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Pinning Your Way to Copyright Infringement: The Legal Implications Pinterest Could Face

Brittany Fink

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Abstract

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Keywords

pinterest, copyright infringement

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**Pinning Your Way to Copyright
Infringement: The Legal
Implications Pinterest Could Face**

*Brittany Fink**

* Brittany Fink graduated *summa cum laude* from West Virginia University, where she received a Bachelor of Arts in Spanish and Political Science. She received her Juris Doctor from West Virginia University College of Law in 2014. She was an Associate Editor and the Alumni and Executive Assistant for the *West Virginia Law Review*. Brittany Fink will be working for Lewis Glasser Casey & Rollins, PLLC in Charleston, West Virginia.

Abstract

With the simple click of a button, anyone can copy an image from one place and paste it to another. What some people do not realize is that these actions could have them one click away from copyright infringement. Advancements in technology have made it easier for Internet users to infringe on the rights of copyright owners. Many popular websites, such as YouTube and Facebook, have seen the dangers of allowing users to upload videos and images onto their websites. However, one popular website has not yet seen the wrath of copyright owners. This Article looks at the rights copyright owners have in the realm of Pinterest. Specifically, this Article analyzes how a court would rule on a case of copyright infringement involving Pinterest and the Digital Millennium Copyright Act (or the DMCA), with an emphasis on the safe harbor provision within the DMCA. This Article predicts what a court might do if it were presented with a copyright infringement claim against Pinterest. Finally, this Article concludes with a look into the future of Pinterest copyright law.

Table of Contents

INTRODUCTION..... 365

I. HISTORY OF PINTEREST & PINTEREST’S
COPYRIGHT POLICIES & TERMS OF USE..... 367

II. CURRENT COPYRIGHT LAW..... 375

 A. *Copyright Act*..... 375

 B. *Digital Millennium Copyright Act* 377

 1. Cases Involving the Safe Harbor
 Provision..... 383

 a. *Specific Knowledge*..... 385

 b. *Lawful & Unlawful Use* 389

III. PINTEREST SUED: IS IT LIABLE? 391

A. <i>Types of Claims That Could Be Made</i>	394
1. Direct Copyright Infringement	394
2. Willful Infringement	395
3. Contributory Liability	396
4. Vicarious Liability	398
B. <i>Protection from Digital Millennium Copyright Act’s Safe Harbor Provision</i>	400
CONCLUSION.....	402

INTRODUCTION

After months and months of trial and error, a mother of three finally perfected a recipe for a healthy and low-calorie dessert. Excited about her accomplishment, she enthusiastically wrote about it on her “Guilt-Free Eating” blog, in which she often blogs about the ability to eat foods most women shy away from due to high caloric content. A month later, a reader of her blog posted the recipe on Pinterest. This Pinterest user “pinned” the recipe on her “Delectable Desserts” board. Within a week the post had 140 “re-pins” and 57 likes. Within a year, this same recipe had been branded as “Skinny Girl Desserts” and was being sold in grocery stores across the country. It was not until the mother was at a friend’s house and saw what resembled her dessert on the front of a “Skinny Girl Desserts” box that she realized someone had stolen her idea.

Years of sweat-drenching workouts and muscle-draining lifts finally paid off for a physical trainer as he developed a work-out program incorporating interval cardio, weight lifting, and circuit training that led to amazing results. After using the program on his clients for a year and seeing the anticipated changes and results, he finally felt confident that he could create a fitness video to sell on the market.

However, before he could take these steps, one commercial virtually stole this dream away from him. A workout video called Circuit Plus was nearly identical to the workout he created a year ago. A few weeks later he overheard a group of people at the gym discussing how Circuit Plus was just like something they had seen posted on Pinterest eight months ago.

Experiences and life lessons helped one musically inclined artist to compose lyrics that were worthy of song development. Along with other songs he had written, he posted these lyrics on his Music Shaped Me webpage. With the help of his father, also a lawyer, this artist took the steps to copyright his lyrics, but made no mention of this on his webpage. His webpage is available for anyone to see who navigates on the Internet. It wasn't long until portions of his lyrics ended up in cursive letters with a decorative background and graphic designs on the boards of many Pinterest users. Even though he had no idea his work had made its way to Pinterest, he was oddly aware his work had made its way to the radio in a new hit song crafted by a fresh artist in the business. Not to his surprise, his name was not mentioned before or after the song played.

Given the current structure of copyright law, only one of the three previously listed individuals might be protected and have a claim for copyright infringement. Because the music artist took the steps to own the legal rights to his lyrics, he is protected from copyright infringement. While he has a right to sue someone, who is liable for using his copyrighted lyrics as their own? Pinterest for allowing it to be posted on someone's board? The Pinterest member who reposted the lyrics? Or the person who took those lyrics and made a top hit with them?

This Article looks at the rights of copyright owners in the realm of Pinterest. Specifically, this Article analyzes how a court would rule on a case of copyright infringement involving Pinterest, as no such cases have reached the court system. Part I outlines the history of Pinterest and discusses Pinterest's copyright policies and terms of use. Part II summarizes the Copyright Act and the Digital Millennium Copyright Act ("DMCA"), with an emphasis on the safe harbor provision within the DMCA. Part III predicts what a court might do if it were presented with a copyright infringement claim against Pinterest. Finally, this Article will conclude with a look into the future of Pinterest copyright law.

I. HISTORY OF PINTEREST & PINTEREST'S COPYRIGHT POLICIES & TERMS OF USE

Pinterest was launched in March 2010 by Ben Silbermann, Paul Sciarra and Evan Sharp.¹ Ben Silbermann's love for collecting tangible objects led to the development of a website that would allow others to virtually collect ideas and more in one virtual place.² Pinterest had a slow start, but as of July 2013, it had reached almost 70 million users.³ Users have come to enjoy the virtual ability to scrapbook images that link to ideas and crafts.

¹ Adam Belz, *Pinterest Stands Out in Crowded Social Media Field*, USA TODAY (Oct. 28, 2011, 4:11 PM), <http://usatoday30.usatoday.com/tech/news/story/2011-10-28/pinterest-Ben-Silbermann/50979542/1>.

