

4-1-2018

Capitol Records v. Vimeo: How the Digital Millennium Copyright Act is Outdated and in Need of Revision

Dustin Johnson

Recommended Citation

Dustin Johnson, *Capitol Records v. Vimeo: How the Digital Millennium Copyright Act is Outdated and in Need of Revision*, 38 Loy. L.A. Ent. L. Rev. 155 (2018).

Available at: <https://digitalcommons.lmu.edu/elr/vol38/iss2/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CAPITOL RECORDS V. VIMEO: HOW THE DIGITAL MILLENNIUM COPYRIGHT ACT IS OUTDATED AND IN NEED OF REVISION

*Dustin Johnson**

This Comment analyzes the Second Circuit Court of Appeals' interpretation of the Digital Millennium Copyright Act (DMCA) in *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016). Beginning with a brief overview of the DMCA's history, this Comment acknowledges the Second Circuit's holding in *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012). In *Viacom*, the Second Circuit set precedent with its interpretation of the knowledge requirements for safe harbor under section 512(c) of the DMCA.

In *Capitol Records*, the Second Circuit confirmed its holding in *Viacom* but missed an opportunity to adequately clarify the knowledge requirements under section 512(c) of the DMCA. The Second Circuit also overturned a district court ruling which held that the DMCA did not apply to pre-1972 sound recordings. This Comment critiques the Second Circuit's interpretations of the DMCA while exploring the safe harbor provisions of section 512(c) and 512(m). This Comment concludes by providing recommendations for updating the DMCA to more effectively protect copyright holders by balancing their interests with those of internet service providers.

* J.D. Candidate at Loyola Law School, Los Angeles, 2018. The author would like to thank Professor Carlos Berdejó, the Loyola of Los Angeles Entertainment Law Review's staff and editors, and his family for making this possible.

I. INTRODUCTION

The days of dial-up internet and America Online are ancient history. Technology has rapidly advanced to the point that goods and services are exchanged across the globe with the click of a mouse, and love is found with the swipe of a finger across an iPhone screen. Consumers of various types of media, including music and video content, have also seen a dramatic change from the days of VHS and cassettes to a nearly exclusive online market. However, legislation aimed to protect creative expressions from infringement has not advanced beyond the days of dial-up internet.

Content creators have battled for copyright protection since technology made it possible for anyone to copy, print, and disseminate an author's written words.¹ The founding fathers recognized the importance of protecting creative works and gave Congress the responsibility "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."² In the wake of the World Intellectual Property Organization Copyright Treaty, Congress passed the Digital Millennium Copyright Act ("DMCA") in 1998 "to update domestic copyright law for the digital age."³ The DMCA was passed in an effort to modify the law at a time when music distribution was changing from compact discs to Mp3s.⁴ At the time of the DMCA's passage, Congress was concerned that the threat of expensive copyright infringement litigation would stifle the speed in which new internet companies would make technological advances.⁵

The Second Circuit of the United States Court of Appeals interpreted the DMCA's safe harbor provisions in *Viacom Int'l Inc. v. YouTube, Inc.* ("Viacom")⁶ and applied those interpretations in *Capitol Records v. Vimeo*

1. 1 ROBERT A. GORMAN, ET AL., COPYRIGHT 1 (8th ed., 2011) ("When printing from type was invented and works could be reproduced in quantities for circulation, however, it seems that the author was without protection as soon as the work got into print.").

2. U.S. CONST. art. I, § 8, cl. 8.

3. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012); *see also* *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

4. Tatsuya Adachi, Note, *Did Vimeo Kill the Radio Star? DMCA Safe Harbors, Pre-1972 Sound Recordings & the Future of Digital Music*, 34 CARDOZO ARTS & ENT. L.J. 443, 445 (2016).

5. *Id.*

6. *Viacom Int'l*, 676 F.3d 19.

(“*Capitol Records*”).⁷ In *Capitol Records*, Vimeo, an online video sharing website, was sued for copyright infringement for hosting videos containing copyright protected sound recordings without the copyright holders’ permission.⁸ The Second Circuit applied its reasoning from *Viacom*, a 2012 case involving nearly identical facts.⁹ However, in both cases, the Second Circuit failed to adequately explain and clarify what constitutes actual or “red flag” knowledge under the DMCA’s safe harbor provisions.¹⁰ Therefore, Congress should update the DMCA to include pre-1972 sound recordings in order to reduce costly litigation that negatively impacts both content creators and internet service providers.

This Comment analyzes the DMCA and the Second Circuit’s application of the statute in *Capitol Records*. Part II discusses the background of the DMCA from its inception and details the provisions discussed in *Capitol Records*. Part III will discuss the Second Circuit’s interpretation of the DMCA as applied in *Viacom* and *Capitol Records*. Part IV analyzes and critiques the Second Circuit’s decision. Part V recommends changes to the DMCA that will clarify certain provisions to reduce the amount of costly litigation that plagues both copyright holders and internet service providers. Part VI concludes that Congress should update the DMCA so that copyright holding creators are afforded similar levels of protection that internet service providers currently receive.

II. BACKGROUND OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

In response to the difficulties of protecting against copyright infringement in the internet age, Congress passed Title II of the DMCA—the Online Copyright Infringement Liability Limitation Act (OCILLA)—in 1998.¹¹ “OCILLA endeavors to facilitate cooperation among internet service providers and copyright owners, ‘to detect and deal with copyright

7. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

8. *Id.*

9. *See Viacom Int’l*, 676 F.3d 19.

10. *See id.*; *Capital Records*, 826 F.3d 78.

11. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

infringements that take place in the digital networked environment.”¹² Congress passed OCILLA in hopes of resolving questions regarding the liabilities of service providers whose networks are used to transmit infringing material.¹³ However, instead of clarifying the numerous copyright doctrines, “Congress elected ‘to leave current law in its evolving state and . . . create[d] a series of “*safe harbors*[.]” for certain common activities of service providers.”¹⁴

The safe harbors of the DMCA limit the liability of internet service providers in copyright infringement claims.¹⁵ OCILLA shields internet service providers from liability for copyright infringement claims resulting from: (1) “transitory digital network communications”;¹⁶ (2) “system caching”;¹⁷ (3) “information residing on systems or networks at direction of users”;¹⁸ and (4) “information location tools.”¹⁹

Only “service providers” may qualify for safe harbor protection.²⁰ Once deemed a service provider, a party must also satisfy certain conditions for safe harbor eligibility.²¹ These conditions include the adoption and reasonable implementation of a policy that terminates subscribers and

12. *Id.* (quoting S. REP. NO. 105-190, at 20 (1998); H.R. REP. NO. 105-551, pt. 2, at 49 (1998)).

13. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) (quoting S. REP. NO. 105-190 at 2).

14. *Id.* (quoting S. REP. NO. 105-190 at 19 (emphasis added)).

15. *Id.*; *see also Ellison*, 357 F.3d at 1076.

16. 17 U.S.C. § 512(a) (2018).

17. *Id.* § 512(b).

18. *Id.* § 512(c).

19. *Id.* § 512(d).

