

# Exploring the Safe Harbor Principle and the Allocation of Platform Liability in the DMCA

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**Abstract.** The Digital Millennium Copyright Act's safe harbor clauses, which was established more than 20 years ago, are no longer able to reconcile the current widespread problem of copyright infringement in social media. Therefore, this paper examines the allocation of responsibilities between social media platforms, users and copyright owners in the event of digital copyright infringement in social media, the negative impact of the DMCA provisions on stakeholders in social media and possible solutions to the problem. The main problem with the current DMCA's safe harbor doctrine is that the exemptions provided shift too much responsibility and liability to copyright owners and social media users, fail to provide effective remedies, and place an extremely heavy burden on them to enforce their rights. This has had a negative impact on the development of social media and creative output. For this reason, Congress need to change the DMCA's upregulating to increase the bar for safe harbor designation and impose additional requirements on platforms. In order to more effectively contribute to the growth of the social media business and the preservation of digital copyright pairs in the field of practice, this study primarily adopts a legal doctrinal research technique, comparative research approach, and literary research method.

**Keywords:** DMCA; Safe Harbor Principles; Digital Copyright Infringement.

## 1. Introduction

The US Congress passed the Digital Millennium Copyright Act (DMCA) in 1998 in an attempt to adjust copyright law to the developing digital technologies throughout the 20th century, when the Internet and computer technology took off [1]. This law was originally legislated to protect the innovation and sustainable development of the Internet industry. Congress therefore saw the potential purpose of providing service providers with greater possibilities to attract the substantial investment needed to continue development and to ensure the expansion and upgrading of the Internet as equally important as addressing copyright infringement on the Internet [1]. In order to prevent them from being held accountable for copyright infringement, they devised four safe harbor policies for online service providers (OSPs) and Internet service providers (ISPs) [2]. Experts are also presently researching the legal rules pertaining to social media and the DMCA to some extent. Some academics contend that because social media did not exist when the DMCA was created, the DMCA's crucial safe harbor concepts are no longer compatible with the copyright conflicts that occur in social media. There is now a consensus among academics that the DMCA's provisions should be amended to make them more responsive to the modern legal framework. Some scholars have also proposed some solutions, such as referring to the UK's TPM complaint procedure and expanding the role of the Copyright Office, but in general there are some impracticalities [3].

Through the use of many media formats and numerous delivery systems, social media is a kind of technology that enables the production and distribution of user-generated content, facilitating simultaneous worldwide communication [4]. Additionally, it is defined as "cooperative online applications and systems that allow users to participate, link user-generated content, exchange information, and cooperate in groups of users"[4]. The convenience of social media has also made it increasingly popular with users in today's society, with more than 4.48 billion people using social media worldwide by 2021, representing 56.8% of the world's population, and this figure is continuing to grow. However, this huge volume of users and the use of online sharing of user-generated content has resulted in the presence of copyright infringing material in hundreds of millions of pieces of online content. One of the most classic examples was in 2005 when Viacom International Inc sued

the YouTube platform, claiming that hundreds of millions of videos on YouTube were illegally taken from Viacom's copyrighted works without authorization [5]. On the other side, YouTube Inc. maintained that since they were in accordance with the DMCA safe harbour theory and had no awareness of the infringement, they were not responsible for any infringement. The court ultimately accepted YouTube's company's interpretation that it was not liable for infringement and that Viacom international Inc. had not been able to successfully protect their copyright. This decision has led to a broader academic debate about the DMCA's safe harbor principle and copyright protection.

This essay makes the case that the safe harbour concept of the DMCA falls short in its attempts to combat copyright infringement through social media, particularly in terms of allocating the responsibilities of copyright owners, infringers and platforms. To effectively safeguard the rights of copyright holders and advance the Internet entertainment sector, the safe harbour concept of the DMCA must be revised. In order to explore how this can be done, the first part of this paper explains how copyright infringement arises and how the safe harbor principle applies, the second part analyses the three negative effects of the safe harbor principle, and the third part proposes two possible ways to reform the safe harbor principle.

## **2. Copyright infringement and the safe harbor in the DMCA**

### **2.1 Creation of copyright infringement issues and allocation of liability**

Copyright issues arise not when users upload their own original videos, but when users upload third party copyrighted content or videos containing content belonging to third parties [6]. This covers both overt copyright infringement, like the unlawful downloading of a complete movie or TV show, and covert copyright infringement, like the unlicensed use of music from a work that has been granted a copyright as background music in one's own video production. However, creative works of expression, such as books, films, images, artwork, and songs, are protected by copyright law. The right to reproduce, adapt, distribute, publicly exhibit, or publicly perform a work protected by copyright belongs exclusively to the copyright owner. Copyright infringement would occur if the content was published without consent, authorization, or an exemption from copyright.

