
**DON'T "PIN IT" ON PINTEREST: ADDRESSING THE
CONFLICT BETWEEN THE CULTURE OF SHARING AND
SECONDARY LIABILITY FOR COPYRIGHT
INFRINGEMENT**

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I. INTRODUCTION

In the past decade we have truly become a community committed to sharing our interests, daily activities, and ideas through various social media platforms. We share our daily adventures and personal pictures on Facebook, our feelings and opinions in 140 characters or less on Twitter, and our professional skills and experiences on LinkedIn. As of March 2010, a new platform, Pinterest,¹ was released which allows its users to connect with others sharing things they find interesting.² Pinterest has quickly expanded to a community of over 70 million users.³ The site allows users to create digital bulletin boards, or "pinboards," where images can be organized, posted, and shared by "re-pinning."⁴ Users can upload images or add pictures from websites using Pinterest's "Pin It" button which links back to the original source of the image.⁵

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¹ See PINTEREST (last visited Jan. 27, 2014), *archived at* www.perma.cc/9KYE-N24L (displaying various images shared on Pinterest); *see also* Dina Leytes & Kathryn G. Legge, *Changing the Culture of Copyright: What Pinterest Means to Content Owners*, THE LEGAL INTELLIGENCER (May 8, 2012), *archived at* www.perma.cc/GAT9-XZ8X (noting the launch and growth of Pinterest). Cold Brew Labs, Inc. is the company behind Pinterest. *See Terms of Service*, PINTEREST (last visited Jan. 27, 2014), *archived at* www.perma.cc/BM4J-4HCG [hereinafter *Terms*] (describing Pinterest as an online service provider available on computers and mobile phones).

² See Katie Kavulla, *Pinterest: What it is, How to Use it and Why You'll be Addicted*, SHE KNOWS LIVING (Jan. 19, 2012), *archived at* www.perma.cc/697N-AENL (stating how and why Pinterest is used).

³ See Jennifer Slegg, *Pinterest Tops 70 Million Users; 30% Pinned, Repined, or Liked in June*, SEARCH ENGINE WATCH (July 16, 2013), *archived at* www.perma.cc/H2FW-MEJ4 (discussing the extent of the Pinterest user base); *see also* Josh Horwitz, *Semiocast: Pinterest now has 70 Million Users and is Steadily Gaining Momentum Outside the US*, THE NEXT WEB (July 10, 2013), *archived at* www.perma.cc/S3HL-WLCS (analyzing Pinterest's user statistics). Pinterest is worth \$3.8 billion as of October 2013. *See* Sarah Perez, *Pinterest Raises Massive \$225 Million Series E, Valuing The Firm At \$3.8 Billion*, TECHCRUNCH (Oct. 23, 2013), *archived at* www.perma.cc/WKW6-DWG5 (indicating the networth of Pinterest in 2013); *see also* Owen Thomas, *Here's a Reason No One's Thought of for Google to Buy Pinterest*, BUSINESS INSIDER (May 17, 2012), *archived at* www.perma.cc/37XF-S68K (stating Pinterest's monetary value).

⁴ See PAUL D. MCGRADY, Jr., MCGRADY ON SOCIAL MEDIA § 34.01 (Matthew Bender 2012) (summarizing the function of Pinterest).

⁵ *See id.* at § 34.04 (describing how the "Pin It" button works).

The Pin It button can be embedded in a user's browser toolbar allowing users to grab images from various websites to his or her pin-board while surfing the Internet.⁶ Creating a compilation of images obtained from outside or unauthorized sources using the Pin It button can create a problem of copyright infringement because copyright holders retain particular exclusive rights to their works.⁷ In an effort to limit liability, Pinterest implemented an "opt out" function, where website owners who do not want their copyrighted images pinned can disable the Pin It feature.⁸ However, this opt out function may not solve the problem of copyright infringement by Pinterest users.⁹ This Note analyzes the question of whether Pinterest by its Pin It button induces its users to infringe the copyrights of image owners or creators.

Section II begins with an overview and history of copyright law in the United States affirming Congress's sustained purpose to promote innovation while protecting those innovators with exclusive rights to their work.¹⁰ Liability for copyright infringement is divided into three tiers, providing courts with standards used to assess potential direct and indirect infringement.¹¹ Not only can users be held directly liable for their infringing conduct but service providers may also be indirectly liable for users' directly infringing conduct if the Internet service providers (ISPs) are not protected by safe harbor provisions.¹² It also examines how the Digital Millennium Copyright Act (DMCA) has evolved and adapted to changes in technology, assessing how courts handled issues of secondary liability regarding

⁶ See *id.* (identifying the specific mechanics behind the Pin It button).

⁷ See *id.* (explaining how images from websites can be shared on Pinterest); Therese Poletti, *Is Pinterest the Next Napster?*, THE WALL STREET JOURNAL (March 14, 2012), archived at www.perma.cc/59J8-H3GV (suggesting users can share images from across the Web that they do not own rather than uploading images they do own); see also 17 U.S.C. § 106 (2012) (listing copyright owner's exclusive rights).

⁸ See Leytes & Legge, *supra* note 1 (explaining the "nopin" meta tag that provides site owners the opportunity to restrict visitors' ability to easily grab images from their sites without permission).

⁹ See Leytes & Legge, *supra* note 1 (addressing lasting potential for copyright infringement liability despite the opt out feature).

¹⁰ See *infra* Part II.A (discussing the overview of copyright in the United States).

¹¹ See *infra* Part B. (discussing direct infringement, contributory infringement, and vicarious infringement).