² *Id.*

³ Craig Smith, (*April 2014*) *By the Numbers: 65 Amazing Pinterest Statistics*, DIGITAL MARKETING RAMBLINGS (Mar 4, 2014), <http://expandedramblings.com/index.php/pinterest-stats/#.U34WYCijO3Q>.

Pinterest allows users to “pin” or “re-pin” images found on the web or on another user’s Pinterest boards. A pin can either be an image or a video from another website or uploaded by the user. Pinterest users can categorize their pins into different boards such as “food,” “crafts,” “wedding ideas,” and much more. Pinterest users can find recipes, workouts, craft ideas, quotes, and photographs of countless objects, people, and places. Comparable to other social networks, a Pinterest user can follow others, share their pins, like pins, and make comments on pins. The Pinterest homepage gives updates to users as to what their followed accounts are pinning. Finally, a Pinterest user can re-pin what others have on their boards, automatically adding the pin to one of the re-pinner’s boards. When something is re-pinned, credit is given to the person who first pinned the image or video. While a Pinterest user cannot edit the image or remove the source link,⁴ a user can edit or add to the description of the image or video.

When 80% of images or videos pinned on Pinterest are re-pins,⁵ it is no surprise that copyright infringements issues are just a pin away. However, before a user can start using Pinterest, he must agree to abide by the Terms and Services and the Privacy Policy. It is important to understand the Terms and Services before analyzing whether a plaintiff has a cause of action or if they have relin-

⁴ A source link is a link to the page from which the pin came from. For example, if a picture was taken from someone’s blog, then the link to that blog would remain with the image every time it was pinned.

⁵ Craig Smith, (*April 2013*) *By the Numbers: Some Amazing Pinterest Stats*, PINTEREST INSIDER (Apr. 6, 2013, 8:35 AM), <http://www.pinterestinsider.com/2013/04/april-2013-by-numbers-some-amazing.html>.

quished or waived any rights by using Pinterest. The Terms and Services reads as follows:

Pinterest's products and services are provided by Pinterest, Inc. These Terms of Service ("Terms") govern your access to and use of Pinterest's website, products, and services ("Products"). Please read these Terms carefully, and contact us if you have any questions. By accessing or using our Products, you agree to be bound by these Terms and by our Privacy Policy.

1. Using Pinterest

a. Who can use Pinterest

You may use our Products only if you can form a binding contract with Pinterest, and only in compliance with these Terms and all applicable laws. When you create your Pinterest account, you must provide us with accurate and complete information. Any use or access by anyone under the age of 13 is prohibited. If you open an account on behalf of a company, organization, or other entity, then (a) "you" includes you and that entity, and (b) you represent and warrant that you are authorized to grant all permissions and licenses provided in these Terms and bind the entity to these Terms, and that you agree to these Terms on the entity's behalf. Some of our Products may be software that is downloaded to your computer, phone, tablet, or other device. You agree that we may automatically upgrade those Products, and these Terms will apply to such upgrades.

...

c. Commercial use of Pinterest

If you want to use our Products for commercial purposes you must create a business account and agree to our Business Terms of Service.

2. Your Content

a. Posting content

Pinterest allows you to post content, including photos, comments, and other materials. Anything that you post or otherwise make available on our Products is referred to as “User Content.” You retain all rights in, and are solely responsible for, the User Content you post to Pinterest.

b. How Pinterest and other users can use your content

You grant Pinterest and its users a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing, and using the Pinterest Products. Nothing in these Terms shall restrict other legal rights Pinterest may have to User Content, for example under other licenses. We reserve the right to remove or modify User Content for any reason, including User Content that we believe violates these Terms or our policies.

c. How long we keep your content

Following termination or deactivation of your account, or if you remove any User Content from Pinterest, we may retain your User Content for a commercially reasonable period of time for backup, archival, or audit purposes. Furthermore, Pinterest and its users may retain and continue to use, store, display, reproduce, re-pin, modify, create derivative works, perform, and distribute any of your User Content that other users have stored or shared through Pinterest.⁶

The policy outlines who can use Pinterest, what rights one has as a user, and what can be done with one's content. The website also rewords the policy more simply on the right side of the page so users are not confused by the legal language used in the policy: "If you post your content on Pinterest, it still belongs to you but we can show it to people and others can re-pin it. . . .Copies of content shared with others may remain even after you delete the content from your account. . . . We respect copyrights. You should, too."⁷

Pinterest policies are aimed at protecting itself and informing its users on how to protect themselves as well. It emphasizes the importance of copyright issues. Pinterest's copyright policy is listed on its webpage and reads:

Pinterest ("Pinterest") respects the intellectual property rights of others and expects

⁶ *Terms of Service*, PINTEREST, <http://about.pinterest.com/en/terms-service> (last visited May 22, 2014).

⁷*Id.*

its users to do the same. It is Pinterest's policy, in appropriate circumstances and at its discretion, to disable and/or terminate the accounts of users who repeatedly infringe or are repeatedly charged with infringing the copyrights or other intellectual property rights of others.

In accordance with the Digital Millennium Copyright Act of 1998, the text of which may be found on the U.S. Copyright Office website at

<http://www.copyright.gov/legislation/dmca.pdf>, Pinterest will respond expeditiously to claims of copyright infringement committed using the Pinterest website (the "Site") that are reported to Pinterest's Designated Copyright Agent, identified in the sample notice below.⁸

After detailing the copyright policy, Pinterest also outlines what rights a copyright owner has and what steps he should take in order have the copyright infringement taken care of:

If you are a copyright owner, or are authorized to act on behalf of one, or authorized to act under any exclusive right under copyright, please report alleged copyright infringements taking place on or through the Site by completing the following DMCA Notice of Alleged Infringement and delivering it to Pinterest's Designated Copyright Agent. Up-

⁸ *Copyright*, PINTEREST, <http://about.pinterest.com/en/copyright> (last visited May 22, 2014).

on receipt of the Notice as described below, Pinterest will take whatever action, in its sole discretion, it deems appropriate, including removal of the challenged material from the Site. DMCA Notice of Alleged Infringement (“Notice”).⁹

⁹ The steps a copyright owner should take are listed below:

1. Identify the copyrighted work that you claim has been infringed, or - if multiple copyrighted works are covered by this Notice - you may provide a representative list of the copyrighted works that you claim have been infringed.
2. Identify (i) the material that you claim is 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 us to locate the material, including at a minimum, if applicable, the URL of the link shown on the Site where such material may be found, and (ii) the reference or link, to the material or activity that you claim to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit us to locate that reference or link, including at a minimum, if applicable, the URL of the link shown on the Site where such reference or link may be found.
3. Provide your mailing address, telephone number, and, if available, email address.
4. Include both of the following statements in the body of the Notice:
“I hereby state that I have a good faith belief that the disputed use of the copyrighted material or reference or link to such material is not authorized by the copyright owner, its agent, or the law (e.g., as a fair use).”

