



Updating the Section 230 Safe Harbor Provision in a New Age of Social Media Platforms

Arnold Owusu

DePaul University College of Law, aoseiowu@depaul.edu

Follow this and additional works at: <https://via.library.depaul.edu/jatip>



Part of the [Computer Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Arnold Owusu, Updating the Section 230 Safe Harbor Provision in a New Age of Social Media Platforms, 31 DEPAUL J. OF ART, TECH. & INTELL. PROP. L. 77 (2022).

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

UPDATING THE SECTION 230 SAFE HARBOR PROVISION IN A NEW AGE OF SOCIAL MEDIA PLATFORMS

*Arnold Owusu**

I. INTRODUCTION

Sharing our most intimate moments with our friends, families, or strangers is the pinnacle of social media. We often share photos or videos of our vacations, our new purchases, and often any accomplishment we achieve. This experience sounds great until you receive a notification from a platform that your account could be suspended or terminated because your post or live video violated its terms of service because of a copyright infringement. The use of platforms to share information has gained greater significance than it did in 1998 when Congress passed the DMCA.¹ On May 28, 2021, in *Capitol Records, LLC v. Vimeo, LLC*, a New York district court held a copyright owner's showing that a video posted by a user on the service provider's site includes substantially all of a recording of recognizable copyrighted music and that an employee of the service provider saw at least some part of the user's material, is insufficient to sustain the copyright owner's burden of proving that the service provider had either actual or red flag knowledge of the infringement.² The court's reasoning is based on the lack of employees knowledge of copyright law and licensing.³ This case illustrates how copyright holders attempt to obtain copyright infringement judgment from online service providers despite the safe harbor provision in the DCMA.

The court's decision in *Capitol Records, LLC*, explains that DCMA's safe harbor applies only if the service provider has neither "actual knowledge" of the infringing material nor "awareness of facts or circumstances from which infringing activity is apparent"—

*Arnold Owusu is a 2023 DePaul University College of Law J.D. Candidate. Arnold is the Junior Editor for the DEPAUL JOURNAL OF ART, TECHNOLOGY AND INTELLECTUAL PROPERTY. Arnold graduated from The Ohio State University in 2017, where he received a Bachelor of Science in Economics, minoring in International Studies.

¹ Mark S. Lee, *Entertainment and Intellectual Property Law* § 1:101 (2021).

² *Capitol Recs., LLC v. Vimeo, LLC*, No. 09-CV-10101 (RA), 2021 WL 2181252, at *2 (S.D.N.Y. May 28, 2021).

³ *Id.* at *5.

78 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:

otherwise known as “red flag” knowledge.⁴ The court believed that Congress did not expect the extension to cover a range of instances.⁵ The fact that the service provider did not subjectively know that the posted material infringed but knew facts that made infringement objectively obvious did not amount to red flag knowledge established by Congress.⁶

The central argument of this note is the court correctly provided safe harbor to service providers as Congress intended. Congress intended to allow pioneering internet platforms and services to innovate and grow without the constant threat of liability for the third-party content uploaded to their websites or using their services. The safe harbor provision requires the service providers to follow strict guidelines or risk losing their immunity.⁷ Part II of this note provides background on the historical trend presented by federal courts with previous and recent decisions of the safe harbor provision of the DMCA. Part III of this note discusses the opinion by the United States District Court for the Southern District of New York in *Capitol Records, LLC v. Vimeo, LLC*, including the requested further proceedings, holding, and reasoning.⁸ Part IV examines the social, legal, and business effects of the DMCA. Part IV examines the social, legal, and business effects of the DMCA. Part IV will also look at the effects cases such as *Capitol* and the effect of the immunity provided by the DMCA and how it affects the industry. Part V concludes with the importance of maintaining safe harbor protection in a world where service providers are required to regulate posts from billions of users that use their technology to share their most personal moments.

II. BACKGROUND

A. *Establishing the Digital Millennium Copyright Act*

⁴ *Id.* at *3.

⁵ *Id.* at *4.

⁶ *Id.*

⁷ *Id.* at *3.

⁸ *Capitol Recs.*, 2021 WL 2181252.