20. *Viacom Int’l*, 676 F.3d at 27 (defining a service provider as “[a] provider of online services or network access, or the operator of facilities therefor.”) (quoting 17 U.S.C. § 512(k)(1)(B)); *see also* 17 U.S.C. § 512(k)(1)(A) (defining a service provider as “an entity offering the transmission, routing, or providing or connections for digital online communications, between or among points specified by user, of material of the user’s choosing, without modification to the content of the material as sent or received.”).

21. 17 U.S.C. § 512(i).

account holders deemed repeat infringers.²² Furthermore, a service provider seeking safe harbor protection must allow copyright owners to employ certain measures to identify and protect their works.²³

In addition to the threshold criteria, each specific safe harbor has certain requirements.²⁴ This Comment mainly focuses on the safe harbors afforded by section 512(c) and—to a lesser extent—section 512(m).²⁵ Section 512(c)'s safe harbor protection will apply only if the service provider: (1) does not have actual knowledge that the material is infringing;²⁶ (2) is not aware of facts or circumstances from which infringing activity is apparent;²⁷ (3) acts expeditiously to remove or disable access to the infringing material after acquiring actual knowledge;²⁸ and (4) does not receive financial benefit from the infringing activity where the service provider has the right and ability to control such activity.²⁹

The DMCA requires a service provider to adopt, implement, and inform its users of its policy to terminate repeat infringers.³⁰ However, under section 512(m), the DMCA explicitly removes any responsibility from the service provider to proactively police its network for infringing content.³¹ Consequently, these safe harbor provisions unfairly bias copyright-holders

22. *Id.* § 512(i)(1)(A).

23. *Viacom Int'l*, 676 F.3d at 27 (explaining and quoting the conditions set forth in 17 U.S.C. § 512(i)(1)(B), (i)(2)).

24. *Id.*

25. 17 U.S.C. § 512(c)(1) (“A service provider shall not be liable for monetary . . . injunctive or other equitable relief, 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 . . .”); *Id.* § 512(m).

26. 17 U.S.C. § 512(c)(1)(A)(i).

27. *Id.* § 512(c)(1)(A)(ii).

28. *Id.* § 512(c)(1)(A)(iii).

29. *Id.* § 512(c)(1)(B).

30. *Id.* § 512(i)(1)(A).

31. *Id.* § 512(m)(1) (“Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity . . .”).

by making it nearly impossible for them to prevail against internet service providers on copyright infringement claims.

III. INTERPRETING THE DMCA: CAPITOL RECORDS, LLC V. VIMEO, LLC

Prior to hearing the appeal from *Capitol Records*, the Court of Appeals for the Second Circuit interpreted the DMCA in *Viacom*.³² This Part will discuss the opinion rendered by the Second Circuit in *Viacom* and how that interpretation of the DMCA was applied in *Capitol Records*.

A. *Prelude to Capitol Records: Viacom Int'l Inc. v. YouTube, Inc.*

Before *Capitol Records*, the Second Circuit addressed the DMCA's safe harbor protections in *Viacom*.³³ In *Viacom*, a group of plaintiffs—including Viacom, various Viacom affiliates, and the Premier League (an English soccer league)—filed a putative class action against YouTube for copyright infringement “on behalf of all copyright owners whose material was copied, stored, displayed, or performed on YouTube without authorization.”³⁴ In total, Viacom identified 63,497 video clips allegedly containing infringing content while Premier League produced 13,500 clips on behalf of the putative class.³⁵

1. The District Court's Holding

Prior to trial, both parties moved for summary judgment based on the applicability of the DMCA's safe harbor protections.³⁶ The district court determined that a jury could decide whether YouTube had a general awareness of copyright infringing material posted on its website and whether it possibly even encouraged users to post such content.³⁷ However, after analyzing the statutory language of the DMCA regarding actual and apparent red flag knowledge, the court held, “[m]ere knowledge of [the] prevalence

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

33. See generally *id.*

34. *Id.*

35. *Id.* at 28–29.

36. *Id.* at 29.

37. *Id.*

of such activity in general is not enough [to constitute knowledge].”³⁸ Therefore, the district court granted summary judgment in favor of YouTube.³⁹

2. *Viacom* in the Second Circuit Court of Appeals

On appeal, the Second Circuit affirmed the district court’s interpretation of DMCA section 512(c)(1)(A), which held that both actual and red flag knowledge “refer to ‘knowledge of specific and identifiable infringements.’”⁴⁰ After examining plaintiffs’ evidence as to YouTube’s alleged knowledge, the Second Circuit vacated the lower court’s holding and remanded the case back to the district court to determine if the evidence (e-mails between YouTube employees) constituted actual knowledge.⁴¹ Furthermore, the court held that in order to survive defendant’s motion for summary judgment on remand, plaintiffs had to show that those emails specifically referenced the video clips at issue.⁴²

Additionally, plaintiffs argued that YouTube was “willfully blind” to specific instances of infringement and, therefore, should be disqualified from safe harbor protection.⁴³ The court defined willful blindness to mean “where the person ‘was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’”⁴⁴ The court held that the willful blindness doctrine could be applied to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.⁴⁵ The Second Circuit held on remand that, the district court must consider whether the defendant made a “deliberate effort to avoid guilty knowledge” in order to determine

38. *Id.*

39. *Id.* at 41.

40. *Id.* at 30.

41. *Id.* at 32–34.

42. *Id.* at 34.

43. *Id.*

44. *Id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

45. *Id.*

whether YouTube qualifies for safe harbor protection.⁴⁶ The court's interpretation of the DMCA's knowledge requirements is echoed in *Capitol Records*.⁴⁷

B. *Capitol Records v. Vimeo in the District Court*

1. District Court Procedure

Prior to reaching the Second Circuit, the parties involved in *Capitol Records* twice argued in front of the United States District Court for the Southern District of New York.⁴⁸ In the first proceeding, Capitol Records, Virgin Records, and various subsidiaries of EMI Music ("Plaintiffs") brought claims of copyright infringement against Vimeo, a company which provided an online platform for users to post and share videos with the public.⁴⁹ The suit, filed on December 10, 2009, alleged copyright infringement involving 199 user-created videos containing sound recordings to which Plaintiffs owned the rights to.⁵⁰

In September 2012, Vimeo filed a motion for summary judgment based on the safe harbor defense afforded to service providers by the DMCA.⁵¹ Plaintiffs countered by filing a cross-motion for partial summary judgment, alleging that Vimeo was ineligible for safe harbor protection.⁵²

2. The District Court's Summary Judgment Analysis

The United States District Court for the Southern District of New York granted Vimeo's motion for summary judgment for 144 of the 199 videos,

46. *Id.* (citation omitted).

47. *Capitol Records, LLC v. Vimeo, LLC (Capitol Records I)*, 972 F. Supp. 2d 500, 523 (S.D.N.Y. 2013), amended on reconsideration in part, *Capitol Records, LLC v. Vimeo, LLC (Capitol Records II)*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013), and *aff'd in part, vacated in part, remanded*, *Capitol Records, LLC v. Vimeo, LLC* 826 F.3d 78 (2d Cir. 2016).

48. *Capitol Records I*, 972 F. Supp. 2d 500.

49. *See Capitol Records I*, 972 F. Supp. 2d at 504.