Pinterest takes more steps by outlining what a Pinterest user should do if they receive a copyright complaint and how to file a counter-notice.¹⁰ As one last preventive measure, Pinterest also has a page for rights of trademark owners.¹¹ Pinterest has created policies for its own protection, and to assist individuals in protecting themselves from claims of

“I hereby state that the information in this Notice is accurate and, under penalty of perjury, that I am the owner, or authorized to act on behalf of the owner, of the copyright or of an exclusive right under the copyright that is allegedly infringed.”

5. Provide your full legal name and your electronic or physical signature.

Deliver this Notice, with all items completed, to Pinterest’s Designated Copyright Agent

Id.

¹⁰ *Id.*

¹¹ *Trademark*, PINTEREST,

<http://about.pinterest.com/en/trademark> (last accessed May 22, 2014).

Pinterest respects the trademark rights of others. Accounts with usernames, Pin Board names, or any other content that misleads others or violates another’s trademark may be updated, transferred or permanently suspended. If you are concerned that someone may be using your trademark in an infringing way on our site you can let us know by completing the form below. Pinterest will review your submission and take whatever action, in its sole discretion, it deems appropriate, including temporary or permanent removal of the trademark from the Pinterest site.

Id.

copyright infringement. However, even with these precautionary guidelines, Pinterest and individual users may still find themselves in legal trouble. What happens if Pinterest fails to remove an image after being informed by the copyright owner that its image was being reproduced without his permission? What happens if a Pinterest user somehow benefits from a copyrighted image? Both the Copyright Act and the DMCA will guide the analysis of these potential legal issues.

II. CURRENT COPYRIGHT LAW

A. Copyright Act

The Copyright Act of 1976 was created to grant copyright holders a set of exclusive rights to their works.¹² Included in this set of rights is the right to “reproduce, perform publicly, display publicly, prepare derivative works of, and distribute copies of” the protected work.¹³ Without such a collective set of rights, people would be discouraged from creating new works. Affording for this, the “principle purpose of the [Copyright Act] is to encourage the origination of creative works by attaching enforceable property rights to them.”¹⁴ The Act not only outlines the rights of copyright owners, but also

provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to

¹² See 17 U.S.C. § 102 (2012).

¹³ *Arista Records LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010); see also 17 U.S.C. § 106 (2012).

¹⁴ *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 240 F.3d 116, 122 (2d Cir. 2001) (quoting *Diamond v. Am-Law Publ'g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984)) (alteration in original).

restrain the infringer from violating his rights, the impoundment and destruction of all reproductions of his work made in violation of his rights, and a recovery of his actual damages and any additional profits realized by the infringer or a recovery of statutory damages, and attorney fees.¹⁵

However, a copyright owner cannot successfully prevail on a copyright claim by just stating his work has been infringed. In order to prevail on a copyright infringement claim, “two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”¹⁶ Ownership alone, however, is only prima facie evidence of both valid ownership and originality.¹⁷ While copyright owners are granted a set of rights and can sue infringers, “liability is excused where the defendant demonstrates that he made ‘fair use’ of the plaintiff’s copyrighted work.”¹⁸

Section 102 of the Copyright Act outlines the extent of copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communi-

¹⁵ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433-34 (1984).

¹⁶ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

¹⁷ Scholz Design, Inc. v. Sard Custom Homes, LLC, 691 F.3d 182, 186 (2d Cir. 2012).

¹⁸ Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 550 (S.D.N.Y. 2013) (“The availability of a fair use defense permits courts to avoid the ‘rigid application of the copyright statute’ when ‘it would stifle the very creativity which the law is designed to foster.’”) (quoting Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994)).

cated, either directly or with the aid of a machine or device.”¹⁹ The Act defines “works of authorship” as any of the following: “(1) literary works; (2) musical works, including accompanying words; (3) dramatic works, including accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”²⁰ Section 302 of the Act allows for a lengthy protection for copyright owners as it gives them “a term consisting of the life of the author and seventy years after the author’s death.”²¹ Finally, the Act also outlines how to transfer a copyright and the process for registration of original works.²²

B. Digital Millennium Copyright Act

In order to provide protections to copyright owners even more so than what the Copyright Act of 1976 provides, additional copyright laws have been crafted to provide owners exclusive rights to their material.²³ Given the quick and expansive technological advances with regard to the Internet, copyright infringement has increased with just the click of a button. Internet users are now able to upload content to webpages very easily and infringers can copyright this material just as easily.

¹⁹ 17 U.S.C. § 102 (2012).

²⁰ *Id.*

²¹ 17 U.S.C. § 302 (2012).

²² 17 U.S.C. §§ 205, 411 (2012).

²³ It is important to note that “[t]he DMCA did not simply rewrite copyright law for the on-line world... [and that] [c]laims against service providers for direct, contributory, or vicarious copyright infringement, therefore, are generally evaluated just as they would be in the non-online world.” *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (quoting *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2002)).

In 1998, Congress passed the Digital Millennium Copyright Act (“DMCA”) to further outline the rights and protections copyright owners deserve. One of the main purposes of the DMCA is to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”²⁴ Another purpose of the Act was to create protection from liability for Internet service providers (“ISPs”).²⁵ Congress has taken steps to keep up with the fast-paced changes in technology, and the legislative history of the DMCA explains why this statute is necessary to keep up with these changes: “With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.”²⁶

The DMCA is divided into five sections. Title II of the Act is designed to protect ISPs from liability of copyright infringement. However, the DMCA was also designed to protect copyright owners at the same time. Copyright owners can still sue users who upload copyrighted material, but under the safe harbor provision, ISPs are not liable for detecting the infringement on their websites.