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 79

In 1998, Congress enacted the DMCA to address copyright issues raised by the use of digital media for distributing copyrighted materials and the widespread adoption of the internet.⁹ The Act protects online service providers from exposure to potential copyright infringement liability arising from their users' activities.¹⁰ The DMCA safe harbor framework sets out a detailed notice requirement for a copyright owner to provide notice of alleged infringement also called a DMCA takedown notice.¹¹ Each notice may trigger obligations a service provider must comply with to remain protected under the applicable safe harbors.¹² The framework also provides an additional safe harbor to protect service providers from liability for complying in good faith with the DMCA's notice, takedown, and counter-notice provisions.¹³

The DMCA defines a service provider as an entity providing transmission, routing, or connections for digital online communications that are between or among points specified by the user, send material chosen by the user, and do not modify the content of the material sent or received.¹⁴ The definition includes providers of internet access, website hosting, websites, online forums, and email services.¹⁵ To qualify for safe harbor, the service provider must not have actual or red flag knowledge of the infringement or receive a direct financial benefit from the activity.¹⁶ If the service provider has the right and ability to control the infringing activity, they must respond expeditiously to remove or disable access to the material or infringing activity on receiving a DMCA takedown notice.¹⁷

⁹ Digital Millennium Copyright Act (DMCA): Safe Harbors for Online Service Providers, Practical Law Practice Note 1-518-6907.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Digital Millennium Copyright Act (DMCA): Safe Harbors for Online Service Providers, Practical Law Practice Note 1-518-6907.

¹⁵ *Id.*

¹⁶ 17 U.S.C. § 512(c)(1) (2010).

¹⁷ *Id.* § 512(c)(1)(C).

80 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:

B. *Perfect 10, Inc. v. CCBill LLC: Defining Service
Provider Responsibility*

In *Perfect 10, Inc. v. CCBill LLC*, the court considered whether an entity that allowed patrons to use credit cards or checks to pay for subscriptions or memberships to online venues violated copyright laws by providing their services to websites that posted images stolen from a publisher's magazine and website.¹⁸ The court held that a service provider implements a policy if it has (1) a working notification system, (2) a procedure for dealing with DMCA-complaint notifications, and (3) does not actively prevent copyright owners from collecting information needed to issue such notification.¹⁹ The court reasoned that the DMCA permits service providers to implement a variety of procedures, but implementation is reasonable if, under appropriate circumstances, the service provider terminates users who repeatedly or blatantly infringe copyright.²⁰ This holding protects to copyright holders while restricting the rights of the users on these platforms.

C. *Mavrix Photographs LLC v. LiveJournal Inc.:
Service Providers Losing Immunity*

In *Mavrix Photographs LLC v. LiveJournal Inc.*, the court considered whether a social media platform may allow its users to post copyrighted content in user-created thematic communities.²¹ The Ninth Circuit found that in instances where moderators assist in selecting content submitted by users, an online service provider may not be eligible for DMCA safe harbor protections.²² This case incentivizes service providers to have a hands-off approach when it comes to examining user-submitted content on their platforms.

III. SUBJECT OPINION

¹⁸ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1102 (9th Cir. 2007).

¹⁹ *Id.*

²⁰ *Id.* at 1109.

²¹ *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1045 (9th Cir. 2017).

²² *Id.* at 1054-55.

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 81A. *Capitol Records, LLC v. Vimeo, LLC: Factual Background*

In 2009, Capitol Records brought this action against Vimeo, alleging copyright infringement of musical recordings used in 199 videos that appeared on Vimeo’s website.²³ Vimeo operates an internet platform that permits users to upload and share original videos.²⁴ Capitol Records is a record and music-publishing company.²⁵ In 2013, Vimeo moved for summary judgment, asserting entitlement to safe-harbor protection under the DMCA while Capitol Records cross-moved for partial summary judgment, seeking a ruling that Vimeo was ineligible for the safe harbor.²⁶

Internet users may access and view videos on Vimeo’s website free of charge.²⁷ To upload a video, a user must register for an account on the website.²⁸ Users register by providing a username, password, and e-mail address and agreeing to Vimeo’s Terms of Service.²⁹ Registration affords users access to certain features on the Website, such as the ability to “like” or comment on videos.³⁰ Capitol’s complaint contained a schedule of URLs corresponding to a total of 199 videos that had been uploaded to the Website.³¹ Capitol owned copyrights to musical recordings used in these 199 videos.³² It is undisputed that these musical recordings were used without authorization and infringed on Capitol’s copyrights.³³

B. *Examining Red Flag Knowledge of the DMCA*

²³ *Capitol Recs.*, 2021 WL 2181252 at *1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Capitol Recs., LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 505 (S.D.N.Y. 2013), *amended on reconsideration in part*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013), and *aff’d in part, vacated in part, remanded*, 826 F.3d 78 (2d Cir. 2016).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 506-07.