50. *Id.* at 506–507.

51. *Id.* at 507.

52. *Id.*

holding that the DMCA's safe harbor protections applied to those videos.⁵³ The court found, however, that there was a genuine issue of material fact as to whether Vimeo had knowledge or awareness regarding the fifty-five remaining videos.⁵⁴ Plaintiffs' evidence showed that Vimeo employees interacted, at some point, with the remaining fifty-five videos through various features of Vimeo's website.⁵⁵ While the court was unwilling to declare such interactions as actual knowledge of infringement, it did, however, hold that triable issues remained as to whether such interactions constituted actual or red flag knowledge of infringement.⁵⁶

Additionally, the district court granted summary judgment for Plaintiffs for any videos containing sound recordings that were made prior to February 15, 1972.⁵⁷ The court based its ruling on section 301(c) of the Copyright Act.⁵⁸ Section 301(c) states: "With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067."⁵⁹ The court concluded that the statutory language of the Act, along with a December 2011 report by the Copyright Office, indicated that it was Congress' responsibility, rather than the court's, to extend the Copyright Act to pre-1972 sound recordings if it so desired.⁶⁰ As a result, the court denied safe harbor protection to Vimeo for any of the 199 videos containing sound recordings made before February 15, 1972.⁶¹

53. *Id.* at 537.

54. *Id.*

55. *Id.* at 522.

56. *Id.* at 523.

57. *Id.* at 537.

58. *Id.* at 536.

59. 17 U.S.C. § 301(c) (2018).

60. *Capitol Records I*, 972 F. Supp. 2d at 536–37 (referring to "Copyright Office Report"); see also *Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFFICE (Dec. 2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> [<https://perma.cc/9VM8-GSZP>].

61. *Capitol Records I*, 972 F. Supp. 2d at 536–37.

3. Post-Summary Judgment Motions by Capitol Records and Vimeo

After the Southern District of New York's ruling, Vimeo moved for reconsideration and certification for interlocutory appeal, and Plaintiffs moved for leave to file amended complaints.⁶² The court granted Vimeo's motion for reconsideration, and in a new proceeding, granted its motion for summary judgment for seventeen additional videos while denying summary judgment for the remaining thirty-seven.⁶³ Regarding the seventeen additional videos, the court found insufficient evidence to support the allegation that Vimeo's employees ever viewed fifteen out of the seventeen.⁶⁴ Furthermore, the court posited that the sound recordings in the two remaining videos were so short—thirty-eight and fifty-seven seconds during the middle of the videos in question—that the infringing nature was not objectively obvious.⁶⁵

Plaintiffs also filed a motion to amend the complaint to add 1,476 new instances of infringement: one quarter of which were videos containing pre-1972 sound recordings and approximately one-third of which were subject to interaction by Vimeo employees.⁶⁶ Despite Vimeo's objections, the court held that Plaintiffs satisfied all necessary requirements under Federal Rule of Civil Procedure 15(a)(2) and granted leave to amend the complaint to include the additional videos.⁶⁷

4. Questions for Interlocutory Appeal

Vimeo asked the court to certify two questions for interlocutory appeal:

(1) Are the DMCA's safe harbor provisions applicable to sound recordings fixed prior to February 15, 1972? (2) Does a service provider's mere viewing of a user-generated video containing third-party copyrighted music automatically give rise to a triable

62. *Capitol Records II*, 972 F. Supp. 2d at 538.

63. *Id.* at 541.

64. *Id.* at 544–45.

65. *Id.* at 546 (applying the standard for 'red flag' knowledge set forth in *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010)).

66. *Id.* at 549.

67. *Id.* at 549–50.

issue of fact as to the service provider’s knowledge of infringement under the DMCA?⁶⁸

Plaintiffs did not offer any opposition but requested that the court certify “whether Vimeo had the ‘right and ability to control’ infringing activity, whether [Vimeo] acted with ‘willful blindness’ to infringement, and whether [Vimeo] had instituted a repeat infringer policy.”⁶⁹ The court discussed and denied all of Plaintiffs’ requests.⁷⁰

The court modified Vimeo’s second question, determining that a more appropriate question was, “whether, under *Viacom Int’l Inc. v. YouTube, Inc.*, a service provider’s viewing of a user-generated video containing all or virtually all of a recognizable, copyrighted song may establish ‘facts or circumstances’ giving rise to ‘red flag’ knowledge of infringement.”⁷¹

C. The Second Circuit’s Opinion

1. Summary of District Court’s Opinion

In the opening of the Second Circuit’s opinion, Judge Leval briefly summarized the proceedings leading up to this decision.⁷² Judge Leval discussed that: (1) the district court held that any of the 199 videos-in-suit posted on Vimeo’s website containing pre-1972 sound recordings were not subject to safe harbor protection;⁷³ (2) the district court granted Vimeo’s motion for summary judgment for 153 videos because of a lack of proof that Vimeo employees had viewed them;⁷⁴ (3) the district court rejected Plaintiffs’ argument alleging that Vimeo’s general policy of willful blindness towards infringement on its website constituted actual or red flag

68. *Id.* at 550.

69. *Id.*

70. *Id.* at 554–56.

71. *Id.* at 553.

72. *Capital Records*, 826 F.3d at 81–82.

73. *Id.* at 81.

74. *Id.*

knowledge;⁷⁵ and (4) as to the remaining videos discussed above, the district court denied each party's motion for summary judgment, holding that there were genuine issues of material fact as to whether Vimeo had *red flag* knowledge of infringement, which would disqualify it from safe harbor protection.⁷⁶

2. Issues to Be Decided via Interlocutory Appeal

In addition to the two questions for interlocutory appeal, the Second Circuit answered an additional issue brought forth by Plaintiffs: "whether Plaintiffs have shown that Vimeo had a general policy of willful blindness to infringement of sound recordings, which would justify imputing to Vimeo knowledge of the specific infringements."⁷⁷

The Second Circuit held: (1) the DMCA's safe harbor protection *does* apply to pre-1972 sound recordings; (2) under the standard set forth in *Viacom*, some viewing by a service provider's employee of a video that plays all, or virtually all, of a recognizable song is *not* sufficient to establish red flag knowledge; and (3) the district court was correct in rejecting Plaintiffs' argument that Vimeo's alleged general policy of willful blindness disqualified it from DMCA's safe harbor protection.⁷⁸

3. Pre-1972 Sound Recordings

The Second Circuit held that the district court erred in its ruling that the DMCA did not apply to pre-1972 sound recordings.⁷⁹ The district court, along with the Federal Copyright Office, determined that section 301(c) of the Federal Copyright Act kept pre-1972 sound recordings under state law protection until they passed into the public domain on February 15, 2067.⁸⁰ With that interpretation in mind, Plaintiffs successfully persuaded the district

75. *Id.*

76. *Id.* at 82.

77. *Id.*

78. *Id.* (emphasis added).