Within the DMCA, Congress passed the Online Copyright Infringement Liability Limitation Act (“OCILLA”) to deal with the copyright issues found on the Internet.²⁷ More specifically, the Ninth

²⁴ S. REP. NO. 105-190, at 1-2 (1998).

²⁵ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

²⁶ S. REP. NO. 105-190, at 2 (1998).

²⁷ See Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512).

Circuit stated that “[d]ifficult and controversial questions of copyright liability in the online world prompted Congress to enact Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA) [(safe harbor provision)].”²⁸ The DMCA is crafted so that ISPs are not held liable for the actions of their users. The Act protects both primary and secondary providers as long as the ISP did not play a role in posting the infringing material.²⁹

Section 512(k)(1) helps courts understand what an ISP is by defining both a narrow definition connected to § 512(a) and a broader definition that applies to all of § 512.³⁰ Both types provide protec-

²⁸ See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (second alteration in original). The Ninth Circuit looked to legislative intent for support and found that “Congress decided that ‘by limiting [service providers] liability,’ it would ‘ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.’” *Id.* (alterations in original).

²⁹ Carl E. Brody, Jr., *Catch the Tiger by the Tail: Counseling the Burgeoning Government Use of Internet Media*, 83 FLA. B.J., Dec. 2009, at 52, available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/00741B654A2BF05F8525767E006FC561> (defining a primary provider as “an ISP that creates a Web site that interacts with the public and allows public comment or posting, whereas secondary providers use outside Web providers, such as Facebook, YouTube, or Twitter, in order to network”).

³⁰ 17 U.S.C. § 512(k)(1) (2012).

(1) Service provider.

(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s

tion when a user posts potentially infringing content without modification of the content by the ISP.³¹ “The intent is to allow providers protection from the misdeeds of others in order to foster the free and open and exchange of information on the Internet.”³² The DMCA is aimed at placing the blame on the person who is actually responsible for copyright infringement, not the ISP for providing the arena to do so. Some courts have recognized that Congress made a policy decision that the “DMCA notification procedures [would] place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of the copyright.”³³ After parsing through the statute, the Ninth Circuit declined to shift this burden to the ISP from the copyright owner.³⁴

In order to receive the protections of the safe harbor provision, an ISP must meet specific requirements. The Supreme Court of New York believes:

[T]he thrust of the DMCA is to relieve Internet service providers of the initial need

choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

Id.

³¹ Brody, *supra* note 29.

³² *Id.*

³³ Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007).

³⁴ *Id.*

to ascertain the copyright status of the sound recordings that they make available, to place the burden of asserting copyright ownership on the owners of such copyrights, and to require the Internet service providers to “take down” infringing material, upon receipt of a valid notice of infringement.³⁵

Section 512(c) of the DMCA specifically outlines the requirements that a service provider must meet. It provides in relevant part:

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for 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, if the service provider—

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing ac-

³⁵ UMG Recordings, Inc. v. Escape Media Grp., Inc., 948 N.Y.S.2d 881, 886 (Sup. Ct. 2012).

tivity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.³⁶

In *Io Group, Inc. v. Veoh Networks, Inc.*, the District Court for the Northern District of California outlined the requirements in their own words:

[I]t must be a “service provider” and it must adopt, reasonably implement and inform subscribers of a policy providing that it may, in appropriate circumstances, terminate the accounts of repeat infringers. Further, the service provider is obliged to accommodate, and must not interfere with, “standard technical measures” used by copyright owners to identify or protect copyrighted works.³⁷

³⁶ 17 U.S.C. § 512(c) (2012).

³⁷ *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1142-43 (N.D. Cal. 2008) (citations omitted).

The DMCA speaks on many requirements necessary for the safe harbor provision, but fails to mention what happens when an ISP encourages users to share illegal material. In *MGM Studios, Inc. v. Grokster, Ltd.*, the Supreme Court held Grokster liable for doing just this.³⁸ Even though Grokster may not have had specific knowledge of when a user did actually upload and share illegal material, it encouraged its users to share illegal material and the company could be found liable by a jury.³⁹ The court explained, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁴⁰

Given the increasing use of the Internet over the past decade or two, copyright infringement claims have been finding their way to the courts more and more. The courts have analyzed various issues within these copyright infringement claims, taking a careful look at the safe harbor provision found within the DMCA. Some of these issues include the specific knowledge prong within the DMCA and the idea of lawful versus unlawful uses of Internet websites. The following subsections look at the case law that has developed over the past couple decades and the rules that have been created as innovation creates new copyright infringement opportunities.

1. Cases Involving the Safe Harbor Provision

Once a defendant proves that he has met all of

³⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

³⁹ *Id.* at 924.

⁴⁰ *Id.*

the requirements of the safe harbor provision, he is protected from liability because the safe harbor provision is an affirmative defense.⁴¹ The Ninth Circuit has an abundance of cases dealing with copyright infringement in our technologically growing world. In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, the Ninth Circuit granted Veoh Networks partial summary judgment “in a careful and comprehensive decision holding that Veoh met all the § 512(c) requirements and thus was entitled to DMCA safe harbor protections.”⁴² The plaintiff, UMG Recordings Inc., did not dispute that Veoh removed the copyrighted material from its webpage, but “filed suit against Veoh for direct, vicarious and contributory copyright infringement, and for inducement of infringement.”⁴³ UMG further alleged that “Veoh’s efforts to prevent copyright infringement on its system were ‘too little too late’ because Veoh did not adopt filtering technology until ‘after Veoh harbored infringing material for its own benefit[.]’”⁴⁴ Finally, UMG argued that Veoh only removed copyrighted material that was identified in the notice of infringement.⁴⁵ Nothing in the safe harbor provision requires that ISPs implement a system that detects and prevents copyright infringement or that it has to remove material that is not listed within a notice of copyright infringement. Even though Veoh had copyrighted material on its website, it was not found liable because it satisfied all four of the requirements

⁴¹ See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1013 (9th Cir. 2013).