¹² See *infra* Part B. (discussing the three tiers of liability).

social media sites.¹³ However, Congress struggles to keep up with technology and sustain the founding purposes of copyright law as the DMCA continue to evolve.¹⁴

Section III describes aspects of Pinterest, a new and increasingly popular website, including the Pin It button and its policies.¹⁵ Pinterest is equipped with standard take-down notice procedures, yet its Pin It button eases the ability of users to copy media without owners' permission leaving open the question of secondary liability.¹⁶ Section IV applies current copyright laws to the Pin It button to determine whether Pinterest could be found liable for contributory infringement by inducing its users to violate others' copyrights.¹⁷ It also compares Pinterest with precedent assessing it against other social media sites.¹⁸ It also provides possible measures Pinterest can take to make it more conformant to copyright law, more likely to avoid secondary liability, and more clearly discouraging of users' copyright infringing conduct.¹⁹ This Note ultimately argues that Pinterest is protected by DMCA safe harbor provisions, yet its Pin It button leaves Pinterest vulnerable to lawsuits because this feature subconsciously invites and encourages its users to directly infringe others' copyrights.²⁰

¹³ See *infra* Part C. (discussing the safe harbor provisions under the DMCA).

¹⁴ See *infra* Part D. (discussing social media websites and their relationship to copyright law).

¹⁵ See *infra* Part 0 (summarizing the history of Pinterest).

¹⁶ See *infra* Part 0 (describing how Pinterest works).

¹⁷ See *infra* Part IV. (describing Pinterest potential liability for copyright infringement).

¹⁸ See *infra* Part C (comparing the copyright issues surrounding Flickr, among others, with those of Pinterest).

¹⁹ See *infra* Part D (naming as possible preventative measures).

²⁰ See *infra* Part V. (expounding upon the shortfalls of the take-down procedure).

II. HISTORY OF U.S. COPYRIGHT LAW, THE DMCA, AND SECONDARY LIABILITY FOR ONLINE CONTENT SHARING

A. Overview of U.S. Copyright Law

The United States valued copyrights as significant from the beginning.²¹ Congress first enacted the Copyright Act of 1790, to encourage learning and to secure “the copies of maps, charts, and books, to the authors and proprietors of such copies,” thus encouraging sharing by publishing such maps, charts, and books.²² It remains a fundamental aspect of our legislation and continues to evolve, from eliminating common law copyright protection in 1976²³ to expanding copyright protection to works created online.²⁴ The Copyright Act grants copyright holders a bundle of six exclusive rights: (1) to re-

²¹ See U.S. CONST. art. I, § 8, cl. 8 (granting the legislative branch the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). U.S. copyright law comes from England with the Statute of Anne, enacted in 1710. See Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 369 (2004) (explaining origins of American copyright law). The Statute was put in place for the purpose of encouraging learning. See *id.* at 403 (illustrating the history, purposes and goals of Statute of Anne).

²² See *id.* at 427 (describing the Copyright Act of 1790). The Copyright Act of 1790 did not protect sound recordings or any other writings outside of maps, charts, or books. See R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 136 (2007) (noting the scope of the Copyright Act of 1790).

²³ See 17 U.S.C. § 301 (1998) (stating that enactment of the Copyright Act of 1976 (Copyright Act) preempted common law and state copyright laws). Originally, federal copyright law protected registered works while state common law protected those not registered until the Copyright Act of 1976 was passed. See *United States Copyright Office: A Brief Introduction and History*, U.S. COPYRIGHT OFFICE (last visited Jan. 29, 2014), archived at www.perma.cc/HAZ3-MXXS [hereinafter *USCO History*] (providing a timeline history of U.S. copyright law).

²⁴ See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter *DMCA*] (noting how DMCA expanded scope of copyright law to digital content); see also Trevor Cloak, *The Digital Titanic: The Sinking of YouTube.com in the DMCA's Safe Harbor*, 60 VAND. L. REV. 1559, 1569 (2007) (noting Congress's intention in passing the DMCA was to balance technological advances with protecting copyright holders from infringement). Prior to the enactment of the DMCA, the Copyright Act underwent several amendments and changes. See *USCO History*, *supra* note 23 (setting forth the various amendments occurring after passing the Copyright Act).

produce copies; (2) distribute copies; (3) prepare derivative works; (4) perform works publicly; (5) perform publicly by digital transmission; and (6) to display works publicly.²⁵ When any one of these rights is violated, the copyright holder may be able to recover remedies for copyright infringement.²⁶ Evidence of ownership and the violation of at least one exclusive right establish a prima facie case of copyright infringement.²⁷ However, if the alleged infringer proves a valid defense, such as the fair use defense, he or she may escape liability.²⁸ Fair use provides an exception to the exclusive rights of copyright holders, allowing for the reproduction or distribution of works for the purposes of “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research[.]”²⁹ In determining liability for infringement, courts try to balance the importance of limiting infringement without restricting innovation.³⁰ Furthermore, the ease, accessibility, and instantaneous

²⁵ See 17 U.S.C. § 106 (2002) (setting forth exclusive rights of copyright holders). Certain exclusive rights, namely the rights to perform or display copyrighted works publicly only apply to “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.” *Id.*

²⁶ See 17 U.S.C. § 501 (setting forth penalties for infringement and remedies for copyright holders); see also Cloak, *supra* note 24, at 1565 (discussing various ways copyright infringers can be prosecuted in civil or criminal proceedings). Copyright infringers may subject to injunctions, monetary damages and/or criminal ramifications. See Cloak, *supra* note 24, at 1565 (describing possible remedies for copyright holders).

²⁷ See Robert A. McFarlane, *The Ninth Circuit Lands a “Perfect 10” Applying Copyright Law to the Internet*, 38 GOLDEN GATE U.L. REV. 381, 385 (2008) (discussing the reasoning in *Perfect 10 v. Amazon.com*: what the plaintiff must prove in order to establish a case of copyright infringement); Debra Weinstein, *Defining Expeditious: Uncharted Territory of the DMCA Safe Harbor Provision*, 26 CARDOZO ARTS & ENT. L.J. 589, 595 (2008) (setting forth basic requirements for copyright infringement).

²⁸ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.04 (Matthew Bender, Rev. Ed. 2012) (noting that in addition to applying the fair use doctrine, possible mechanisms a defendant can use to defend a claim of infringement include “a license or assignment from the copyright owner, joint ownership of the work, jurisdictional defects, limitations, laches, or res judicata”).