79. *Id.*

80. *Id.* at 87–88.

court that in order to abide by section 301(c) of the Copyright Act, the DMCA could not apply to pre-1972 sound recordings.⁸¹

After a dense and complicated discussion of the statutory language and interpretation by the district court and the Copyright Office, the Second Circuit concluded that both the district court and the Federal Copyright Office misread section 512(c).⁸² The Second Circuit held that Congress' purpose in passing the DMCA is defeated if interpretation of section 512(c) leaves service providers liable to state-law copyright infringement claims for infringements of which those service providers were unaware.⁸³ Under the district court's interpretation, a service provider would incur heavy costs in order to monitor its websites for infringements involving pre-1972 recordings or it would otherwise incur potentially high state law penalties.⁸⁴ Furthermore, the Second Circuit held that forcing service providers to monitor their websites for pre-1972 recordings would conflict with section 512(m), which specifically excuses an internet service provider from such proactive screening.⁸⁵ With this opposing interpretation of the DMCA in mind, the Second Circuit vacated the district court's granting of summary judgment to Plaintiffs for all of the videos-in-suit containing pre-1972 sound recordings.⁸⁶

4. Red Flag Knowledge of Infringement

The Second Circuit went on to answer the second certified question, “[w]hether . . . a service provider’s viewing of a user-generated video containing all or virtually all of a recognizable, copyrighted song may establish facts and circumstances giving rise to red flag knowledge of

81. *Id.* at 88 (“[T]hat the interrelationship of § 301(c) with the safe harbor provision of § 512(c) requires that the latter be interpreted to have no application to pre-1972 sound recordings . . . if this safe harbor provision is interpreted to protect service providers from infringement liability under state copyright laws [due to preemption], it conflicts irreconcilably with § 301(c)’s provision that, until 2067, ‘rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title.’”).

82. *Id.* at 89.

83. *Id.* at 90.

84. *Id.*

85. *Id.* at 92.

86. *Id.* at 93.

infringement.”⁸⁷ This question arose out of the district court’s denial of summary judgment in favor of Vimeo in regard to a number of videos-in-suit that Plaintiffs alleged Vimeo employees viewed.⁸⁸ On one hand the district court held that triable issues of fact remained regarding those videos-in-suit and whether Vimeo employees had gained red flag knowledge of infringement by viewing them.⁸⁹ On the other hand, the Second Circuit held that Plaintiffs provided insufficient facts to prove red flag knowledge, and vacated the district court’s denial of summary judgment in favor of Vimeo.⁹⁰

In *Viacom*, the Second Circuit held:

The difference between actual and red flag knowledge is . . . not between specific and generalized knowledge, but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or *subjectively* knew of specific infringement, while the *red flag* provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement *objectively obvious to a reasonable person*.⁹¹

This reasonable person is someone without specialized knowledge or expertise in music or copyright laws.⁹² Using the obvious reasonable person standard, the court held that a Vimeo employee merely viewing a video containing all, or virtually all, of a copyrighted, recognizable song would be insufficient.⁹³ The Second Circuit, in explaining its reasoning for vacating the district court’s order, discussed the burden of proof necessary to prove red flag knowledge allegations.⁹⁴

87. *Id.* at 93.

88. *Id.*

89. *Capitol Records I*, 972 F. Supp. 2d at 523.

90. *Capital Records*, 826 F.3d at 93.

91. *Viacom Int’l*, 676 F.3d at 31 (emphasis added).

92. *Capital Records*, 826 F.3d at 93–94.

93. *Id.* at 94.

94. *Id.* at 94–98.

Because safe harbor protection is an affirmative defense, a defendant raising this defense bears the burden of establishing both service provider status and the fulfillment of the required steps for eligibility.⁹⁵ However, the burden of proof shifts to the plaintiff when attempting to disqualify a defendant from safe harbor protection either by failure to abide by statutory requirements or by having actual or red flag knowledge.⁹⁶ The Second Circuit noted that expecting a defendant service provider to prove that none of its employees had either actual or red flag knowledge is unreasonable and would defeat the purpose of safe harbor defenses.⁹⁷

In assessing the sufficiency of Plaintiffs' attempt to disqualify Vimeo from safe harbor protection, the Second Circuit held that simply showing that a Vimeo employee viewed a video containing all or most of a recognizable copyrighted song was not enough to sustain the Plaintiffs' burden.⁹⁸ The court provided several reasons for this determination.⁹⁹ First, Plaintiffs provided no evidence of how long the video was viewed.¹⁰⁰ The court noted that an employee commenting on a posted video was not sufficient evidence to establish that the employee knew the video contained an entire piece of copyright-protected music.¹⁰¹ Second, there are many different purposes for why an employee may have viewed the video in question, many of which may have nothing to do with music recognition.¹⁰² Moreover, a song—or a portion of a song—that is recognizable to one person may be entirely unrecognizable to another.¹⁰³

95. *Id.* at 94.

96. *Id.*

97. *Id.*

98. *Id.* at 96.

99. *Id.* at 96–97.

100. *Id.* at 96.

101. *Id.* (“The fact that an employee viewed enough of a video to post a brief comment . . . would not show that she had ascertained that its audio track contains all or virtually all of a piece of music.”).

102. *Id.*

103. *Id.*

Additionally, the court expressed that it would be unfair to presume that service providers' employees are experts in copyright law.¹⁰⁴ Generally speaking, service providers' employees cannot be expected to know the difference between infringement and fair use, whether the user has acquired authorization, or if a certain song is licensed.¹⁰⁵ The court recognized that in some instances, service providers' employees may have the requisite knowledge to make such determinations.¹⁰⁶ However, the burden of proof to establish such knowledge lies with the Plaintiffs who, in this case, provided no such evidence.¹⁰⁷

Plaintiffs argued that the Second Circuit's interpretation of what constitutes red flag knowledge is nearly identical to what constitutes actual knowledge.¹⁰⁸ In response, the court stated that although there is not a vast difference between red flag and actual knowledge of infringement, there is a real difference.¹⁰⁹ Plaintiffs also argued that this slight delineation between the two reduces red flag knowledge to a nearly obsolete category.¹¹⁰ The court replied that Congress' decision to include red flag knowledge as a bar to protection does not necessarily mean that it intended red flag knowledge to be easily attainable.¹¹¹

Ultimately, the court vacated the district court's denial of summary judgment and remanded for further consideration.¹¹² The court held that summary judgment should be granted in favor of Vimeo unless Plaintiffs could prove that Vimeo personnel had red flag or actual knowledge of infringement.¹¹³

104. *Id.* at 96–97.

105. *Id.* at 97.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 96.

111. *Id.* at 97.

112. *Id.* at 97–98.

113. *Id.*

5. Willful Blindness

The final issue addressed by the Second Circuit pertained to Plaintiffs' assertion that the district court misapplied the doctrine of willful blindness outlined previously in *Viacom*.¹¹⁴ In *Viacom*, the Second Circuit held that a plaintiff can use willful blindness to establish a defendant's knowledge of infringement under the DMCA.¹¹⁵

Here, Plaintiffs made three arguments to show that Vimeo demonstrated willful blindness: (1) Vimeo monitored its users' content for video infringement but not audio infringement;¹¹⁶ (2) Vimeo failed to investigate possible infringements even though it was aware of facts suggesting that infringement was likely;¹¹⁷ and (3) Vimeo encouraged users to post infringing content and then turned a blind eye to resulting infringements.¹¹⁸ The Second Circuit rejected the first argument based on section 512(m) of the DMCA, which excuses the service provider from policing its website for infringing content.¹¹⁹ The fact that Vimeo voluntarily monitored its website for infringing video does not mean that it is required to monitor for infringing audio.¹²⁰

Similarly, the Second Circuit applied section 512(m) of the DMCA to reject Plaintiffs' second argument.¹²¹ The court acknowledged that section 512(c) provides consequences when a service provider has actual knowledge of infringement or becomes aware of facts and circumstances that would make infringement obvious (harking back to the confusing objective versus

114. *Id.* at 98.