³² *Capitol Recs., LLC*, 972 F. Supp. at 507.

³³ *Id.* at 507.

82 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:

The DMCA created a compromise, which augments the protections available to copyright owners, and also insulates service providers from liability for infringements of which they are unaware.³⁴ The Act makes it commercially feasible to provide valuable Internet services to the public.³⁵

On the one hand, the DMCA enhances copyright protection by establishing a notice-and-takedown regime that requires service providers to expeditiously remove material that is claimed to be infringing.³⁶ On the other hand, it relieves internet service providers of any obligation to monitor posts made by users and detect infringements.³⁷ Service providers may be immunized from copyright liability if they are unaware of the infringement.³⁸

In the event that infringing material has not been promptly removed from a site, the § 512(c) safe harbor applies only if the service provider has neither actual nor red flag knowledge of the infringing material.³⁹ 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.⁴⁰

The court reasoned that Vimeo did not have red flag knowledge because a particular instance showing that some employees of Vimeo had some contact with a user-posted video was not enough to show knowledge of the infringement.⁴¹ The court continued that Vimeo employees cannot be expected to know how to distinguish between infringements and parodies that may qualify as fair use.⁴² Employees are also not expected to know if the user who posted the material had authorization to use the copyrighted

³⁴ *Capitol Recs.*, 2021 WL 2181252 at *2.

³⁵ *Id.*

³⁶ 17 U.S.C. § 512(c)(1)(C).

³⁷ *Capitol Recs.*, 2021 WL 2181252 at *2.

³⁸ *Id.*

³⁹ *Id.* at *3.

⁴⁰ *Id.* at *2.

⁴¹ *Id.*

⁴² *Id.* at *3.

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 83

music.⁴³ The court added that knowledge of fair-use and licensing principles cannot automatically be imputed to a service-provider employee.⁴⁴ The court denied Capitol's motion for summary judgment in its entirety.⁴⁵ Vimeo's motion for summary judgment was denied for the twenty-six videos that were uploaded or maintained by its employees and granted summary judgment for the remaining 281 videos.⁴⁶

IV. ANALYSIS

The safe harbor provision of the DMCA provides protections for hosts and other service providers that make the Internet we use today possible. Without the legal security the law provides, most of the platforms we enjoy may not exist. Since the creation of the DMCA in 1998, the Internet has grown rapidly, and the protection safe harbor statute provides is no longer adequate to ensure that the platforms will continue to evolve. The Court in *Capitol Records, LLC v. Vimeo, LLC*, defined the scope of the safe harbor provision and provided an analysis on how much protection the platforms receive if they are able to comply with the requirements of the law.⁴⁷ The case also describes the steps required for service providers to maintain their protections.⁴⁸ The case also highlights the precedent set by federal courts when deciding infringement cases as well as the shortcomings of the DMCA.

A. *Implications of Redefining Safe-Harbor*

Redefining safe harbor has many implications including protecting the fair use doctrine. Without the availability of fair use, many creators may not have a definitive defense against copyright infringement claims. Safe harbor is important because many of the internet innovations we are accustomed to may not exist without the

⁴³ *Capitol Recs.*, 2021 WL 2181252 at *3.

⁴⁴ *Id.*

⁴⁵ *Id.* at *13.

⁴⁶ *Id.*

⁴⁷ *Capitol Recs.*, 2021 WL 2181252 at *3.

⁴⁸ *Id.*

84 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:]

freedom it provides platforms.⁴⁹ In an attempt to keep their safe harbor protections and comply with the DMCA, platforms takedown any content that copyright holders request to be removed. Users have a few defenses against a potential unwarranted removal of their content. Fair use serves as one of the more important protections against these actions. Without the ability to claim fair usage, there will be no reliable defense against an incorrect infringement claim or an improper takedown.⁵⁰ Social media users often use copyrighted work in the background of their posts without meeting the elements required for an infringement. The exponential growth of social media in the last decade has caused many posts to be removed due to unfounded takedowns by copyright owners.⁵¹ Redefining the safe harbor means that the platforms are unlikely to remove content without providing users and creators adequate opportunity to dispute the takedown or defend their use under fair use doctrine.