²⁹ See 17 U.S.C. § 107 (explaining the fair use defense). The applicability of the fair use defense depends on the purpose and character of the use, the nature of the work, the amount of the work used, and the use’s effect on the market. *Id.*

³⁰ See Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U.L. REV. 1607, 1614 (2009) (stating that “copyright requires a balance between ‘the interest of authors and inventors in the control and exploitation of their writings and dis-

nature of the Internet make this balancing act more complex and difficult.³¹

B. Tiers of Liability for Copyright Infringement

The Copyright Act, in conjunction with courts, established tiers of liability for copyright infringement.³² The tiers consist of direct and indirect infringement.³³ Indirect infringement is also recognized as secondary liability with two subcategories: contributory and vicarious infringement.³⁴ Thus, liability for copyright infringement is split into three tiers: direct, contributory, and vicarious.³⁵

In order for one to be liable under the first tier of liability—direct copyright infringement—an individual must copy the “protected elements of a copyrighted work,” such as originality, for instance, by evidence of access to the work or the copy’s “substantial similarity” to the original.³⁶ Direct infringement calls for active conduct by the infringer though the infringer need not know his/her activity violates copyright law.³⁷ For example, in *Playboy Enterprises v. Frena*,³⁸

coveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.””) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) [hereinafter *Betamax*]).

³¹ See Cloak, *supra* note 24, at 1568 (recalling ISPs’ opposition to the recommendation for adopting laws by Congress that strictly protected digital works); see also Sag, *supra* note 30, at 1607 (addressing how Internet has changed or shifted implications for copyright law).

³² See Weinstein, *supra* note 27, at 595 (discussing the existence of tiers of liability within the copyright infringement structure).

³³ See Weinstein, *supra* note 27, at 595 (noting the doctrines of copyright liability). The doctrines of liability are split into three, however, both contributory and vicarious liability are recognized as secondary liability. Weinstein, *supra* note 27, at 595.

³⁴ See Cloak, *supra* note 24, at 1566 (acknowledging contributory and vicarious liability as types of secondary or indirect infringement); see also Weinstein, *supra* note 27, at 595 (confirming the multiple types of secondary or indirect copyright infringement).

³⁵ See Cloak, *supra* note 24, at 1566 (inferring that the copyright infringement scheme is three tiered); see also Weinstein, *supra* note 27, at 595 (confirming the inference that there is a three tier structure to copyright infringement).

³⁶ See Cloak, *supra* note 24, at 1566 (explaining requirements for direct infringement, and noting that “protected elements” of a copyrighted work include originality that meets a minimal creativity level).

³⁷ See *CoStar Grp., Inc. v. Loopnet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (explaining that “[w]hile the [Copyright Act] does not require that the infringer know

George Frena operated a computer bulletin board service that distributed Playboy's copyrighted photographs without Playboy's permission.³⁹ By uploading the photographs, it allowed other bulletin board subscribers to access the photographs, thus Playboy claimed its exclusive right to distribute copies was violated.⁴⁰ Playboy established a prima facie case of direct copyright infringement by proving ownership of the photographs by evidence of copyright registration, and that its distribution rights were violated because Frena, who added the copyrighted photographs to his service, lacked permission to do so.⁴¹ The burden then shifted to Frena to provide a defense for his activity; however he failed to do so.⁴² Thus, the court found Frena liable as owner and operator of the service for direct infringement by publicly displaying and distributing Playboy's copyrighted photographs.⁴³

that he is infringing or that his conduct amount to a willful violation of the copyright owner's rights, it nonetheless requires conduct by a person who causes in some meaningful way an infringement."'). In *CoStar*, the Fourth Circuit held that the ISP allowing its users to post copyrighted pictures to its site was not directly liable for copyright infringement because the provider's users, and not the ISP itself, engaged in the infringing conduct. *See id.* at 556-57 (describing appellate court's holding). Furthermore, when the ISP found out about the infringing content on its site, it removed it. *See id.* at 547 (noting the *CoStar* court's reasoning); *see also* *Wolk v. Kodak Imaging Network Inc.*, 840 F. Supp. 2d 724, 742 (S.D.N.Y. 2012) (holding photo-sharing service provider not liable for direct copyright infringement). The District Court reasoned that an organization, such as Kodak, who provided tools to make copies of copyrighted material, cannot be held liable for direct infringement because its users who made the copies committed the volitional conduct sufficient for direct infringement. *See id.* (describing the court's reasoning).

³⁸ 839 F. Supp. 1552, 1554 (4th Cir. M.D. Fla. 1993).

³⁹ *See id.* (providing the facts of the case).

⁴⁰ *See id.* (describing how the bulletin board service operated).

⁴¹ *See id.* at 1556 (showing how Playboy provided evidence of copyright infringement).

⁴² *See id.* (describing plaintiff's responsibility to prove a prima facie case, and then, the defendant's burden to provide defenses).

⁴³ *See id.* at 1563 (granting Playboy's motion for partial summary judgment regarding copyright infringement). The court defined "public display" as "a display at a place open to the public or . . . where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered." *See Playboy*, 839 F. Supp. at 1563 (internal quotation marks omitted) (noting how the court defined public display); *see also* *NIMMER & NIMMER*, *supra* note 28, at § 8.14[C] (defining the term public and publicly displayed).

Next, in order to establish secondary infringement, one must first establish the existence of direct infringement on behalf of a third-party.⁴⁴ Secondary liability, as mentioned above, encompasses contributory infringement and vicarious infringement of copyrighted material.⁴⁵ The second tier of liability, contributory infringement, requires knowledge of the infringing conduct, and inducement or material contribution to the infringing conduct of another.⁴⁶ The standard for knowledge is objective and thus established when a defendant knew or should have known about the infringing conduct.⁴⁷ Inducement requires “purposeful, culpable expression and conduct.”⁴⁸ Advertisement is a common method of inducing infringement.⁴⁹ Material contribution occurs “when an actor ‘either actively

⁴⁴ See Weinstein, *supra* note 27, at 595 (identifying direct infringement as one means of establishing secondary infringement).