115. *Viacom Int'l*, 676 F.3d at 35 (“[T]he willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA.”).

116. *Capitol Records*, 826 F.3d at 98.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

subjective analysis).¹²² However, the court noted that the facts and circumstances in the present case did not amount to more than suspicion, and based on the court's interpretation of section 512(m),¹²³ suspicion is not enough to create a duty to investigate further.¹²⁴ The court also noted that Congress' intention, when passing the DMCA, was to protect service providers from heavy expenses and liabilities to copyright owners.¹²⁵ Thus, the Second Circuit rejected Plaintiffs' second argument.¹²⁶

Plaintiffs' third argument concerned Vimeo's alleged general policy of willful blindness to infringement.¹²⁷ Based on its opinion in *Viacom*, the Second Circuit acknowledged that willful blindness can constitute knowledge of infringement.¹²⁸ However, such willful blindness *must* correlate to *specific* instances of infringement.¹²⁹ Although Plaintiffs provided evidence of Vimeo employees ignoring and sometimes encouraging users to post infringing content, those encouragements did not encompass any of the 199 videos involved in this lawsuit.¹³⁰ Moreover, the few documented instances of Vimeo employees encouraging the posting of infringing videos were not enough evidence to support Plaintiffs' allegation that Vimeo employed a general policy of encouraging infringement.¹³¹ Absent evidence of specific instances that Vimeo employees encouraged

122. *Id.*

123. 17 U.S.C. § 512(m)(1) (2018) ("Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on – (1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure.").

124. *Capital Records*, 826 F.3d at 98–99.

125. *Id.* at 98.

126. *Id.* at 98–99.

127. *Id.* at 99.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

users to post known infringing content in the videos at issue, the court held that Vimeo was entitled to safe harbor protection.¹³²

In sum, the Second Circuit held that: (1) the DMCA's safe harbor protection applies to pre-1972 sound recordings; (2) the district court erred in denying Vimeo's motion for summary judgment in regard to videos allegedly viewed by its employees; and (3) the district court correctly ruled in Vimeo's favor as to Plaintiffs' willful blindness accusation.¹³³

IV. ANALYSIS AND CRITIQUE OF THE SECOND CIRCUIT'S DECISION

In *Capitol Records*, the Second Circuit broke new ground in holding that the DMCA's safe harbors apply to pre-1972 recordings.¹³⁴ The court also confirmed its interpretation of the DMCA established in *Viacom* regarding the application of actual or red flag knowledge to internet service providers.¹³⁵ However, the court failed to adequately clarify the difference between actual and red flag knowledge under the DMCA.¹³⁶ Although the Second Circuit correctly applied the law to the facts according to the DMCA, the lack of clarification as to the difference between actual and red flag knowledge will likely result in further litigation. This result will have a negative impact on content creators and internet service providers alike.

A. Pre-1972 Recordings

Prior to the Second Circuit's reversal, the District Court for the Southern District of New York held that the DMCA's safe harbor protections did not apply to pre-1972 sound recordings.¹³⁷ Influenced by the New York Appellate Division's holding in *UMG Recordings, Inc. v. Escape Media*

132. *Id.*

133. *Id.*

134. See *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016) (reversing *Capitol Records II*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013) and distinguishing from *UMG Recs., Inc. v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106 (2013)).

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

136. See generally *Capitol Records*, 826 F.3d at 99.

137. See *Capitol Records I*, 972 F. Supp. 2d 500, 536–37 (S.D.N.Y. 2013), amended on reconsideration in part, *Capitol Records II*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013), and *aff'd in part, vacated in part, remanded, Capitol Records*, 826 F.3d 78.

Grp., Inc., along with a report produced by the United States Copyright Office, the district court reasoned that Congress should decide whether the DMCA's safe harbors apply to pre-1972 sound recordings.¹³⁸ In reversing the district court's ruling, the Second Circuit not only disregarded the opinion of the United States Copyright Office but also took on the complicated task of deciphering Congressional intent.¹³⁹ Without an amendment to the DMCA, it is foreseeable that courts will have differing interpretations regarding the applicability of the DMCA to pre-1972 recordings, resulting in costly litigation and lengthy appeals. Furthermore, amending and federalizing the DMCA would allow libraries and other preservationists to preserve and provide digitalized, historical sound recordings to the public without fear of being exposed to costly copyright litigation.¹⁴⁰

Opponents of modifying the DMCA include broadcasters and publishers who argue that the federal protection of pre-1972 sound recordings will force them to either pay expensive licensing fees or not play those recordings at all.¹⁴¹ These new expenses could require a complete overhaul of the business practices of certain broadcasting and publishing companies.¹⁴² However, companies in the ever-evolving global economy must make the necessary changes to adapt or fall prey to those companies who are able to do so.

Even though the Second Circuit set precedent in its jurisdiction by holding that the DMCA applied to pre-1972 sound recordings,¹⁴³ the statute itself needs to be amended to prevent varying interpretations of the DMCA

138. *Id.*

139. *See Capitol Records*, 826 F.3d at 87–99.

140. Andrew M. Pinchin, Comment, *Casting Common Law and the Music Industry Adrift: Pre-1972 Recordings Enter Federal Safe Harbors*, 91 OR. L. REV. 635, 668 (2012); *see also* P. Dylan Jensen, Note, *The Pre-1972 Sound Recording Landscape: A Need for a Uniform Federal Copyright Scheme*, 38 HASTINGS COMM. 7 ENT. L.J. 273, 286 (2016).

141. Avonne Bell, *Federalization of Pre-1972 Sound Recordings: A Debate About Uncertainty and Public Access*, PUB. KNOWLEDGE (June 22, 2011), <http://www.publicknowledge.org/news-blog/blogs/federalization-pre-1972-sound-recordings-deba> [<https://perma.cc/7JVC-RVWJ>]; *see also* Jensen, *supra* note 140, at 286.

142. Bell, *supra* note 141; *see also* Jensen, *supra* note 140, at 286–87.

143. *See Capitol Records*, 826 F.3d 78 (reversing *Capitol Records II*, 972 F. Supp. 2d 537 and distinguishing from *UMG Recs.*, 964 N.Y.S.2d 106).

from court to court. This could create circuit splits, leading to increased litigation and ultimately require the Supreme Court to render a final opinion. One simple solution is to have Congress update the DMCA language to include pre-1972 sound recordings.