⁴² *Id.* at 1013.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

under § 512(c).⁴⁶

In *Viacom International Inc. v. YouTube, Inc.*⁴⁷ the Court found that

Section 512(m) is explicit: DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider. For that reason, § 512(m) is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring.⁴⁸

Instead, an ISP is only required to remove copyrighted information once it receives notice that its website contains copyrighted information. As long as an ISP follows the requirements found in the safe harbor provision, it will be protected from liability.⁴⁹

a. Specific Knowledge

The first requirement of the safe harbor provision is that the ISP: “(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing.”⁵⁰ Courts have been reluctant to stray from a strict application of this provision. In *Sony Corporation of America v. Universal City Studios, Inc.*, the Supreme Court found that there was “no precedent in the law of copyright for the imposition of vicarious liability” based on the fact that a defendant had “sold equipment with constructive knowledge of the fact that

⁴⁶ *Id.*

⁴⁷ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

⁴⁸ *Id.* at 35.

⁴⁹ 17 U.S.C. § 512 (2012).

⁵⁰ 17 U.S.C. § 512(A)(i).

their customers may use that equipment to make unauthorized copies of copyrighted material.”⁵¹ The Ninth Circuit adapted the holding of *Sony* to the internet, and held that “if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement,” however, “absent any specific information which identifies infringing activity, a computer system cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material.”⁵²

The Ninth Circuit has had the opportunity to adjudicate several cases pertaining to copyright infringement and the Internet. In so doing, it has had the opportunity to establish its opinion on the purpose of specific knowledge found in the safe harbor provision, and why it believes allowing a general knowledge of copyright infringement should not be a basis for liability.

[I]f merely hosting material that falls within a category of content capable of copyright protection, with the general knowledge that one’s services could be used to share unauthorized copies of copyrighted material, was sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a dead letter: § 512(c) applies only to claims of copyright infringement, yet the fact that a service provider’s website could

⁵¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).

⁵² *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1021 (9th Cir. 2001).

contain copyrightable material would remove the service provider from § 512(c) eligibility.⁵³

The court emphasizes the idea that if it were to hold an ISP to a general knowledge standard, the safe harbor provision of the DMCA would be useless. While the Ninth Circuit holds that specific knowledge should be the standard by which it will determine whether an ISP has engaged in copyright infringement, the Second Circuit held in *Viacom International v. YouTube, Inc.*, that “a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge.”⁵⁴

In *Viacom*, the plaintiff, owner of several television networks, sued the defendant, YouTube, for copyright infringement of videos uploaded by users to its website.⁵⁵ In order to find YouTube liable for its users’ illegal actions of uploading copyrighted videos, Viacom claimed that YouTube had specific knowledge of copyright infringement and failed to remove the illegally uploaded videos.⁵⁶ After a thorough analysis of the DMCA safe harbor requirements, the Court found that YouTube deserved protection under the safe harbor provision.⁵⁷ Looking to the fact that YouTube removed all copyrighted videos once notified, the court was able to uphold the safe

⁵³ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013).

⁵⁴ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013) (quoting *Viacom Int’l v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012)).

⁵⁵ *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010)

⁵⁶ *Id.* at 518-519.

⁵⁷ *Id.* at 523.

harbor provision.⁵⁸ Viacom then tried to argue that even though YouTube may not have had specific knowledge of copyrighted material, it had general knowledge of copyrighted material on its website.⁵⁹ YouTube was granted summary judgment because the judge found that YouTube did not know which users had permission to upload and therefore could not be held liable for general knowledge of copyrighted material on their website.⁶⁰

While many ISPs such as Facebook or Twitter have difficulty monitoring all of their users' activities, making it harder to prove specific knowledge of copyright infringement, the company Napster set up its operations in a way that specific knowledge was obvious. The case *A&M Records v. Napster, Inc.* is a great example of how effective the DMCA can be in stopping ISPs from allowing their users to infringe copyrighted materials. Napster allowed users to search its directory for files and then provided the user with the address of the computer that contained the wanted file.⁶¹ Because Napster controlled and owned the centralized system where the directory was located, the plaintiffs were able to show that

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* It should be noted that this case was appealed in 2012. The United States Court of Appeals for the Second Circuit remanded the case to the District Court to determine whether YouTube had knowledge or awareness of any specific instances of infringement corresponding to the clips-in-suit. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. N.Y. 2012). However, on April 18, 2013, District Judge Stanton again granted summary judgment in favor of defendant YouTube. *Viacom Int'l, Inc. v. Youtube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

⁶¹ *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

Napster had actual knowledge of illegal copyrighting activity.⁶² Whereas Facebook and Twitter have a strong argument that they are not aware if a user reposts or tweets copyrighted material, Napster could not use this same argument. Napster owned and operated the system; therefore actual knowledge of copyright infringement was obvious.

b. Lawful & Unlawful Use

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the question the court answered was “under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product.”⁶³ After a lengthy analysis, the court held “that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁶⁴ The court took a lot of its analysis from the Supreme Court case of *Sony Corporation of America v. Universal City Studios*,⁶⁵ in which the Court held that “distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of in-

⁶² *Id.* at 1023.

⁶³ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918-19 (2005).

⁶⁴ *Id.*

⁶⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (establishing that secondary infringement can arise from the very distribution of a commercial product, but there must be evidence of stated or indicated intent to promote infringing uses in order to impose liability on Sony).

fringement and failed to act on that knowledge.”⁶⁶

This analysis is a good reflection of a doctrine that is now codified in the United States Code that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways.⁶⁷ Several cases have cited this proposition by stating that “[o]ne who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent.”⁶⁸ While the courts strongly uphold the doctrine that parties will be held liable if they distribute a product intended for copyright infringement, the doctrine also “absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s product will be misused. It leaves breathing room for innovation and a vigorous commerce.”⁶⁹

⁶⁶ *Metro-Goldwyn-Mayer*, 545 U.S. at 927 (summarizing the Court of Appeals’ interpretation of *Sony*, 464 U.S. 417).

⁶⁷ See 35 U.S.C. §271(c) (2012); see also *Metro-Goldwyn-Mayer*, 545 U.S. at 932; *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) (noting codification of cases) (“The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used in commerce that the distributor intended the article to be used to infringe another’s patent , and so may justly be held liable for infringement.”).