⁴⁵ See, e.g., Cloak, *supra* note 24, at 1566 (describing the different types of infringement liability); Weinstein, *supra* note 27, at 595 (describing types of secondary liability). The concept of secondary or indirect infringement is not statutory, it comes from common law principles that courts have willingly applied. See Cloak, *supra* note 24, at 1566 n. 49 (explaining the origin of secondary infringement); see, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (noting that contributory infringement theory originated in tort law which values holding “one who directly contributes to another’s infringement . . . accountable”).

⁴⁶ See Weinstein, *supra* note 27, 595 (setting forth knowledge and material contribution requirements of contributory infringement).

⁴⁷ See *Arista Records LLC v. Myxer Inc.*, No. CV 08-03935 GAF(JCx), 2011 U.S. Dist. LEXIS 109668, at *136-37 (C.D. Cal. Apr. 1, 2011) (describing knowledge requirement of contributory infringement).

⁴⁸ See *MGM Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 937 (2005) (pointing to the requirements of inducements); see also *Columbia Pictures Indus. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at *7 (C.D. Cal. Dec. 21, 2009) (reiterating an explanation of inducement requirement).

⁴⁹ See *Columbia Pictures Indus.*, 2009 WL 6355911, at *10 (explaining ways inducement element is satisfied). In *Columbia Pictures*, the District Court held Fung’s file-sharing service induced copyright infringement by explicitly encouraging its users to infringe copyrighted material on its sites by way of advertising and solicitation. See *id.* at *11; see also *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012) (suggesting liability for contributory infringement by inviting users to infringe). The Seventh Circuit could not hold bookmarking site secondarily liable because there was no evidence that users were encouraged to infringe copyrights. See *id.* at 763 (vacating preliminary injunction against bookmarking site absent evidence of contributory conduct).

encourages infringement, or knows of the infringing activity and could control it, but does nothing to prevent it.”⁵⁰

One of the first decisions based on this theory of contributory infringement was *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*⁵¹ The American Society of Composers, Authors and Publishers (ASCAP) sued Columbia Artists Management, Inc. (CAMI) on behalf of Gershwin for failing to pay licensing fees to ASCAP to publicly perform a copyrighted song for-profit.⁵² The singers performed the copyrighted song for-profit at a public, local community association’s concert without obtaining prior permission.⁵³ CAMI managed the performers and also promoted and organized the concert where the unauthorized performance occurred.⁵⁴ The performers directly infringed Gershwin’s exclusive performance copyright.⁵⁵ The Second Circuit held CAMI liable for contributory copyright infringement because it “knowingly participated” in the infringing conduct by its knowledge and active role in organizing what content was performed at its associations’ concerts.⁵⁶ By contrast, in *Betamax*, the Supreme Court reasoned that Sony, manufacturers of the Betamax video recording machine, could not be liable for contributory copyright infringement just because one of the Betamax’s many uses could be infringing to Universal, the motion picture studio company’s copyrights in certain television programs.⁵⁷ Universal alleged that Betamax consumers used this machine to record its copyrighted works thereby infringing its exclusive right to reproduce copies.⁵⁸ However, the Betamax could also be used for innocent “time-shifting” purposes, where a user can record a program he or she was

⁵⁰ See Weinstein, *supra* note 27, 595-96 (laying out the requirements for contributory infringement occur).

⁵¹ 443 F.2d 1159, 1163 (2d Cir. 1971).

⁵² See *id.* at 1160 (setting forth a brief procedural history).

⁵³ See *id.* (describing the facts of the case).

⁵⁴ See *id.* (noting CAMI’s relationship to the artists).

⁵⁵ See *id.* at 1163 (labeling the performers as “primary infringers”).

⁵⁶ See *id.* at 1160 (affirming district court’s grant of publishing company’s summary judgment: finding management company indirectly caused the copyright infringement of publishing company’s copyrighted works).

⁵⁷ See *Betamax*, 464 U.S. at 426 (reasoning that Betamax’s primary use was not for infringing purposes, and Sony’s constructive knowledge of this possibility is not enough for secondary liability).

⁵⁸ See *id.* at 420 (explaining Universal’s reason for bringing about this suit against Sony).

unable to watch at home, watch the recorded program once then erase it.⁵⁹ The users would be considered direct infringers because they record the television program, however the Supreme Court found that “time shifting” individual copies does not constitute copyright infringement.⁶⁰ Furthermore, the Supreme Court reasoned that Sony could not be liable for secondary infringement because it had no active involvement in the direct infringement of its consumers.⁶¹ Usually an entity held liable for contributory infringement is one that likely has more control or awareness of a direct infringer’s conduct.⁶²

However, this type of infringement can also be found in situations where a service provider turns a “blind eye” to infringement or refuses to proactively remove infringing material.⁶³ Some courts have accepted constructive knowledge as sufficient for the knowledge re-

⁵⁹ See *id.* at 421, 423-24 (explaining “time-shifting” and how this practice does not constitute copyright infringement).

⁶⁰ See *id.* at 425-26 (acknowledging how recording television programs or engaging in “time-shifting” is fair use because doing so did not depreciate Universal’s television market in the original copyrighted works).

⁶¹ See *id.* at 426, 437 (affirming District Court’s holding of no liability because Sony had no control over conduct of consumers). See also Leytes & Legge, *supra* note 1 (citing *Betamax* as an early case example of technology that was ahead of copyright law).

⁶² See, e.g., *MGM Studios*, 545 U.S. at 936-37 (“holding 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”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-22 (9th Cir. 2001) (holding peer-to-peer network liable for contributory copyright infringement because Napster, the peer-to-peer network, knowingly facilitated direct infringement by making it easy and accessible for its users to illegally download copyrighted music).