B. Actual and Red Flag Knowledge Standards Lack Clarity

In both *Viacom* and *Capitol Records*, the Second Circuit held that an internet service provider is disqualified from safe harbor protection *only* when it has actual or red flag knowledge of *specific* acts of infringement.¹⁴⁴ This is why the court did not disqualify Vimeo from safe harbor protection even though emails existed between Vimeo employees and subscribers acknowledging that copyrighted content was being uploaded to Vimeo's website without the rights holders' permission.¹⁴⁵

Furthermore, the Second Circuit rejected Plaintiffs' argument that Vimeo's actions, or lack thereof, constituted willful blindness.¹⁴⁶ The Supreme Court held, that "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."¹⁴⁷ The Court's definition of willful blindness and the confusing distinction between actual and red flag knowledge outlined by the Second Circuit in *Viacom* and affirmed in *Capitol Records* makes it nearly impossible to disqualify a service provider from safe harbor.

The narrowness in which courts have applied the knowledge standard encourages service provider employees . . . to keep [user-generated content] at arm's length and never inspect it closely. . . . [S]uch requirements encourage business owners of video sharing services to employ a bare minimum number of staff

144. See *Viacom Int'l*, 676 F.3d at 26; *Capital Records*, 826 F.3d at 95.

145. See *Capital Records*, 826 F.3d at 85, 97.

146. *Id.* at 98.

147. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (adopting the willful blindness doctrine in the context of induced patent infringement).

so that the service's chance of exposure to [user generated content] is significantly reduced.¹⁴⁸

A service provider can protect itself from liability as long as it can prevent its employees from becoming aware of specific instances of copyright infringement.¹⁴⁹ Thus, a service provider's general awareness of infringement on its website is not enough to disqualify it from safe harbor.¹⁵⁰ This may all but directly encourage a system of "don't ask, don't tell" amongst service providers regarding the content on their websites.

The DMCA was fashioned to achieve a balance between content creators and internet service providers, yet it seems to have complicated the issue. Copyright holders are expected to police the internet and send DMCA compliant takedown notices to service providers, or else their chances for prevailing in an infringement suit are nil.¹⁵¹ Conversely, internet service providers live in fear of expensive litigation that can lead to bankruptcy even after a win in court.¹⁵² To add further confusion, the Second Circuit provided a wordy and ineffective explanation as to what constitutes the difference between actual and red flag knowledge.¹⁵³ Without clarification of the difference between the two types of knowledge, both content creators and internet service providers are going to continue to spend millions of dollars

148. Tong Xu, Note, *The Future of Online User-Generated Content in the Video Sharing Business: Capitol Records LLC v. Vimeo LLC*, 17 TUL. J. TECH & INTELL. PROP. 375, 385 (2013).

149. *See id.*

150. Methaya Sirichit, *Catching the Conscience: An Analysis of the Knowledge Theory Under § 512(C)'s Safe Harbor & the Role of Willful Blindness in the Finding of Red Flags*, 23 ALB. L.J. SCI. & TECH. 85, 129 (2013) (quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004)).

151. *Id.* at 130; *see also* S. REP. NO. 105-190, at 45 (1998); 17 U.S.C. § 512(c)(3)(B)(i) (2018) ("[A] notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions in subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.").

152. Tatsuya Adachi, Note, *Did Vimeo Kill the Radio Star? DMCA Safe Harbors, Pre-1972 Sound Recordings & the Future of Digital Music*, 34 CARDOZO ARTS & ENT. L.J. 443, 447 (2016).

153. *Viacom Int'l*, 676 F.3d at 31 (holding that "the actual knowledge provision turns on whether the provider actually or *subjectively* knew of specific infringement, while the *red flag* provision turns on whether the provider was *subjectively* aware of facts that would have made the specific infringement *objectively obvious to a reasonable person.*").

trying to prove whether the provider is disqualified from safe harbor protection for having knowledge of infringement and failing to remove the content.¹⁵⁴

Perhaps, in addition to codifying the DMCA's application to pre-1972 sound recordings, Congress can build clearer instructions into the DMCA itself to avoid further litigation in courtrooms across the country.

C. Additional Considerations Regarding the DMCA

1. What is Streaming?

In addition to the issues discussed above, the DMCA is ill-equipped to regulate the problems associated with music and video streaming.¹⁵⁵ Streaming refers to a user's ability to immediately listen to or watch content via the internet in real time.¹⁵⁶ Media content can be played immediately without having to store it to a hard drive, like a traditional Mp3 download.¹⁵⁷ Music streaming services like Spotify have attracted 24 million users and "6 million paying subscribers" since 2013, while YouTube, which streams music and video content, attracts over 1 billion users each month.¹⁵⁸ Both

154. Erick Shonfeld, *Google Spent \$100 Million Defending Against Viacom's \$1 Billion Lawsuit*, TECHCRUNCH (July 15, 2010), <http://techcrunch.com/2010/07/15/-google-viacom-100-million-lawsuit> [<https://perma.cc/FGN9-DVKZ>]; see also Sirichit, *supra* note 150, at 144 n.406 ("Google is reported to have paid over \$100 million in legal fees to defend itself against Viacom.").

155. See Mike A. Ortega, Note, *Paddling Against the Current: Why the DMCA's Safe Harbor Provision is Ineffective Against Music Stream-Ripping*, 11 RUTGERS BUS. L.J. 60, 64 (2014) (arguing "that the preventative measures and strict safe harbor provision regulations do nothing more than provide a number of hurdles and chilling deterrents for copyright owners to jump over, and that the burden of regulating infringing copyright content on service provider's services needs to be shifted back to service providers.").

156. *Id.* at 86; see also *Streaming Media*, STREAMINGMEDIA.COM, <http://streamingmedia.com/Glossary/Terms/Streaming+media> [<https://perma.cc/MHR2-C3J3>].

157. Ortega, *supra* note 155, at 86; see also *Definition: Streaming Media*, WHATIS.COM, <http://whatis.techtarget.com/definition/streaming-media> [<https://perma.cc/BPA6-MPUC>]; *Streaming Media*, *supra* note 156.

158. Ortega, *supra* note 155, at 87–88; see also *YouTube for Press*, YOUTUBE, <https://www.youtube.com/yt/about/press/> [<https://perma.cc/SZ89-DPFC>].

Spotify and YouTube pay rights holders¹⁵⁹ “through per-stream, ad-supported fees generated by free plays from consumers.”¹⁶⁰

2. The Rise of Stream-ripping

Consumers flock to streaming services like Spotify and YouTube because of the ease with which one can consume content. However, that ease also attracts consumers with subversive motives such as stream-ripping.¹⁶¹ “Stream-ripping is the process of using a program to save streaming media in the form of a file so that it is accessed locally.”¹⁶² Consumers can simply copy the URL link attached to the desired streaming media and paste it into a program that converts it into an Mp3 file.¹⁶³ The Mp3 file can then be stored on the consumer’s hard drive.¹⁶⁴ Music streaming services such as Spotify are victims to similar programs whereby users can convert a copyrighted song to an Mp3 and store it on their personal hard drive.¹⁶⁵

3. How the DMCA Fails to Protect Against Stream-ripping

Stream-ripping allows paying subscribers of music streaming services to illegally download and share music with people who are not paying for

159. See Ortega, *supra* note 155, at 88 (“Rights holders’ generally includes labels, publishers, distributors, and through certain digital distributors, independent artists themselves.”).

