.com/2012/05/09/harvard-baseball-call-me-maybe_n_1504147.html, [<http://perma.cc/G2SA-YN55>] (referencing a prior cover by University of Florida students as well); *SMU Women’s Rowing 2012 Call Me Maybe Cover*, YOUTUBE, <http://www.youtube.com/watch?v=K7ppxF4O130>, [<http://perma.cc/5Q8H-XU3H>] (last visited Nov. 24, 2014).

134. *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673, at *6 (N.D. Cal. Jan. 24, 2013).

135. See § 512(c)(1)(C) (declaring a service provider not liable if, upon notification of infringement, it acts expeditiously to remove the infringing material).

136. *Id.* § 512(g) (explaining that a user can issue a counter notification to have his material replaced after it has been removed).

that it wants on its own network under the Terms of Service.¹³⁷ Therefore, a video-sharing website that removes a video to avoid liability under the belief that it may have attained red flag knowledge does greater damage to users than removal via a formal takedown notice from the copyright owner, because the user has no realistic avenue to get the video restored after removal. The video-service provider has no duty to restore the video and will most likely not do so in order to avoid liability.¹³⁸

V. HOW TO RESOLVE THE CURRENT RED FLAG PROVISION ISSUES

In order to keep the DMCA protecting the progression of the arts,¹³⁹ Congress needs to add a provision which declares: Awareness of material that contains any original content, even if the material also contains what appears to be the use of another's copyright, does not amount to red flag knowledge of infringement.¹⁴⁰ Whether the use of another's copyright is unlicensed or amounts to fair use would not matter, as originality would be the key factor for this determination. The analysis to determine whether the content has sufficient originality should be the same as the threshold requirement for copyright protection under 17 U.S.C. § 102(a).¹⁴¹ This change in the DMCA would resolve many of the issues that courts have had to deal with, leading to less confusion, less litigation, and the preservation of the easily accessible publishing capabilities that video-sharing websites provide.

The main issue that this revision to the statute would eliminate is the difficult determination of whether viewing a certain video that can “conceivably be justified by a colorable claim of license or fair use”¹⁴² makes “the provider . . . subjectively aware of

137. See *Terms of Service*, *supra* note 72 (“YouTube reserves the right to remove Content without prior notice.”).

138. See *id.*

139. See S. REP. NO. 105-190, at 2 (1998) (indicating that promoting and protecting creativity is a goal of the DMCA).

140. See § 512(c)(1)(A)(ii).

141. See *id.* § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression”); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 340 (1991) (“Article I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity.”).

142. *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 547 (S.D.N.Y. 2013).

facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”¹⁴³ Determining what constitutes red flag knowledge of a video’s infringing nature when the video also contains original content involves judicial decision-making on whether a video’s infringing characteristics are “objectively obvious”—a process that shares the flexibility of the fair use analysis, making compliance next to impossible.¹⁴⁴ By changing the law to designate any video containing original content to not be considered evidence of red flag knowledge, the court will no longer have to determine which infringing activity is “objectively obvious” with regard to any works that could conceivably be fair use.

Determining what is “objectively obvious” infringement becomes even more difficult when the person responsible for making the determination is an employee of a video-sharing website who is not an attorney, is not necessarily educated in copyright law, or is not aware that he has a duty to take action. Even if an employee is educated in copyright law, such an analysis will still not likely lead to a conclusive answer, because it is difficult to know if a judge will agree with the employee’s determination in the event of a lawsuit, mirroring the problems of determining fair use on an *ex ante* basis.