1. Updating Safe Harbor in a World of Emerging Technology

To keep up with the rapid growth of their platforms, service providers have begun to rely on technologies like Content ID to aid with the process of complying with takedown notices.⁵² Content ID helps to ease the process required to keep their immunity.⁵³ Content ID automatically scans user-submitted videos uploaded to YouTube, or other services against a database of files that are submitted by copyright holders.⁵⁴ If there is a match, the video may be blocked or monetized by the rightsholder.⁵⁵ Unfortunately for

⁴⁹ *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, Electronic Frontier Foundation (last visited Nov. 21, 2021) <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>.

⁵⁰ *Id.*

⁵¹ *What Really Does and Doesn't Work for Fair Use in the DMCA*, Electronic Frontier Foundation (last visited Nov. 22, 2021) <https://www.eff.org/deeplinks/2020/07/what-really-does-and-doesnt-work-fair-use-dmca>.

⁵² *Unfiltered: How YouTube's Content ID Discourages Fair Use*, *supra*.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 85

creators, Content ID does not take fair use into account when removing posts.⁵⁶ Allowing platforms more deference when it comes to its immunity may decrease how strict they are when reviewing content posted by users.⁵⁷ Content ID is an important technology because, without it, many service providers may not be able to handle the millions of takedown requests they receive daily.⁵⁸

Many service providers like YouTube have established that they are more interested in appeasing large corporate holders than protecting the rights of their users or promoting creativity.⁵⁹ Previously, YouTube has made it difficult for users to access the content of creators that may displease corporations.⁶⁰ This act is considered shadow banning, where the platform shifts its algorithm in a way that lessens the creator's impact and availability on the app.⁶¹ Congress' purpose of promoting creativity by establishing the safe harbor provision is at risk because of the threat the providers face in potentially losing their immunity. When posts are blocked or monetized by a rights holder without proper due diligence, content creators face the risk of losing compensation for their work. In many cases, content that is rightly posted using fair use may be removed because it is flagged by Content ID.

Implementing fair use in the Content ID process could resolve the current issue of mistakenly removing posts of users that are not actually infringing copyrighted works. Updating the safe harbor provision would provide a better solution to users and service providers. The risk of losing immunity forces providers to implement strict guidelines in regard to copyright use. These strict

⁵⁶ *Id.*

⁵⁷ *Unfiltered: How YouTube's Content ID Discourages Fair Use, supra.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Kelly Wynne, *YouTube Allegedly Shadowbanned Its Biggest Creator PewDiePie and People Aren't Happy*, Newsweek (last visited Jan. 6, 2022) <https://www.newsweek.com/youtube-allegedly-shadowbanned-its-biggest-creator-pewdiepie-people-arent-happy-1541498>.

⁶¹ *Id.*

86 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:]

guidelines affect the creativity and freedom of users because they may risk having their posts removed or their account suspended even if their posts doesn't actually infringe.

B. The Purpose of Red Flag Notice

In exploring red flag knowledge the court looked to determine the level of awareness required for actual knowledge.⁶² The court stated that 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.⁶³ However, it is difficult for providers that use Content ID, to claim that they had no actual knowledge of the infringement. To establish red flag knowledge, copyright holders have to prove that service providers were aware of facts or circumstances from which infringing activity is apparent.⁶⁴ The use of Content ID may make it harder for providers to avoid the actual knowledge requirement. Mere awareness that a post contains copyrighted material is insufficient for red flag knowledge because the user could have authorization to use the material or it could qualify as fair use.⁶⁵

The Plaintiff has the burden of proving knowledge.⁶⁶ The court found that Capitol Records did not establish that Vimeo employees who interacted with the specific videos at issue possessed the knowledge, experience, and background to distinguish infringement from authorized or fair use. The court correctly determined that Vimeo employees who screened the videos did not have red flag knowledge because they lacked knowledge of copyright laws or music licensing.⁶⁷ Additionally, there was no evidence that Vimeo employees were aware of the likelihood that the users were not authorized to use the content.⁶⁸

⁶² *Capitol Recs.*, 2021 WL 2181252 at *2.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at *4.

⁶⁷ *Capitol Recs.*, 2021 WL 2181252 at *5.