⁶³ See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (finding willful blindness may render an ISP ineligible for safe harbor protection, discussed *infra* Part C.); *In re Aimster Copyright Litigation (Aimster)*, 334 F.3d 643, 655 (7th Cir. 2003) (holding ISP’s conduct leaned more towards contributory infringement than safe harbor, discussed *infra* Part C.); see also Todd C. Chapman, *Sharing in the Groove: Ninth Circuit Allows Peer-to-Peer Networks to Continue File Sharing* *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), 4 CHI.-KENT J. INTELL. PROP. 304, 316 (2005) (accounting for the theory that liability should not be avoided for consciously ignoring knowledge of infringement). Willful blindness occurs when “[a] person . . . engages in ‘conscious avoidance’ amounting to knowledge where the person ‘was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’” *Viacom*, 676 F.3d at 35 (defining willful blindness).

quirement where actual knowledge is deliberately avoided, and where the service or mechanism is predominantly or solely used to infringe.⁶⁴

Vicarious liability for copyright infringement has somewhat differing requirements. "It occurs when an actor 'enjoys a direct financial benefit from another's [directly] infringing activity and has the right and ability to supervise the infringing activity,' but declines to stop or limit it."⁶⁵ Vicarious liability usually entails an employer-employee type of relationship, although such a relationship is not required.⁶⁶ For example, a venue owner is vicariously liable when unauthorized copyrighted material is performed at the venue because the owner had control over its performances and monetarily benefited from its patrons.⁶⁷ Though there is no explicit knowledge requirement, knowledge is implicitly established when a service provider has the ability to supervise or control the directly infringing conduct

⁶⁴ See *Aimster*, 334 F.3d at 650 (finding that "[w]illful blindness is knowledge, in copyright law where indeed it may be enough that the defendant *should* have known of the direct infringement") (parentheses omitted). The Seventh Circuit based its finding of constructive knowledge as sufficient on a theory of criminal intent. See *id.* (providing that deliberate avoidance of "guilty knowledge" is enough to establish a guilty mental state). However, constructive knowledge was not sufficient in the *Betamax* case where manufacturers were aware that the machine could likely be used for infringing purposes because this was only one of many uses the machine had. See *Betamax*, 464 U.S. at 426 (describing the holding of the *Betamax* case).

⁶⁵ Weinstein, *supra* note 27, at 595-96; see also Chapman, *supra* note 63, at 315 (setting forth elements of vicarious liability).

⁶⁶ See *Aimster*, 334 F.3d at 654; see also *Gershwin*, 443 F.2d at 1162 (explaining origin of vicarious liability relates back to respondeat superior agency doctrine); *Arista*, 2011 U.S. Dist. LEXIS 109668, at *140 (articulating vicarious liability as a situation where the principal is responsible for its agent's infringing conduct).

⁶⁷ See *Cloak*, *supra* note 24, at 1566 (citing *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co. (Dreamland)*, 36 F.2d 354, 355 (7th Cir. 1929) as example of vicarious liability). A similar example is in *Shapiro, Bernstein & Co. v. H.L. Green Co. (Shapiro)*, 316 F.2d 304, 309 (2d Cir. 1963), where defendant store was held vicariously liable for copyright infringement through unlicensed records sold on behalf of its employees. This is because the defendant financially profited from such sales and because as employer, the defendant had control over employees' conduct. *Id.*; see also Brett White, *Viacom v. YouTube: A Proving Ground for DMCA Safe Harbors against Secondary Liability*, 24 ST. JOHN'S J.L. COMM. 811, 817 (2010) (describing the *Shapiro* court's reasoning).

of its agents or users.⁶⁸ Indirect infringement is a means of holding not only users but service providers liable for copyright infringement.⁶⁹

C. DMCA Safe Harbor Provisions

In 1998, the DMCA was passed to establish a standard for determining the liability of Internet service providers (ISPs).⁷⁰ Congress intended to continue protecting copyright holders while creating avenues of limiting liability for ISPs under certain conditions.⁷¹ These limits or “safe harbors” were established in Title II: Online Copyright Infringement Liability Limitation Act codified as the DMCA.⁷² The safe harbor provisions act as a middle ground for preserving innovation while shielding the “deep pockets” of ISPs.⁷³ ISPs are defined broadly by the DMCA to include network service companies, search engines, and even social media websites.⁷⁴ ISPs are categorized four ways as follows: “(1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; or (4) information location tools.”⁷⁵

⁶⁸ See White, *supra* note 67, at 817. (reiterating knowledge requirement implied as part of vicarious liability).

⁶⁹ See Cloak, *supra* note 24, at 1573 (describing indirect infringement, generally).

⁷⁰ See Cloak, *supra* note 24, at 1561 (describing the history of the DMCA).

⁷¹ See Cloak, *supra* note 24, at 1569 (describing Congress’s aspirations for DMCA); Weinstein, *supra* note 27, at 596 (describing Congress’s aspirations for DMCA).

⁷² See *Frequently Asked Questions (and Answers) about DMCA Safe Harbor, CHILLING EFFECTS*, archived at www.perma.cc/RE4N-PX6B [hereinafter *DMCA FAQs*] (describing history of DMCA).

⁷³ See *id.* (noting the purpose of DMCA safe harbors); see also NIMMER & NIMMER, *supra* note 28, at § 12B.01[C][1] n.185 (explaining that “[s]ervice providers, as deep pockets, are natural targets for copyright litigation.” See White, *supra* note 67, at 822 (explaining that the DMCA was also established “to facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age” (citing S. REP. NO. 105-190, at 1-2 (1998))).

⁷⁴ See 17 U.S.C. § 512(k)(1) (2014) (defining ISPs as “service providers”); see also DMCA FAQs, *supra* note 72 (defining ISPs). The DMCA defines an ISP twofold: as “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 choosing” or as “a provider of online services or network access, or the operator of facilities . . .” See 17 U.S.C. § 512(k)(1).

⁷⁵ See Weinstein, *supra* note 27, at 597 (discussing the four categories of ISPs).