It is also very common in the US for social media users to face litigation over copyright disputes [6]. In 2017, for example, Kim Kardashian was sued by Xposure for posting a copyrighted photo on her Instagram. The fact that Kardashian is the only defendant and that the Instagram platform is not responsible for this has also created a buzz.

Social media relies on the number of views and advertising input from its user base to generate revenue. Therefore, platforms encourage users to engage more on their social media accounts and post larger material in order to boost the platforms' popularity and possible revenue [8]. It makes sense that they should be more accountable for safeguarding and warning consumers about the dangers of copyright infringement. As a result, many users have also argued that when they face copyright lawsuits, the platforms should also be jointly and severally liable and pay some compensation.

Direct copyright infringers are sometimes not the only ones who may be liable for infringement, and social media platforms may also be found to be indirect or secondary infringers. Secondary infringement means that one person should be liable for directly contributing to the infringement of another person, a concept that is explicitly provided for in both trademark and patent law. However, social media platforms are less probable to be found guilty of secondary infringement and more likely to be held accountable for indirect infringement since they merely give users a way to post and distribute information rather than supplying the original copyrighted material itself [1].

The three primary theories of indirect tort liability under the common-law system are joint tort, indirect tort, and induced tort. Joint liability is recognized in the law of torts and is imposed when one person or commercial establishment directly contributes to the wrongful act of another. There are two conditions necessary to establish joint tort liability, the first being a knowing act the second being a substantial contribution. In contrast, social networking software gives infringers a platform and, in

the event that a claim of infringement is made, may give rise to secondary copyright infringement consequences. Vicarious tort liability, on the other hand, develops when the defendant has the obligation and capacity to control the direct tort but fails to do so while also profiting directly from that behaviour. In *Shapiro, Bernstein and Co. v. H.L. Green Co.*, vicarious liability in tort was found where a band played unlicensed music in a dance hall and the dance hall operator profited from the performance even though he did not participate in it [9]. As a result of this doctrine and jurisprudence, social media platforms may also be held liable in the same way. A positive purpose that the product be used for infringement is required under the idea of induced infringement, but a benefit is not essential. Examples of such actions include promoting an infringing use or providing instructions on how to participate in an infringing use. Mere knowledge of the possibility of infringement or even knowledge of an actual infringing use is not sufficient to make social media platforms liable for infringement, so they are unlikely to constitute inducement to infringe.

## 2.2 DMCA's Safe Harbor Principles

It is evident from the discussion above that social media networks might be held accountable for any joint or tertiary infringement. However, the DMCA's safe harbour principle offers protection from this. First, a platform must conform to the DMCA's definition of "service provider" in order to be covered by the safe harbour rules. Under the DMCA, "service provider" might be read in two different ways, the first of which is described as an organization that offers transient digital network connections, conveying content selected by the user between users across the internet without being altered and merely sending or receiving it [10]. The second definition is more inclusive and adds "the supplier of an online service or network access, or the operator of a connected facility" in addition to all the items mentioned by the first description [10]. Section 512(c) of the DMCA, which exempts service providers from liability for "information residing on the service supplier's system or network at the direction of a user, if certain conditions are met," is the one that most directly applies to social networking sites out of the four safe harbours available to service providers under the Act. from responsibility. First off, neither the infringement nor the infringement-causing material is known to the service supplier. The second is that the supplier is not financially benefited by the illegal content. Third, that upon notification, the service provider takes down the infringing content within a specific time frame. Fourth, the network operator takes action to prevent users from abusing copyright in the future. Fifth, the network operator has put in place "standard technical mechanisms" that allow copyright owners to recognise works that are protected by copyright [11]. The safe harbour exception is only granted if the fourth and fifth of these requirements are satisfied.

Social media platforms, on the other hand, are granted safe harbor when they meet the thresholds of Articles 4 and 5 as service providers and are not only liable for indirect infringement, but also not even for direct infringement. However, this actually gives service providers too much immunity, with many flaws and negative consequences in practice, which will be discussed in the next sections of this paper.