160. *Id.*; John Maples, *YouTube’s Parity Problem, or Why a Billion Isn’t That Impressive*, BILLBOARD (Mar. 4, 2014, 11:58 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5923137/youtubes-parity-problem-or-why-a-billion-isnt-that> [<https://perma.cc/PNB8-5ES4>].

161. See Ortega, *supra* note 155, at 88–89; Jason Koebler, RIAA: *YouTube Audio Rippers Are New Pirating Threat*, U.S. NEWS (June 22, 2012, 1:38 PM), <https://www.usnews.com/news/articles/2012/06/22/riaa-youtube-audio-rippers-are-new-pirating-threat> [<https://perma.cc/VRB9-DNDH>].

162. Ortega, *supra* note 155, at 88 (quoting *Definition: Streaming Media*, *supra* note 157).

163. Ortega, *supra* note 155, at 90.

164. *Id.* at 89.

165. *Id.* at 91.

the music.¹⁶⁶ As a result, rights holders are deprived of their royalties.¹⁶⁷ Consider an artist that has tens of millions of monthly listeners on Spotify. If just a small fraction of those listeners illegally “ripped” a song and sent copies to multiple people, the results would affect revenues for the rights holder, publisher, artist, and Spotify itself. Lost revenue from streaming services may not profoundly affect a mega-star, but it could seriously undermine the career of a small, independent artist who relies on every revenue source.

Copyright infringement via stream-ripping also affects audio/video streaming websites like YouTube.¹⁶⁸ Consider a scenario in which an unauthorized and unreleased song from a popular artist is uploaded to YouTube.¹⁶⁹ Users could stream-rip the song from YouTube and save it to their personal computers. In another scenario, that same unreleased song could be added to a video and uploaded to YouTube.¹⁷⁰ Any YouTube user with a stream-ripping program such as “YouTube-MP3” could stream-rip and save the unreleased song and video to their hard drive.¹⁷¹ The users—in both scenarios—could then further propagate the infringed content by uploading it onto other streaming services or social media sites.¹⁷² This process of “sharing” the infringed material can be continued with each new user, spreading it like wildfire across the internet.

These scenarios illustrate fundamental inadequacies of the DMCA. Under section 512(m), the internet service provider (YouTube) has no duty to police its website for infringing content.¹⁷³ Furthermore, if the internet service provider does not have actual or red flag knowledge that the song (a)

166. *See id.* at 92; Koebler, *supra* note 161.

167. *See* Ortega, *supra* note 155, at 92.

168. *Id.* at 90.

169. *See id.* at 92.

170. *See id.*

171. *Id.* at 93–94.

172. *See id.* at 92–94.

173. 17 U.S.C. § 512(m)(1) (“Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on – (1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure . . .”).

is a copyright protected work and (b) is shared without permission on its website, then the service provider is protected from any liability.¹⁷⁴

Perhaps the artist or an affiliate becomes aware that the unreleased song and video are on YouTube. Based on the DMCA, the artist or affiliate must comply with specific statutory requirements when notifying a YouTube agent about the unauthorized song and the resulting infringement.¹⁷⁵ If the notification does not substantially comply with the statute, it will not constitute actual or red flag knowledge.¹⁷⁶ Upon receiving a notification of infringement in compliance with the DMCA, YouTube must immediately remove the video or potentially face copyright infringement claims by the artist.¹⁷⁷ The YouTube subscriber responsible for posting the unauthorized song is then allowed to file a counter-notification under the DMCA.¹⁷⁸ If that counter-notification complies with the DMCA, YouTube *must* re-post the audio/video file within 10-14 business days unless the copyright holder obtains a court order prohibiting such action.¹⁷⁹ In this hypothetical, the section 512 safe harbors of the DMCA shield YouTube from any copyright infringement action filed on the artist's behalf.

174. *Id.* § 512(c)(1)(A)(i), (ii).

175. *Id.* § 512(c)(3)(A)(i)–(vi) (“To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following: (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (iii) Identification of the copyrighted material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (iv) Information reasonably sufficient to permit the service provider to contact the complaining party . . . ; (v) A statement that the complaining party has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.”).

176. *Id.* § 512(c)(3)(B)(i).

177. *See id.* § 512(c)(1)(C).

178. Ortega, *supra* note 155, at 95; *see also* 17 U.S.C. § 512(g)(3).

179. Ortega, *supra* note 155, at 95; *see also The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE, 1, 12 (1998) (available at <http://www.copyright.gov/legislation/dmca.pdf>) [<https://perma.cc/6BTv-MVRA>].

4. The Consequences of Stream-ripping

Section 512(m) of DMCA slights copyright holders by relieving service providers of the onus and incentive to adequately police their websites for infringing content and places that burden on the copyright holders.¹⁸⁰ Furthermore, subscribers who are caught posting infringing content on those websites may, at worst, have their subscriptions revoked. Thus, those who wish to post illicit content are all but encouraged to do so. Meanwhile, there is little if any recourse for the lost time, effort, and potential revenue that the artist suffers as a result of the infringement. There must be some middle ground and an incentive for wealthy companies like YouTube (owned by Google, LLC)¹⁸¹ and, to a lesser extent, Vimeo,¹⁸² to balance their financial interests with the interests of content creators.

V. RECOMMENDATIONS

Below, this Comment recaps and discusses the following recommendations: (1) Congress should amend the DMCA to specifically include pre-1972 recordings; (2) Congress should clarify the standards for what constitutes actual or red flag knowledge under section 512(c) and apply those standards nationwide to prevent further confusion; and (3) Congress should remove or modify section 512(m) of the DMCA, which relieves internet service providers of any responsibility to police their websites for infringing content.

A. Congress Should Modify the DMCA to Explicitly Include Pre-1972 Sound Recordings

While the Second Circuit held that the DMCA's safe harbor protections apply to pre-1972 sound recordings, other circuits and state courts have interpreted the statute differently.¹⁸³ Clearly, congressional intent weighs

180. Ortega, *supra* note 155, at 97.

181. See *Viacom Int'l*, 676 F.3d at 28 (“In November 2006, Google acquired YouTube in a stock-for-stock transaction valued at \$1.65 billion.”).

182. See Samantha Cortez, *Vimeo Releases Revenue Numbers for the First Time*, WALL STREET INSANITY, (Nov. 19, 2013 12:00 PM), <http://wallstreetinsanity.com/vimeo-releases-revenue-numbers-for-the-first-time> (“At the end of October [2013] the site’s 12-month revenue had reached roughly \$40 million.”) [<https://perma.cc/95T5-CRN2>].

183. See *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) (holding that DMCA *does* apply to pre-1972 sound recordings); *Capitol Records I*, 972 F. Supp.

heavily on judges' minds when they are forced to rule on this issue.¹⁸⁴ To provide clarity to internet service providers, copyright holders, and state and federal judges—as well as to reduce the amount of costly litigation that will no doubt continue without universal clarification—Congress should amend the DMCA to explicitly include pre-1972 sound recordings.