The DMCA sets forth safe harbor requirements for each of the four categories of ISPs.⁷⁶ Section 512(c) specifically pertains to websites and other systems with user-controlled content.⁷⁷ The first requirement to meet in determining eligibility for safe harbor protection is whether a party qualifies as an ISP.⁷⁸ Furthermore, two other conditions must be met for safe harbor eligibility: (1) the ISP must have a policy and procedure for terminating repeat infringers' accounts; and (2) it must support rather than conflict with standard technical measures designed to identify and protect copyrighted works.⁷⁹ Furthermore, according to Section 512(c), this type of ISP may escape liability if it: lacks actual knowledge of infringement, can control infringing conduct without benefitting financially from such conduct, and upon notification of infringement quickly takes down or restricts access to infringing materials.⁸⁰ The standard of knowledge is high, often requiring specificity.⁸¹ This knowledge is usually obtained upon receiving notification of infringing material or

⁷⁶ See 17 U.S.C. § 512(a)-(d) (articulating requirements for each service provider type providing protection from liability for infringement).

⁷⁷ See *id.* at § 512(c) (describing who the liability for relief is attributable) ; see also Weinstein, *supra* note 27, at 598-99 (explaining applicability of Section 512(c)).

⁷⁸ See Weinstein, *supra* note 27, at 597 (distinguishing between four categories of ISPs).

⁷⁹ See Weinstein, *supra* note 27, at 597-98 (outlining conditions for safe harbor protection). According to the DMCA, standard technical measures "(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs [or burdens] on service providers" 17 U.S.C. § 512(i)(2).

⁸⁰ See *id.* at § 512(c); Weinstein, *supra* note 27, at 598-99 (setting forth elements to limit liability for information residing on systems at direction of users). See Brendan Pierson, *U.S. Copyright Safe Harbor Found to Apply to State Claims*, NEW YORK LAW JOURNAL (July 16, 2012), archived www.perma.cc/7KPH-EG55 (explaining that "the provision says that an [ISP] cannot be held liable for copyright infringement by its users, as long as it takes down any infringing material if asked").

⁸¹ See, e.g., *Viacom*, 676 F.3d at 30 (affirming District Court's finding that specific knowledge satisfied actual knowledge requirement); see also NIMMER & NIMMER, *supra* note 28 at § 12B.04[A][1] (noting high standard of knowledge requirement). "[T]o impute knowledge, the infringement must be readily apparent to a casual observer." White, *supra* note 67, at 827. However, the knowledge requirement alone "does not reach an entity that willfully ignores blatant indications of infringement." See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][1] (acknowledging how willful blindness alone may still render service providers eligible for safe harbor).

activity.⁸² On the other hand, the alternative “red flag” test for knowledge has subjective and objective elements.⁸³ Thus, an ISP can maintain its safe harbor protection in the face of a red flag if it hastily removes or revokes access to the infringing material; on the other hand, an ISP could lack or lose safe harbor protection by failing to react to a red flag.⁸⁴ The District Court in *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*⁸⁵ held that the organization, which owned copyrights to its founder’s works, raised an issue of contributory infringement in its pleadings because the ISP refused to stop a user (after repeated notification from organization) from posting copyrighted work.⁸⁶ Determining evidence of a direct financial benefit from infringing activity calls for a “common-sense, fact-based approach.”⁸⁷ Service providers who conduct legitimate businesses would likely not fall into the category of those who receive a direct financial benefit from infringement.⁸⁸ However, even an ISP that receives such a benefit can still come within the safe harbor if it does not have the right or ability to control the infringing activity.⁸⁹

⁸² See Weinstein, *supra* note 27, at 599 (noting how knowledge initiates take-down procedures).

⁸³ See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][1] (stating that “the standard is not what a reasonable person would have deduced given all the circumstances; it is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware”).

⁸⁴ See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][1] (describing how service providers should act in order to pass the red flag test).

⁸⁵ See 907 F. Supp. 1361, 1382-83 (N.D. Cal. 1995) (providing an example of precedent copyright infringement and a court’s finding that plaintiff’s copyright claims were without merit).

⁸⁶ See *id.* at 1371 (providing example of knowledge requirement satisfied without specific knowledge because service provider was aware of infringing conduct by way of encouragement and facilitation though it did not know when individual copyrighted files were uploaded or downloaded).

⁸⁷ See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][2] (setting forth suggested approach for courts in determining financial benefit requirement).

⁸⁸ See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][2] (noting exception to financial benefit requirement).

⁸⁹ See NIMMER & NIMMER, *supra* note 28, at § 12B.04[A][2] (discussing the importance of looking at “all relevant aspects of the relationship” between ISPs and infringers to determine control); see *Hendrickson v. EBay, Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001) (finding definition of control to mean more than the mere ability to revoke or block access to infringing content).

A copyright holder's notification to an ISP must be a written communication that satisfies the six statutory requirements⁹⁰ while the ISP is required to designate an agent with the Copyright Office to receive such notifications.⁹¹ Notification must comply with the statute in order to provide sufficient knowledge to an ISP.⁹² Once proper notice is given, the ISP is required to expeditiously⁹³ take down the infringing content for safe harbor protection.⁹⁴ For example in *UMG Recordings, Inc. v. Veoh Networks, Inc.*,⁹⁵ the U.S. District Court held that a website that allowed users to upload and share videos was entitled to safe harbor protection because it quickly took down infringing content upon obtaining knowledge of it.⁹⁶ In addition to responding to informal and formal notifications received regarding infringement on the website, this ISP also took down infringing content by implementing its own policy for repeat infringers and using technology that filtered uploaded content to determine if it matched a database of forbidden (i.e. copyrighted) content.⁹⁷ However, ISPs are

⁹⁰ See 17 U.S.C. § 512(c)(3) (setting forth notification requirements). The six notification requirements are: (1) "physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed"; (2) identification of copyrighted work(s); (3) identification of infringing material(s) sufficient to allow the service provider to find such material(s); (4) complainant's contact information; (5) statement of good faith belief that use is unauthorized; and (6) statement that notification is accurate. *Id.* However, copyright holders are not required to statutorily notify service providers to enforce their exclusive rights if they can prove that a service provider ignored a "red flag" or can prove actual knowledge. See *NIMMER & NIMMER*, *supra* note 28, at § 12B.04[A][3] (providing alternative to notification requirement by using other affirmative defenses to protect copyright holders' exclusive rights).