## 3. Deficiencies and negative impacts of the DMCA's safe harbor principle

### 3.1 Negative "self-regulatory" obligations

However, Section 512(m) makes it clear that the DMCA's safe harbour legislation is not dependent on service providers "tracking their assistance or affirmatively seeking to show facts indicating infringement." Section 512(c) of the DMCA necessitates platforms to notify infringers of the removal of pertinent infringing material or to take down infringing works outright. In other words, in order to qualify for safe harbour protection, a resource supplier's website does not need to be actively monitored or "surveilled." This brings with it the disadvantage that when platforms have no mandatory obligations, they may be less likely to proactively review for copyright infringement or potential infringement, so the responsibility for monitoring infringement is largely placed on the copyright owner. It is nearly difficult for copyright owners to discover every single instance of infringement due

to the massive volume of user-generated material on contemporary social networks. A prominent example of this was in 2014 when Universal Music Group and Big Machine Records launched a joint initiative to create a team specifically to search for and remove all content that infringed the copyright of Taylor Swift's album 1989. From 2014 to 2016, they managed to remove 66,000 infringing contents, but found more than 500,000 links to 1.4 million illegal downloads of the album. However, it also illustrates that even though copyright owners try to hire a team dedicated to finding copyright infringements it is useless in the face of the sheer volume of infringing content. What's more, copyright infringement is not specific to a single individual, but not all copyright owners have the resources and financial resources to support them in monitoring copyright infringement across the web. Therefore, shifting the regulatory responsibility to the copyright owner is not substantially feasible.

### 3.2 The abuse of the "take-down obligation" in the DMCA

In addition to this, when a copyright holder suspects that someone has illegally posted copyrighted information on an internet service provider's website, they may file any takedown request with that service provider under Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA). The first drawback of this provision is, as noted above, that copyright owners do not have the ability to send copyright notices to all infringers. The second flaw lies in the unfairness of publishing content to third parties. Instead, the presumed copyright owners can take down any content they wish, or even seek compensation from the user who posted it, as long as they claim that the material infringes their copyright. In exchange, social media platforms are granted legal immunity. There is no law in the DMCA that requires platforms to first review the validity of the copyright statement in question. This has led to the power of "takedown notices" being regularly abused in practice, with 2.2 million copyright affirmations found to be false by YouTube in the first half of 2021. In some extreme cases, false copyright affirmations have even been used to extort money from social media users. In 2019, Christopher Brady repeatedly issued copyright statements to creators of user-generated content on the YouTube platform about the game My World, claiming that they had infringed Brady's copyrighted material and claiming compensation from them. Despite Brady's eventual arrest, the difficulty for social media platforms to address the issue of false claims has left creators uneasy, and the risk of being blackmailed or even solely liable for damages when posting content has had a significant impact on their enthusiasm for creativity, which is clearly not conducive to the health of the industry. Even though section 512(f) of the DMCA provides safeguards against blackmail in theory for those who use false copyrights in bad faith, it is difficult to enforce in practice. This is because the court in the case *Lenz v. Universal Music Corp* held that in order to sue a bad faith claimant, the plaintiff must prove a lack of qualifying good faith on the part of the defendant in order for the claim to stand [12]. Once the blackmailers claim that they acted in good faith - in other words, they claim that they did not know that the copyrighted material was being used without authorization. In the absence of sufficient proof of "bad faith," they cannot be held accountable for their actions.

Furthermore, when a social media outlet receives a copyright notice, it simply takes down the content and, as stated in the appeal, neither reviews whether the copyright is genuine nor considers whether the content is fair use. Regardless of whether the content really violates any copyrights, social media platforms must delete the content and keep it removed for 10 to 14 days after obtaining a copyright notice in order to maintain their exemption from prosecution for copyright violation [13]. Even though the publisher of the content may send a counter-notice regarding the copyright assertion under Section 512(g)(3) to contest the removal of the material, the content in question will remain down for a period of 10-14 days. The commercial nature of social media and the mechanism by which it operates to attract users with traffic makes the potential financial damage even greater when the content being taken down stays down. According to survey results, over 55% of copyright notices received by Google are sent by the company to its competitors [13]. This suggests that the DMCA is even potentially being used as a means of commercial competition, and that some of the material that is taken down is undeniably perfectly legal but is still being taken down. Obama's team faced the same situation when they tried to use the breadth of social media to boost his campaign, and his election

videos were taken down by social media platforms based on the copyright notices they received. It was only because an NBC news clip was used in the video. However, this includes fair use rather than infringement, and it is not an unusual incident; study indicates that 30% of the information removed in accordance with the DMCA constituted fair use [14]. A legal foundation for deciding whether something is a fair use is provided by Section 107 of the US Copyright Act, which also states that certain uses, such as critique, commentary, reportage, education, and investigation, do not constitute infringement. Therefore, it is unjust to authors to remove works that follow the fair use theory when they are referenced in copyright notices. Therefore, the existence of copyright and the fair use doctrine mentioned in the copyright notice are theoretically matters for the platform to consider before the work is taken down, nonetheless, the DMCA somehow doesn't enforce this need. Simply taking down the content in question to gain safe harbor gives too little responsibility to the platform.