⁶⁸ *New York Scaffolding Co. v. Whitney*, 224 F. 452, 459 (8th Cir. 1915); see also *James Heekin Co. v. Baker*, 138 F. 63, 66 (8th Cir. 1905); *Canada v. Michigan Malleable Iron Co.*, 124 F. 486, 489 (6th Cir. 1903).

⁶⁹ *Metro-Goldwyn-Mayer*, 545 U.S. at 932 (citing *Sony*, 464 U.S. at 442); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980)).

This doctrine holds true to the concept that because a product can be used in an unlawful way does not necessarily mean that the item itself is unlawful. For example, a hammer is not unlawful by its nature. Instead a hammer is designed to hammer and remove nails or staples, and to bend metal. However, the hammer is not designed to be used as a weapon for murder. Yet in 2011, more murders were committed by hammers and clubs than murders committed by rifles.⁷⁰ Even though hammers have been used in an illegal manner, it does not mean that those who distributed the hammers should be found liable for accessory to murder. Hammer producers Kobalt, Bostitch, and VAUGHN should not be found partially responsible for any murders or any other type of crime committed with a hammer (e.g., breaking and entering, battery, or assault).

III. PINTEREST SUED: IS IT LIABLE?

Most top social network and video sharing ISPs (e.g., Facebook,⁷¹ Twitter, YouTube, and Mega-video) have been challenged in court for some type of claim for copyright infringement. However, Pinterest, the third largest social network that continues to grow in popularity by the day, has yet to be chal-

⁷⁰ Awr Hawkins, *FBI: More People Killed with Hammers, Clubs Each Year Than Rifles*, BREITBART (Jan. 3, 2013), <http://www.breitbart.com/Big-Government/2013/01/03/FBI-More-People-Killed-With-Hammers-and-Clubs-Each-Year-Than-With-Rifles>.

⁷¹ See *Facebook, Inc. v. Power Ventures, Inc.*, 844 F. Supp. 2d 1025, 1028 (N.D. Cal. 2012); see also *Facebook, Inc. v. ConnectU LLC*, 489 F. Supp. 2d 1087, 1089 (N.D. Cal. 2007). There, the court found that a competing social networking site violated Section 502 when it accessed the Facebook website to collect “millions” of email address of Facebook users, and then used those email addresses to solicit business for itself. *Id.*

lenged for copyright infringement in court. While Pinterest's terms of service and copyright policies outline guidelines for users and protections for copyright owners, it is only a matter of time before a "pin" is more than just an image "re-pinned" on hundreds of Pinterest users' boards. It is inevitable that one day a copyright owner is going to be surfing the web and find his copyrighted image on Pinterest.

One might be surprised to know that this scenario has not yet occurred, and the issue of copyright infringement has not ended in court, but the fact that Pinterest is not a profit-making company is plays a huge role in its ability to avoid litigation. However, prospective future business models for Pinterest, where companies will be able to buy certain boards as a means of advertising,⁷² the potential for damages could be great.⁷³ Given the development of copyright law, how would a court analyze a claim of copyright infringement against Pinterest? This Part will apply current copyright laws and common law to predict how a court would analyze these intellectual property issues.

Predictably, if a copyright owner brought a claim of copyright infringement (direct, willful, con-

⁷² Maria Duron, *Pinterest When You're a Service Provider*, BUZZ101 (May 14, 2012), <http://thebuzz101.blogspot.com/2012/05/pinterest-when-youre-service-provider.html> (discussing business opportunities for companies and advantages of using Pinterest to get ahead); *see also* Hollis Thomases, *4 Things Pinterest Isn't Saying*, INC. (Feb. 24, 2012), <http://www.inc.com/hollis-thomases/what-pinterest-wont-tell-you.html> (discussing Pinterest's appeal to businesses, but the copyright implications involved with using Pinterest).

⁷³ It should be noted that businesses can currently sign up for a business membership with Pinterest, however Pinterest has not used this route as a means of profit, but may look to do so in the future.

tributory, or vicarious) against Pinterest, Pinterest would use the safe harbor provision of the Digital Millennium Copyright Act and argue that it meets all four of the requirements and deserves protection from liability.⁷⁴ First, Pinterest would argue that it is an ISP as defined by the Act. The plaintiff would then try to argue and rebut this fact to show that Pinterest is not a service provider as defined by the Act and does not deserve protection. However, in *In re Aimster Copyright Litigation*,⁷⁵ the District Court for the Northern District of Illinois looked to the language of the DMCA in order to determine what a service provider is defined as under the Act. After a detailed discussion of the definition of a service provider,⁷⁶ the court said that it would “have trouble imaging the existence of an online service that *would not* fall under the definitions”⁷⁷ of what a service provider is under the DMCA. Finally, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, the District Court for the Central District of California also discussed the

⁷⁴ See *supra* note 36 and accompanying text.

⁷⁵ *In re Aimster Copyright Litigation*, 252 F. Supp. 2d 634 (2002).

⁷⁶ “The DMCA defines ‘service provider’ in two different ways, depending upon which safe harbor is at issue. For the purpose of the Transitory Communication Safe Harbor, ‘service provider’ is defined as ‘an entity offering the transmission, routing, or providing of connections for digital online communications, between or among parties specified by a user, of material of the user’s choosing, without modification of the content of the material as sent or received.’ 17 U.S.C. § 512(k)(1)(A). For the purposes of the remaining safe harbors, the ‘service provider’ definition is even more broad: a service provider is ‘a provider of online services or network access, or the operator of facilities therefor.’ 17 U.S.C. § 512(k)(1)(B). The second definition further provides that it includes any entity that qualifies under the first definition. *Id.*” *Aimster*, 252 F. Supp. 2d at 657-58.

⁷⁷ *Id.* at 658.

broad definition of a service provider and stated that “[a]lthough there appears to be uniform agreement that the definition is broad . . . the Court has found no discussion of this definition’s limits.”⁷⁸ Given the social media platform that Pinterest allows and the potential for business uses on the website, I do not think a court would find difficulty in labeling Pinterest as a service provider as defined by the DMCA.

A. Types of Claims That Could Be Made

A copyright owner could pursue many different types of copyright infringement claims. Below are hypotheticals under (1) direct copyright infringement, (2) willful infringement, (3) contributory copyright infringement, and (4) vicarious liability.