⁹¹ See 17 U.S.C. § 512(c)(3)(A) (discussing the requirements for a notification of claimed copyright infringement); see also Weinstein, *supra* note 27, at 599 (discussing designated agent for receiving notifications requirement).

⁹² See *Hendrickson*, 165 F. Supp. at 1089 (finding DMCA prohibits consideration of notification that does not satisfy required elements to establish actual knowledge element). The District Court held that EBay was exempt from liability for copyright infringement by qualifying for safe harbor protection because the plaintiff copyright holder failed to sufficiently notify EBay of its user's infringing conduct. *Id.*

⁹³ See also *NIMMER & NIMMER*, *supra* note 28, at § 12B.04[A][1], n.26 (articulating DMCA's lack of explicit time limit required for expeditious action); see Weinstein, *supra* note 27, at 603 (leaving open interpretation of term "expedient" to courts).

⁹⁴ See Weinstein, *supra* note 27, at 599 (setting forth "take-down" requirement).

⁹⁵ See 665 F. Supp. 2d 1099, 1107, 1118 (C.D. Cal. 2009).

⁹⁶ See *id.* (granting video site's motion for summary judgment).

⁹⁷ See *id.* at 1103-04 (describing methods of removing infringing materials).

not responsible for searching their websites for infringing material; instead the burden remains on copyright holders to police infringement.⁹⁸ Even if an ISP is ineligible for safe harbor protection, it may escape liability by employing other defenses to copyright infringement.⁹⁹

D. Social Media Websites and their Relationship to Copyright Law

Social media websites have for the most part escaped liability for copyright infringement.¹⁰⁰ YouTube, for instance, is a video sharing website that allows users to upload, view and share video clips.¹⁰¹ Furthermore, when a video is uploaded to YouTube, YouTube employs its transcoding process, where YouTube duplicates the uploaded video in its original format as well as in the Flash format, to make it available to a wide variety of viewers.¹⁰² In *Viacom*, the District Court granted YouTube's motion for summary judgment finding the ISP was protected by the Section 512(c) safe harbor.¹⁰³ Another in-

⁹⁸ See Jeffrey D. Neuburger, *New Media Technology and the Law – May 2011*, MONDAQ BUSINESS BRIEFING (May 17, 2011), archived at www.perma.cc/YUV8-TMQA (summarizing *Wolk* court's reasoning). The court in *Wolk* found that the artist copyright holder's past notifications to the ISP of infringement was not sufficient to establish actual knowledge of other infringement of the artist's work. See *id.*; see also *Wolk v. Kodak Imaging Network Inc.*, 840 F.Supp.2d 724, at 746 (S.D.N.Y. Mar. 17, 2011) (holding notice to service providers must be specific not calling for service providers to police sites for current and future infringement of materials).

⁹⁹ See 840 F.Supp.2d 724, at 746 (describing the way in which ISPs can escape liability even if found ineligible for safe harbor protection).

¹⁰⁰ See *Online Social Networking: A Brave New World of Liability*, ADVISEN (March 2010), archived at www.perma.cc/463A-ZBJV (noting that social media websites enjoys certain protections from copyright liability).

¹⁰¹ See *Viacom*, 676 F.3d at 28 (summarizing facts about YouTube service). To upload a video to YouTube, a user has to register an account with the site, and before establishing an account must accept the service's Terms of Use agreement; once the user has a registered account, he or she can upload videos by clicking the "upload" button. See *id.* (outlining how YouTube operates).

¹⁰² See *id.* (describing the transcoding process).

¹⁰³ See *id.* at 29 (holding that though the ISP had actual knowledge of infringement, it was proactive about removing infringing content). However since then, the Second Circuit vacated the summary judgment and remanded the case to determine whether specific instances of infringement that YouTube knew about corresponded to any of the material at issue in the case. See *id.* at 34 (summarizing appellate court's holding).

stance where a social media site was held not liable for secondary copyright infringement is in *Flava Works, Inc. v. Gunter*, where the owner of a social media bookmarking site called myVidster created a forum where its users could bookmark online content making it available to other users.¹⁰⁴ Here, the direct infringers of Flava's copyrighted videos were not myVidster users, but rather the individuals who uploaded the copyrighted videos to the websites that got bookmarked onto myVidster.¹⁰⁵ Furthermore, myVidster did not host the videos on its server.¹⁰⁶ Thus, the Seventh Circuit vacated Flava's preliminary injunction against myVidster finding the site not directly or indirectly liable for infringement because it did not materially contribute to the infringement.¹⁰⁷

Another major issue is how courts should handle online copyrighted images. Copy-reliant technology that does not publicly communicate the author's original expression generally does not constitute infringements found in *Perfect 10 v. Google, Inc.*,¹⁰⁸ for instance.¹⁰⁹ Copy-reliant technology encompasses three key traits:

¹⁰⁴ See 689 F.3d 754, 756-57 (7th Cir. 2012) (summarizing facts about myVidster). The site would get the embed code for a bookmarked video and myVidster creates a webpage to display the video coupled with a thumbnail of the video's opening image. See *id.* at 757 (describing how myVidster operates).

¹⁰⁵ See *id.* at 758-59 (explaining how Flava's copyrights were actually infringed upon). Flava's content is only available to view in full by paying a fee and agreeing not to copy videos or download them for public or commercial use. See *id.* at 756 (describing how Flava Works operates). Therefore, uploading one of Flava's videos to the Internet infringed upon Flava's exclusive rights. See *id.* at 759 (reiterating that uploads to websites, not bookmarks, directly violated Flava's copyrights).