#### 4. Modification path to the DMCA

The DMCA legislation's primary intent was to shield small Internet businesses from expensive lawsuits resulting from copyright infringement claims, helping pave the way for Internet startups such as YouTube and Vimeo to grow into large companies [14]. Although Congress has always claimed that the DMCA is also focused on protecting copyright, in reality the DMCA has not done either of these things very well, and has even ignored copyright protection in order to better absolve ISPs of liability. In order to safeguard creative expression and maintain the functionality of ISPs, it would appear that revisions to the appropriate DMCA sections and concepts are required. The main measures would be to impose positive obligations on social media platforms, including the obligation to monitor for digital copyright infringement or potential infringement and the positive obligation to review copyright notices. If social media platforms fail to meet these obligations, criminal liability is also a viable option where necessary.

To be specific, the first requirement is an amendment to section 512(c) and (m), where the provision "no active monitoring by the platform is required" should also be replaced by a requirement for active monitoring by the platform. Platforms would need to demonstrate that they have made sufficient efforts to prevent infringement, otherwise they cannot claim ignorance of infringement or that the content is unknown. For example, Article 17 of the EU's Digital Single Market Copyright Directive, introduced in 2019, converts the OSP's ignorance exemption into a conditional exemption. The premise is that the OSP has taken "effective and proportionate measures" to "prevent the appearance of the specific unauthorized works identified by the right holder", acted "promptly" to remove those works and demonstrated that "best efforts" have been made to prevent their future appearance [15]. A similar approach could therefore be taken for the DMCA when it comes to reform, requiring platforms to adopt effective technical means to prevent infringement. In fact, many social media platforms, which are also the worst hit by infringement, such as YouTube and Vimeo, have sufficient funding and resources to allow them to create a software program that acts as a first line of defense against infringing content.

The second amendment is to add a positive vetting obligation for platforms. When a platform receives a copyright notice, it should be more careful about how it chooses to handle it, including checking if the fair use principle is applicable and the legality of the copyright in advance. If company did not achieve that, they will not be protected from prosecution under Section 512(f) of the DMCA for fraudulent copyright extortion. The current version of the DMCA grants an overly broad prior restraint right to so-called copyright owners based on allegations. It stipulates that when there is grounds to suspect that the allegedly infringing material violates copyright, the material may be removed forcibly without harming the accuser or causing financial loss as a result of the degradation, even if it is ultimately proven that the act is not an infringement. Therefore, this paper considers that a possible modification would be for the platform not to take down the content during the dispute over the content in question, but to have a dedicated person review it to confirm the existence of

infringement. The content can only be taken down once the exact infringement has been established, but the publisher can still issue a notice and, in the event of an objection

In addition to this, platforms that fail to meet their active duty of review or their duty to monitor infringement may face not only civil tort liability, but also criminal prosecution. While the underlying logic of the DMCA exempts ISPs from criminal liability, it is still possible to hold them liable if they fail to meet the conditions for application of the safe harbor doctrine. For example, by reference to Chinese law, an internet platform may be guilty of aiding criminal activity on the information network when social media users are subject to false copyright extortion when they fail in their duty to review copyright notices. Alternatively, an internet platform may be criminally liable for failing to monitor copyright infringement, leading to a proliferation of infringing works and causing serious economic losses. Although it is very rare in the United States to use criminal provisions in copyright law solely in relation to copyright infringement without involving the theft of trade secrets or patents of others. However, it has to be admitted that the mandatory and deterrent nature of criminal law may make Internet service providers take copyright infringement more seriously and treat the legal rights of their users properly, while not losing sight of a viable path.

## 5. Conclusion

Social media users who use copyrighted material in the creation of content may be at risk of copyright infringement charges. However, they are not the only liable parties, and social media platforms may also be potentially liable for vicarious or joint infringement due to their own traffic-based monetization properties. In the vast majority of cases, however, they are exempt because they meet the safe harbor threshold conditions under the DMCA. However, the extremely low safe harbor threshold in the DMCA, by not imposing any positive obligations on ISPs, leaves them potentially overwhelmed with copyright infringement online. Upon receiving a copyright notice, they can simply click to take down the content in question and fulfil their duties. Copyright owners, on the other hand, are forced to take on all the regulatory responsibilities, investing a lot of time and money and exhausting themselves. At the same time, Internet content creators are forced to bear all the liability alone, and can even face extortion for false copyrights, simply because ISPs are not obliged to vet copyright notices for authenticity and whether fair use is involved. The DMCA goes too far in protecting this aspect of ISPs, and loses its role in protecting copyright. Therefore, changes to Section 512(c) and (m), which deal with the safe harbor principle, to attach a mandatory regulatory obligation and changes to Section 512(f) to attach a positive vetting obligation are necessary to balance the interests of protecting ISPs and protecting copyright. There may still be a long way to go in improving the DMCA, but the rising tension between the Internet's quickly developing social media platforms and the DMCA's limitations on adjusting to the latest technology serves as a reminder that this is a problem that still has to be resolved.

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