1. Direct Copyright Infringement

If a copyright owner tried to sue Pinterest on a claim of direct copyright infringement when one of Pinterest’s users pinned or re-pinned the copyright owner’s image or video, I think a court would look to statutory and common law protections that would allow Pinterest to escape liability. In order to prevail on a direct copyright infringement claim, “a plaintiff must show that he owns the copyright and that the defendant himself violated one or more of the plaintiff’s exclusive rights under the Copyright Act.”⁷⁹

A court could look to *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,⁸⁰ for guidance on whether Pinterest should be found liable for direct

⁷⁸ 213 F.Supp.2d 1146, 1175 (C.D.Cal.2002).

⁷⁹ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing *A & M Records v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)).

⁸⁰ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

copyright infringement or not. In *Cartoon Network*, the Second Circuit “held that the defendants’ Remote Storage DVR (“RS-DVR”) service did not render them liable for infringement of the plaintiffs’ [] rights.”⁸¹ The Second Circuit eventually held that “it was the customer who ‘made’ the copies at issue, not the defendants who merely created and maintained the automated systems for doing so and, therefore, the defendant could not be directly liable for violating the [copyright owner’s] rights.” Because Pinterest users are responsible for things that are “pinned” (uploaded) or “re-pinned” on the site and a copyright owner would have difficulty proving that Pinterest itself “violated one or more of the plaintiff’s exclusive rights under the Copyright Act,”⁸² I predict that a court would not find Pinterest liable for direct copyright infringement.

2. Willful Infringement

If a copyright owner tried to sue Pinterest on a claim of willful infringement when one of Pinterest’s users pinned or re-pinned the copyright owner’s image or video, I again think a court would look to statutory and common law protections that would allow Pinterest to escape liability. In order to prove willful infringement under the Copyright Act,⁸³ a plaintiff must prove one of two things: (1) that the defendant knew its conduct was infringing or (2) that the defendant’s actions were the result of reckless disregard or willful blindness to the prospect that its con-

⁸¹ *Agence France Presse v. Morel*, 934 F. Supp. 2d 547 (S.D.N.Y. 2013) (citing *Cartoon Network*, 536 F.3d 121, 130-33).

⁸² *Ellison*, 357 F.3d at 1076.

⁸³ See 17 U.S.C. § 504(c) (2012).

duct was infringing.⁸⁴

Courts have looked to the defendant's state of mind to determine whether the defendant was on notice that a certain piece of copyrighted work was protected or whether the infringer had warnings of the infringement.⁸⁵ If the defendant or infringer's acts are made in good faith that its conduct is innocent, then infringement is usually not willful.⁸⁶ Finally, the copyright owner has to prove the willfulness of the defendant.⁸⁷ If Pinterest is unaware of an illegal pin or re-pin, then I predict a court would have a difficult time finding Pinterest liable for willful infringement. Further, I think a plaintiff would have a very large uphill battle of proving that Pinterest was willful in copyright infringement.

3. Contributory Liability

Because of Pinterest's nature of pinning, re-pinning, terms of service, and copyright policies, I think any copyright owner would find difficulty in getting a court to find liability for direct or willful copyright infringement for Pinterest. However, I think Pinterest would be closer to liability under a contributory or vicarious copyright infringement claim.

In order to win on a claim of contributory copyright infringement, a copyright owner must show that an infringer is "one who, with knowledge of the

⁸⁴ *Bryant v. Media Rights Prods.*, 603 F.3d 135, 143 (2d Cir. 2010); *Island Software and Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).

⁸⁵ *Agence France Presse*, 934 F. Supp. 2d at 569 (citations omitted).

⁸⁶ *N.A.S. Imp., Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir.1992).

⁸⁷ *Bryant*, 603 F.3d at 143.

infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”⁸⁸ The knowledge prong is determined on a subjective level, but liability requires that “the defendant engage[d] in ‘personal conduct that *encourages* or assists the infringement.”⁸⁹ Finally, courts have generally only found a defendant to be contributorily liable if it “(1) knew or had reason to know of the infringement and (2) materially contributed to the infringement.”⁹⁰

In order to find Pinterest liable for contributory copyright infringement, a copyright owner would have to prove that Pinterest not only knew that one of its users directly infringed copyrighted material, but also that Pinterest *materially contributed* to the infringement. Even though a copyright owner could argue that “[o]ne who furnishes a copyrighted work to another, who in turn wrongfully copies from that work, may be liable as infringer,”⁹¹ and that Pinterest by its nature “furnishes” copyrighted work to its users by giving the forum and outlet to do so, I do not

⁸⁸ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

⁸⁹ *Id.* at 1019 (quoting *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)) (emphasis added).

⁹⁰ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (“We have interpreted the knowledge requirement for contributory copyright infringement to include both those with *actual knowledge* and those who *have reason to know* of direct infringement.”) (citing *A & M Records*, 239 F.3d at 1020); see also *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F.Supp.2d 627, 648 (S.D.N.Y.2011).

⁹¹ *Agence France Presse v. Morel*, 934 F. Supp. 2d 547, 572 (S.D.N.Y. 2013) (alteration in original) (quoting MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.04(3)(b) (2012)).

a believe a court would buy this argument. If a court allowed this argument, then it would be going against the legislative purpose of the safe harbor provision. The safe harbor provision was crafted to make sure that ISPs were less likely to “hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”⁹² Congress wants to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁹³

Further, currently with over 49 million users,⁹⁴ hundreds of millions of boards, pins, and re-pins, it would not only be unlikely, but also inefficient to make Pinterest monitor every pin to ensure that it is not one of copyrighted material. Pinterest should only have to act once it is notified by a copyright owner that a user has pinned or re-pinned a copyrighted image (as outlined by the DMCA).

4. Vicarious Liability

A few copyright owners have tried to sue individuals and companies under the theory of vicarious

⁹² S. REP. NO. 105-190, at 8 (1998).