If video-sharing websites remove videos with original content only when the copyright owner issues a takedown notice, a video

143. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

144. *See Capitol Records*, 972 F. Supp. 2d at 546. The court in *Capitol Records* reviewed twenty videos in the suit to determine if when an employee viewed these videos he “was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.” *Id.* (quoting *Viacom*, 676 F.3d at 31). In doing so, the court essentially engaged in a fair use analysis to determine that two of the videos did not contain facts that would make infringement objectively obvious, because in these videos “the copyrighted songs play for only a short time in the background (approximately 38 and 57 seconds, respectively) during the middle of the video and are otherwise a less significant aspect of the videos.” *Id.* However, doing the same analysis for the other eighteen videos, the court determined that evidence of infringement could be objectively obvious. *Id.* The court does not state that it is determining which videos constitute fair use; however, that is essentially the analysis in which the court engages. This is ironic because the court later refutes Vimeo’s argument that employees cannot have red flag knowledge when a video constitutes a colorable argument for fair use. *See id.* at 547. The court essentially emphasizes the problem: that the judge is the only one who has a say on fair use; so if someone else thinks a work may be fair use, they had better be right when it comes to trial or they will be liable.

creator has a greater chance of having his video replaced if he can argue fair use. Under the proposed change in the statute, if a video has at least some original content and the copyright owner objects to the video's presence, the copyright owner must order the takedown of the video himself if he wants it removed.¹⁴⁵ Under *Lenz*, "a copyright owner must make at least an initial assessment as to whether the fair use doctrine applies to the use in question in order to make a good faith representation that the use is not 'authorized by law.'"¹⁴⁶ When the copyright owner issues a takedown notice, the creator of the video at least has the opportunity to issue a counter-notice if he believes that he has a defense of fair use.¹⁴⁷ In order to deter over-enforcement, the DMCA gives the creator a cause of action against the copyright holder if he believes the copyright holder materially misrepresented the infringing nature of the work.¹⁴⁸

The court in *Capitol Records* would argue that this change in the statute would cause the red flag knowledge exception to disappear, leaving only the actual knowledge exception.¹⁴⁹ However, this change does not eliminate the red flag knowledge exception or *Viacom's* "objectively obvious" standard.¹⁵⁰ The mere fact that a work has not been altered (or has barely been altered) does not mean that one has actual knowledge that it was infringed. It is, however, evidence of apparent infringement, leading to red flag knowledge. There are plenty of examples of works that are not protected by the proposed change in the law that give evidence of red flag knowledge that do not amount to actual knowledge. Take, for instance, the video in *Capitol Records* consisting of the Fountains of Wayne song, "Stacy's Mom," with only the lyrics on the screen.¹⁵¹ The person who created this video took the effort to put the lyrics on the screen to go with the song, combining his own work with the song to create the video, but his own work is not original.¹⁵² Since no originality is added to this video by simply

145. See § 512(c)(3).

146. *Lenz v. Universal Music Corp.*, No. 5:07-cv-03783-JF, 2013 WL 271673, at *6 (N.D. Cal. Jan. 24, 2013).

147. § 512(g).

148. *Id.* § 512(f).

149. See *Capitol Records*, 972 F. Supp. 2d at 547.

150. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

151. See *Capitol Records*, 972 F. Supp. 2d at 546.

152. See § 102(a) (explaining that only original works are protected by copyright law);

putting the lyrics on screen, it would not be covered by the suggested expansion of the DMCA protection when viewed by a service provider.¹⁵³ However, just viewing this video without any further inquiry does not amount to actual knowledge either, because there is no way for the service provider to know that the user created this video without permission, or that the copyright owner did not upload the video itself.¹⁵⁴

Record companies may object to this new revision because it protects some infringing content from being captured under the red flag provision. Nevertheless, if an infringing video is not flagged due to this proposed revision, the copyright holder can make the effort itself to issue a takedown notice or to go after the user who directly infringed if it feels that such an action is worth the effort and expense.¹⁵⁵

CONCLUSION

Expanding safe harbor coverage by declaring that the awareness of the storage of a potentially infringing work that also features original content of any amount does not amount to “aware[ness] of facts or circumstances from which infringing activity is apparent”¹⁵⁶ keeps the DMCA protecting the progression of the arts, one of the objectives of copyright.¹⁵⁷ The current state

Capitol Records, 972 F. Supp. 2d at 546.