⁶⁸ *Id.* at *4.

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 87

Since Vimeo’s employees did not have actual knowledge of the user submitted posts, Capitol did not meet their burden of proving actual or red flag knowledge.⁶⁹ There were also triable issues of fact regarding ten of the fifty-five infringing videos that had been uploaded by Vimeo employees.⁷⁰ If the employees were acting as agents of Vimeo, the Defendants would be disqualified from safe harbor.⁷¹ However, if the employees were acting in their personal capacity, the Defendant’s safe harbor would remain in place.⁷²

The Court concluded that with respect to two of the videos, the infringing activity, which consisted of playing a copyrighted song briefly in the background, was not “objectively obvious,” enough to disqualify Vimeo from protection under the safe harbor.⁷³ For the remaining videos, the Court found that there were genuine issues of fact existed concerning whether Vimeo had red flag knowledge of the videos’ infringing content.⁷⁴ To lose qualification of safe harbor, Plaintiffs would have to prove that the Vimeo employees acted on the companies’ behalf when they uploaded the videos.

Vimeo will be able to keep their safe harbor immunity unless Capitol Records can point to sufficient evidence that Vimeo employees either knew the video was infringing or knew facts making that conclusion obvious to an ordinary person who had no specialized knowledge of music or the laws of copyright.⁷⁵

C. The Process of Examining Evidence of Infringement

Plaintiffs outlined the Defendants’ interaction with the Videos-in-Suit in their argument. Capitol Records emphasized that

⁶⁹ *Id.* at *2.

⁷⁰ *Id.* at *1.

⁷¹ *Capitol Recs.*, 2021 WL 2181252 at *1.

⁷² *Id.*

⁷³ *Id.* at *2.

⁷⁴ *Id.* at *1.

⁷⁵ *Id.* at *2.

88 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:

Vimeo employees watched certain infringing videos with the express purpose of determining their compliance or noncompliance with the website's terms of service.⁷⁶ The purpose was to demonstrate that a Vimeo employee was aware of the content of a Video-in-Suit and that it was objectively obvious that such a video contained copyrighted music.⁷⁷ However, proof that the employees identified the presence of copyrighted material is a necessary but insufficient condition of red flag knowledge.⁷⁸ How the employee interacted with the infringing videos says nothing about the employee's knowledge as to whether the use of such music was authorized or fair.⁷⁹ Therefore, the interactions are insufficient to show that Vimeo employees were aware of facts that would make infringement “objectively obvious”.⁸⁰

1. Interaction with Copyrighted Work Isn't Red Flag Knowledge

The application of music credits and tags to the Videos-in-Suit is not an indicator of red flag knowledge.⁸¹ Although the court agreed that identification of the underlying music by a Vimeo employee permits the inference that the employee knew that the video contained copyrighted material, the awareness is insufficient proof of red flag knowledge.⁸² Vimeo employees cannot be automatically expected to know how likely or unlikely it may be that the user who posted the material had authorization to use the copyrighted music.⁸³ Ultimately, Plaintiff's argument that the application of music credits and tags to the Videos-in-Suit is an indicator of red flag knowledge does not suffice to create a triable issue of fact on red flag knowledge without an additional showing that Vimeo employees could distinguish authorized from unauthorized uses of copyrighted music.⁸⁴

⁷⁶ *Capitol Recs*, 2021 WL 2181252 at *7.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Capitol Recs.*, 2021 WL 2181252 at *7.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 89

The Court also concluded that evidence of employees liking videos or adding them to Vimeo's promotional channels did not raise a triable issue of fact on red flag knowledge in this instance.⁸⁵ The Court shared similar views on employees commenting on the videos. Capitol brought evidence of comments that were placed by Vimeo employees below videos with infringing content.⁸⁶ The Court found that none of the comments indicated employee awareness that a video contained unlicensed or otherwise infringing music.⁸⁷ There were not any comments in which a Vimeo employee demonstrated awareness of facts that the music incorporated in the video was obviously infringing.⁸⁸

2. *Screening Videos Does Not Meet the Burden Required*

The Court considered whether Vimeo's whitelisting and burying satisfied the burden required to meet red flag knowledge. Whitelisting prevents users from flagging a video for review.⁸⁹ It indicates that a Vimeo employee screened a video for the specific purpose of determining whether it complied with Vimeo's Terms of Service.⁹⁰ Since Vimeo's Terms of Service forbid users from uploading videos that infringe another's rights, an employee may have considered the possibility of copyright infringement.⁹¹ However, the Court found that there was no evidence of a whitelisted video or that a Vimeo employee knew that the work was infringing.⁹² Also, there was no evidence that the whitelisting-review process involved any analysis of licensing or fair use.