⁹³ *Id.*

⁹⁴ Craig Smith, *How Many People Use 416 of the Top Social Media, Apps and Tools? (May 2014)* DIGITAL MARKETING RAMBLINGS (Apr. 2, 2013), <http://expandedramblings.com/index.php/resource-how-many-people-use-the-top-social-media/>; *Pinterest Is Worth \$2 Billion Because Its 25 Million Users Are Rich, Female, And Like To Spend*, BUSINESS INSIDER (Feb. 28, 2013, 7:35 AM), <http://www.businessinsider.com/pinterest-is-worth-2-billion-because-its-25-million-users-are-rich-female-and-like-to-spend-2013-2..>

liability of copyright infringement.⁹⁵ A defendant would be found vicariously liable for copyright infringement of others if the defendant “profit[s] from direct infringement while declining to exercise the right to stop him or limit it.”⁹⁶ Some courts have defined a standard to be used to determine if one is vicariously liable for copyright infringement: a plaintiff must show that the defendant has (1) the right and ability to control or supervise the infringing activity and (2) a direct financial interest in the exploitation of the copyrighted materials.⁹⁷

In *A & M Records v. Napster, Inc.*,⁹⁸ the Court determined that Napster could be found vicariously liable for copyright infringement because “Napster has both the ability to use its search function to identify infringing” material and “the right to bar participation of users who engage in the transmission of infringing files.”⁹⁹ While Pinterest has the ability to bar participation of users who engage in copyright infringement once it learns about illegal acts, Pinterest does not have the ability to search all of its members’ boards to determine what has been illegally pinned or re-pinned. Even if Pinterest did monitor its users’ pins, sometimes pinned images do not have anything depicting that the image is protected by

⁹⁵ See *Agence France Presse v. Morel*, 934 F. Supp. 2d 547, 572 (S.D.N.Y. 2013) (citing *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)); see also *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁹⁶ *Metro-Goldwyn-Meyer*, 545 U.S. at 914.

⁹⁷ See *Arista Records LLC v. USENET.com*, 633 F. Supp. 2d 124, 156 (S.D.N.Y. 2009); *Dixon v. Atlantic Recording Corp.*, 1985 U.S. Dist. LEXIS 15291, at *6 (S.D.N.Y. Oct. 3, 1985).

⁹⁸ *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1021 (9th Cir. 2001).

⁹⁹ *Id.* at 1027.

copyright. Therefore it would be nearly impossible for Pinterest to control and supervise all of its members' actions as a means of monitoring copyright infringement.

In order to determine if a defendant is benefiting from the infringement or not, some courts will look to see if "parties pay fees or money to the allegedly vicariously liable defendant for the infringing works."¹⁰⁰ Pinterest is currently free of charge to all of its members and therefore cannot receive any financial benefit from money coming from users. While this could change if Pinterest decides to charge for business accounts in the future, I think a court would not find Pinterest vicariously liable for any direct copyright infringement of its users.

B. Protection From Digital Millennium Copyright Act's Safe Harbor Provision

Apart from the law under the Copyright Act of 1976, Pinterest is held to the standards as described by the DMCA. Unless a copyright owner could prove that Pinterest has actual knowledge that the material on the website is infringing, is aware of facts or circumstances from which infringing activity is apparent or upon obtaining such knowledge or awareness, receives a financial benefit from the infringement, or fails to respond expeditiously to remove the material, then Pinterest will not be found liable for any claim of copyright infringement (i.e., direct, willful, contributory, or vicarious).

The copyright owner has the burden to prove

¹⁰⁰ *Agence France Presse v. Morel*, 934 F. Supp. 2d 547, 574 (S.D.N.Y. 2013); *see e.g.*, *Yash Raj Films (USA), Inc. v. Bobby Music Co. & Sporting Goods, Inc.*, 2006 WL 2792756 at *1 (E.D.N.Y. Sept. 27, 2006).

these elements,¹⁰¹ and if he cannot, then a court will not impose liability on an ISP. While it is impossible to prove that Pinterest has met all of the requirements of the safe harbor provision without a claim against it and facts to dispute such a claim, Pinterest does take precautionary steps with its take down notice policy found on its website.¹⁰²

¹⁰¹ “DMCA notification procedures [would] place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of the copyright.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

¹⁰² See *Copyright*, PINTEREST, <http://about.pinterest.com/en/copyright> (last visited May 22, 2014).

In accordance with the Digital Millennium Copyright Act of 1998, the text of which may be found on the U.S. Copyright Office website at <http://www.copyright.gov/legislation/dmca.pdf>, Pinterest will respond expeditiously to claims of copyright infringement committed using the Pinterest website (the “Site”) that are reported to Pinterest’s Designated Copyright Agent, identified in the sample notice below.

If you are a copyright owner, or are authorized to act on behalf of one, or authorized to act under any exclusive right under copyright, please report alleged copyright infringements taking place on or through the Site by completing the following DMCA Notice of Alleged Infringement and delivering it to Pinterest’s Designated Copyright Agent. Upon receipt of the Notice as described below, Pinterest will take whatever action, in its sole discretion, it deems appropriate, including removal of the challenged material from the Site. DMCA Notice of Alleged Infringement (“Notice”).

CONCLUSION

Most companies and business people do not complain when their product ends up re-pinned on Pinterest because it is free advertising at its finest.¹⁰³ Therefore, it is no surprise that a plaintiff has not yet cried “copyright infringement” against Pinterest or individual users. However, the issue will arise when a non-Pinterest user finds his copyrighted image on Pinterest without his permission. A Pinterest user who posts his copyrighted image on Pinterest gives others the permission to re-pin and reproduce his image, however a non-Pinterest user has not given anyone the permission to post his image or have his image re-pinned on Pinterest.

Until a claim is brought against Pinterest and the facts are presented, it is hard to predict the actual outcome of a case, but as long as Pinterest abides by all of the requirements under the DMCA, Pinterest should be protected in its entirety. Currently, Pinterest may not have to be fearful of copyright infringement claims, but should be prepared for potential legal consequences if it decides to open its social networking website to the profits of business advertising and marketing. As Pinterest continues to grow every year and the number of pins and re-pins continue to multiply rapidly, the chances for copyright infringement increase rapidly at the same time. Pinterest and its members should both think before they pin.

Id.

¹⁰³ See Brendan Lowry, *Three Ways Pinterest Fits Into Your Company's Branding Strategy*, BUSINESS INSIDER (Apr. 3, 2013), <http://www.business2community.com/pinterest/three-ways-pinterest-fits-into-your-companys-branding-strategy-0455259>.