153. The court in *Capitol Records* ruled that this video gave rise to red flag knowledge and not actual knowledge, and the video would still be considered infringing under this comment’s proposed revision to the DMCA. See *Capitol Records*, 972 F. Supp. 2d at 548.

154. Unless the uploader declared under the video that he did not have permission, which some uploaders actually admit. See, e.g., Raising Creativity, *How Do You Know When a Painting is Finished?*, YOUTUBE, Sept. 22, 2013, <https://www.youtube.com/watch?v=oIggqxBXAvs>, [<http://perma.cc/9FUT-H6RS>] (last visited Nov. 24, 2014). In that case, actual knowledge of infringement would exist.

155. Record companies may object further, noting that some videos feature mostly infringing content and only a miniscule amount of original material, and will escape a finding of infringement under this comment’s proposed red flag knowledge provision. Some infringing videos with minimal originality will not lead to red flag knowledge under the proposed revision, but determining what amount of originality is miniscule enough, among other factors, to completely rule out fair use, should not be up to the service provider. See § 107 (setting forth the statutory factors to consider for fair use). If the copyright owner thinks that the video lacks sufficient originality, he can issue a takedown notice or sue the user who directly infringed. If the copyright owner doesn’t mind the video, the law should not impose a duty on the video-sharing website to remove it before there is even a hint of a complaint.

156. *Id.* § 512(c)(1)(A)(ii).

157. See U.S. CONST. art. I, § 8, cl. 8; see also S. REP. NO. 105-190, at 2 (1998).

of the law under *Viacom* and *Capitol Records* threatens the progress in digital art distribution that video-sharing websites have propelled over the past few years. By providing an open platform for video producers to display their works for free to the entire world, video-sharing websites achieve one of the goals of copyright law on a massive scale: fostering the dissemination of creativity so that artists can build on the creativity of others. Even though some of the works on video-sharing websites consist of clear infringement—activity that is harmful for copyright law—the over-enforcement of infringement actions threatens the ability of the video-sharing websites to disseminate many artistic works.

Imposing liability on service providers through the red flag knowledge provision for a video that is arguably fair use threatens the operations of video-sharing websites, as such sites will have to change their methods to avoid liability. These websites could have to remove countless videos that feature an abundance of user-generated original content and do not compete with the copyright owner's work. Once a video becomes popular and an employee of the video-sharing website views it, it will not survive if it features any copyrighted material. Another potential change, to which some websites have already resorted, involves video-sharing websites screening videos before they are uploaded.¹⁵⁸ With changes such as these, an artist could not publish any work featuring the fair use of another's copyright at the risk of the service provider removing the work without a fair use analysis or the service provider not publishing the work at all. Fostering fair use works is important for progression in the arts because allowing artists to interpret and build on established works leads to advancement and growth without having to start from scratch.¹⁵⁹

The expansion of the DMCA safe harbors, if already enacted, would have protected Vimeo from its battle against Capitol Records. Vimeo, a website that takes pride in only allowing users to upload videos they have created, has been sued when it has actively attempted to deter copyright infringement without a statu-

158. YouTube has already implemented some screening devices that can detect the audio of popular songs. *How Content ID Works*, YOUTUBE, <http://support.google.com/youtube/answer/2797370?hl=en>, [http://perma.cc/T2GQ-3NGA] (last visited Nov. 24, 2014); YouTube Help, *You Tube Content ID*, YOUTUBE (Sept. 28, 2010), <https://www.youtube.com/watch?v=9g2U12SsRns#t=39>, [http://perma.cc/9QAL-8R7T] (last visited Nov. 24, 2014).

159. See *supra* note 52 and accompanying text.

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tory demand to do so.¹⁶⁰ This demonstrates that even when a website tries to promote conformity with copyright law, it can find itself liable because the current state of the DMCA makes compliance so difficult.

*Hank Fisher **

160. *See supra* note 69 and accompanying text. *See generally* Capitol Records, LLC v. Vimeo, LLC, 972 F. Supp. 2d 537 (exemplifying Vimeo's legal battle for copyright infringement despite anti-infringement policies).

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