⁸⁵ *Id.* at *8.

⁸⁶ *Capitol Recs.*, 2021 WL 2181252 at *8.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at *9.

⁹⁰ *Id.*

⁹¹ *Capitol Recs.*, 2021 WL 2181252 at *9.

⁹² *Id.*

90 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:]

Burying is defined as de-emphasizing a video that is not exemplary of ‘Vimeoesque’ content.⁹³ The Court finds the practice of burying less probative of red flag knowledge than whitelisting because it does not theoretically involve a review of whether the video complies with the Terms of Service.⁹⁴ The Court noted that even if the employees reviewed the videos to ensure they complied with the Terms and Services, the video may be de-publicized for other reasons.⁹⁵ However, there is no evidence in the record that this form of interaction with an infringing video led any employee to possess facts making infringement objectively obvious.⁹⁶

3. *Service Providers Involvement in User-Submitted Videos*

An employee uploading a video may disqualify Vimeo from the § 512(c)(1) safe harbor with respect to that video.⁹⁷ The Court views employee involvement in the creation of the video as suggestive of knowledge that the users lacked the authorization to incorporate the copyrighted music.⁹⁸ An employee contributing to the creation of an uploaded video was viewed by the Court as probative of red flag knowledge.⁹⁹ Although the Court found that there was not clear enough evidence to suggest that the employee was aware that neither the video creators nor the user-uploader were authorized by the copyright holder to use their song.¹⁰⁰ It also was not clear from the nature of the video whether it would qualify as fair use.¹⁰¹ Ultimately, Capitol failed to raise a triable issue of fact as to the video.¹⁰²

In another instance of employee involvement, the court found that the allegation that the employee signed up to participate

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Capitol Recs.*, 2021 WL 2181252 at *9.

⁹⁷ *Id.* at *10.

⁹⁸ *Id.*

⁹⁹ *Id.* at *11.

¹⁰⁰ *Id.*

¹⁰¹ *Capitol Recs.*, 2021 WL 2181252 at *11.

¹⁰² *Id.*

2022] *UPDATING SECTION 230 SAFE HARBOR PROVISION* 91

in a lip dub video project did not raise a triable fact as to the red flag knowledge.¹⁰³ The employee commented on a page on Vimeo's website that he planned to contribute a lip dub video but later alerted members that he hadn't gotten around to it yet because he was busy and lazy.¹⁰⁴ None of the videos in the suit was created or uploaded by the employee as part of the project and the comments did not demonstrate that he knew other videos in the group project were unlicensed or the likelihood that they were.¹⁰⁵ Plaintiffs failed to demonstrate red flag knowledge that Vimeo employees either knew the videos were infringing or knew facts making that conclusion obvious to an ordinary person who had no specialized knowledge of the music or the laws of copyright.¹⁰⁶

V. CONCLUSION

The court's analysis in *Capitol* establishes the awareness required to satisfy red flag knowledge. Considering whether the user has a license or whether the posts qualify as fair use is extremely important when determining if a provider has violated the safe harbor provision. Requiring a provider to satisfy the takedown requirement without considering whether there is a license, or a fair use qualification goes against the purpose of the DMCA. The DCMA should be updated to allow creators the same protection afforded to internet service providers.

Technologies like Content ID have improved how service providers comply with the takedown requirement established by the DMCA. The technology also intrudes on the freedoms content creators have online. Losing their account, having their videos deleted, or taking the chance on a lawsuit against a better-funded and resourced rightsholder are all too great a risk for most independent video creators.¹⁰⁷ Through the use of an automatic

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Capitol Recs.*, 2021 WL 2181252 at *11.

¹⁰⁷ *Unfiltered: How YouTube's Content ID Discourages Fair Use*, *supra*.

92 *DEPAUL J. ART, TECH. & IP LAW* [Vol. XXXII:

copyright filter, Content ID effectively replaces the legal fair use of
copyrighted material.¹⁰⁸

¹⁰⁸ *Id.*