A federalized copyright system for pre-1972 sound recordings would benefit both copyright holders and internet service providers by reducing the amount of money spent on litigation. Litigation costs are a threat to copyright holders and service providers alike, forcing some defendant service providers into bankruptcy even after prevailing on copyright infringement claims.¹⁸⁵ Since a primary purpose of passing the DMCA was to protect the expansion and growth of the internet by protecting service providers from expensive copyright litigation,¹⁸⁶ it seems obvious that amending the statute to specifically include pre-1972 sound recordings would serve that very purpose.

B. Congress Should Clarify the Red Flag Knowledge Standard

Under section 512(c) of the DMCA, Congress provided two sets of knowledge that would disqualify a service provider from safe harbor protection.¹⁸⁷ The Second Circuit has interpreted the first standard, actual knowledge, to mean that a service provider has information regarding a specific incident of copyright infringement occurring on its website.¹⁸⁸ That actual knowledge requires action on the part of the internet service provider

2d 500, 537 (S.D.N.Y. 2013) (holding that the DMCA does not apply to pre-1972 sound recordings); *UMG Recs., Inc. v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106 (2013) (holding that the DMCA does not apply to pre-1972 sound recordings).

184. See generally *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016); *Capitol Records*, 821 F. Supp. 2d at 641; *Capitol Records I*, 972 F. Supp. 2d at 509; *UMG Recs.*, 964 N.Y.S.2d 106 at 109–11.

185. Tatsuya Adachi, Note, *Did Vimeo Kill the Radio Star? DMCA Safe Harbors, Pre-1972 Sound Recordings & the Future of Digital Music*, 34 *CARDOZO ARTS & ENT. L.J.* 443, 447(2016).

186. *Capitol Records*, 826 F.3d at 98; Adachi, *supra* note 185, at 453–54.

187. See 17 U.S.C. § 512(c)(1)(A)(i)–(ii) (2018).

188. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012); *Capitol Records*, 826 F.3d at 93–94.

or else its safe harbor protection *may* be denied by a court.¹⁸⁹ Overall, this is a sound policy that balances the interests of the copyright holders and the internet service providers, but issues may arise from the time-delay between notice of infringement and takedown. Other than possibly speeding up the process to make the notice and takedown process more seamless, the provision works and does not require any modification.

On the other hand, the Second Circuit missed an opportunity to clarify the red flag knowledge standard in both *Viacom* and *Capitol Records*. The Second Circuit’s explanation of the differences between red flag and actual knowledge is inadequate and confusing to anyone who does not have a law degree—and even then, the explanation is unclear.¹⁹⁰ Furthermore, the Second Circuit held that willful blindness only constitutes knowledge when a service provider intentionally makes an effort to avoid knowledge of a *specific* incident of infringement.¹⁹¹

There are two solutions to the problems that arise out of this lack of clarity. The first is to simply get rid of the red flag knowledge standard. This solution, however, is undesirable at best. While this may achieve the goal of reducing litigation, it is unfair to the copyright holder and would further indemnify internet service providers. The goal of the DMCA should be to balance the interests of both parties, not to benefit one side while overburdening the other.

A second solution is to have Congress establish a better definition for what constitutes red flag knowledge. With a clearer understanding of what constitutes “facts and circumstances from which infringing activity is apparent,”¹⁹² any litigation would be about facts and not about the law itself. Congress should gather some of the leading internet service providers like YouTube and Vimeo, as well as representatives of content creators to create an objective test. The parties should determine what constitutes red flag

189. See 17 U.S.C. § 512(c)(1)(A)(iii) (“[U]pon obtaining such knowledge or awareness, [internet service provider] acts expeditiously to remove, or disable access to, the material.”).

190. See *Viacom Int’l*, 676 F.3d at 31 (2d Cir. 2012) (holding “The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or subjectively know of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person.” (internal quotes omitted)).

191. See *Capitol Records*, 826 F.3d at 98; *Viacom Int’l*, 676 F.3d at 35.

192. 17 U.S.C. § 512(c)(1)(A)(ii).

knowledge by taking into consideration and balancing both sets of interests. If left to the courts, both parties may have to accept interpretations similar to the Second Circuit's, which failed to provide clear guidelines to either party.

Without a viable solution, legal battles will continue over red flag knowledge and willful blindness. This potentially costs both parties millions of dollars and creates further animosity between the service providers and copyright holders. In conclusion, Congress should obtain input from both sides of the issue and create an objective red flag knowledge test that balances the interests of all involved.

C. Congress Should Modify Section 512(m) of the DMCA and Require Service Providers to Implement Some Basic Technologies to Catch Potential Infringers.

A third possible solution is for Congress to modify section 512(m) of the Digital Millennium Copyright Act. Section 512(m) frees service providers from the responsibility of policing their websites against potentially infringing content.¹⁹³ At the time of the DMCA's creation, this was a valid concept because Congress sought to remove restrictions that would inhibit the expansion of the internet.¹⁹⁴ It would have been counterproductive to force companies to spend their resources on policing content as opposed to expanding their technological and internet capabilities.¹⁹⁵ Without section 512(m), the financial burden of policing content would have bankrupted many small start-up companies and slowed the pace of internet expansion.

While section 512(m) was paramount to internet expansion in the late 1990s and early 2000s, it now provides internet service providers with a valid excuse to not engage in any preemptive measures to protect copyright holders. Many companies, like YouTube and Vimeo, have both the capital and resources to create software programs that would be the first line of defense against infringing content. Unless companies are developing such software for their own interests—for example, creating software to catch infringers in order to protect against costly copyright litigation—the DMCA does not require any proactivity. In fact, section 512(m) discourages

193. *See id.* § 512(m).

194. *Capital Records*, 826 F.3d at 98.

195. *See id.* at 98–99.

proactive measures.¹⁹⁶ The time has come for Congress to either modify section 512(m) and establish some baseline preemptive counter-infringement measures for internet service providers to embrace, or completely remove section 512(m) from the DMCA.

VI. CONCLUSION

The DMCA was passed in 1998 with the intention to protect small start-up internet companies from expensive litigation resulting from claims of copyright infringement.¹⁹⁷ That goal has been achieved and has helped pave the way for internet start-up companies—such as YouTube and Vimeo—to become very profitable.¹⁹⁸ With the advancement of technology over the past two decades, the DMCA now goes too far to protect internet service providers and places huge burdens on copyright holders to enforce their rights. There must be a balancing of both interests to keep internet service providers up and running and making technological advances while simultaneously protecting creative expression. Accordingly, Congress should update the DMCA so that content creators are afforded the same level of protection as internet service providers.

196. See 17 U.S.C. § 512(m)(1).

197. See *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 98 (2d Cir. 2016).

198. See generally *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012) (“In November 2006, Google acquired YouTube in a stock-for-stock transaction valued at \$1.65 billion.”); Samantha Cortez, *Vimeo Releases Revenue Numbers for the First Time*, WALL STREET INSANITY, (Nov. 19, 2013 12:00 PM), <http://wallstreetinsanity.com/vimeo-releases-revenue-numbers-for-the-first-time> (“At the end of October [2013] the site’s 12-month revenue had reached roughly \$40 million.”) [<https://perma.cc/95T5-CRN2>].