¹⁰⁶ See *id.* at 758 (describing how videos are displayed on myVidster). As long as visitors and/or users do not make copies of the videos they watch on myVidster, no infringement occurs. *Id.* at 760 (noting viewers by merely watching videos do not violate copyrights).

¹⁰⁷ See *id.* at 763 (summarizing court's holding).

¹⁰⁸ No. CV 04-9484 AHM(SHx), 2010 U.S. Dist. LEXIS 75071, at *1-2 (C.D. Cal. July 26, 2010), *aff'd*, 653 F.3d 976, 976 (9th Cir. 2011).

¹⁰⁹ See Sag, *supra* note 30, at 1608-09 (arguing that copy-reliant technology usually will not be found liable for copyright infringement due to its nonexpressive nature). This concept is also known as the idea-expression dichotomy, a principle that conceals the expression of an idea within the creator's control while the idea itself enters the public domain. See Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 322 (1989) (describing the idea-expression dichotomy); see also 17 U.S.C. § 102(b) (providing where the Copyright Act acknowledges the idea-expression dichotomy).

“(1) the copying of expressive works for nonexpressive uses, (2) a high volume of transactions, and (3) the use of technologically enabled opt-out mechanisms to reduce transaction costs.”¹¹⁰ In *Perfect 10*, an adult entertainment publisher objected to the unauthorized use of its images on Google’s Image Search.¹¹¹ The Ninth Circuit found that Google could not be held directly liable for infringement because the thumbnails constituted fair use in spite of Google’s access to the copyrighted images because the thumbnails served a unique purpose and were not substantially similar to the originals.¹¹² The case was then remanded to determine whether Google was liable for contributory infringement.¹¹³ The Ninth Circuit affirmed the District Court’s holding that Google was protected from secondary liability by safe harbors due to its take-down notice procedures.¹¹⁴

E. Potential Future Changes in Second Tier of Liability

In 2004, a bill—the Inducing Infringements of Copyrights Act of 2004 (INDUCE Act)—¹¹⁵ was introduced by the Senate, who proposed liability for induced infringement.¹¹⁶ This would make inducing copyright infringement its own category of secondary liability as opposed to inducement as an element of contributory infringement.¹¹⁷

¹¹⁰ See Sag, *supra* note 30, at 1608 (explaining and defining copy-reliant technology as “routinely, automatically and indiscriminately” copying copyrighted content).

¹¹¹ See *Perfect 10*, 653 F.3d at 982 (summarizing publisher’s claims against ISP).

¹¹² See McFarlane, *supra* note 27, at 388 (describing appellate court’s holding that thumbnail images were “highly transformative” because they “served a different function than the originals”). “A work is transformative when it does not merely supersede the objects of the original creation, but rather adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” See McFarlane, *supra* note 27, at 388 (internal quotations omitted) (defining transformative works).

¹¹³ See McFarlane, *supra* note 27, at 391 (describing *Perfect 10*’s procedural history).

¹¹⁴ See *Perfect 10*, 2010 U.S. Dist. LEXIS 75071, at *45 (holding Google entitled to safe harbor protection from secondary liability for contributory infringement).

¹¹⁵ S. 2560, 108th Cong. (2nd Sess. 2003-2004).

¹¹⁶ See *id.* (identifying the introduction of the bill by Congress).

¹¹⁷ See Chapman, *supra* note 63, at 326 (describing the INDUCE Act). Furthermore, intent to induce is distinguished from materially contributing to infringement; under the INDUCE Act, the latter is not required. See Raymond T. Nimmer, *Inducing Copyright Infringement*, CONTEMPORARY INTELLECTUAL PROPERTY, LICENSING & INFORMATION LAW (Dec. 2, 2005), archived at www.perma.cc/XX76-Y6WY (describing inducing infringement).

This bill was designed to limit illegal online activity and would prohibit file-trading networks and certain electronics due to their unlawful uses.¹¹⁸ It was introduced at a time when piracy was a growing problem, as a possible solution to the rising threat of peer-to-peer networks that pirated music, movies, and software.¹¹⁹

Under the INDUCE Act, liability would extend to “anyone who intentionally aids, abets, induces or procures any direct copyright violation.”¹²⁰ Intent to induce consists of acts or words that manifest into an intent to induce, and the infringement that occurs must be shown to result from that intent.¹²¹ Those in favor of the bill’s passage argue that it could be a meaningful tool to combat online piracy once and for all.¹²² However, this law was not received well by ISPs for fear that innovation and creativity would be harmed or inhibited by its enactment.¹²³ Those opposed to the bill’s passage also argued that it put the *Betamax* decision at risk of being overturned since that machine could have been used for illegal purposes.¹²⁴ Thus, the

¹¹⁸ See Declan McCullagh, *Senate Bill Would Ban P2P Networks*, CNET (June 23, 2004), archived at www.perma.cc/LE8Q-PZ7T (explaining the purpose of the INDUCE Act).

¹¹⁹ See *id.* (acknowledging how circumstances incited legislative action in the form of this bill).

¹²⁰ See Chapman, *supra* note 63, at 326 (quoting the INDUCE Act). The threshold of intent is lowered and could be proven merely by showing whether a reasonable person would find intent to induce infringement, including “whether the activity relies on infringement for its commercial viability.” See Chapman, *supra* note 63, at 326 (describing how proof of intent can be met).

¹²¹ See Nimmer, *supra* note 117 (explaining the intent-to-induce element of INDUCE Act). For example, “[d]istributing a product that has both infringing and non-infringing uses: Results in inducement liability or not depending on how the product is marketed. Marketing will be viewed in context, rather than simply in terms of what is directly said. Distributing a “copy” program without more is not inducement.” See Nimmer, *supra* note 117 (providing examples as guidelines for considering the concept of inducing infringement).

¹²² See Declan McCullagh, *Antipiracy Bill Targets Technology*, CNET (June 17, 2004), archived at www.perma.cc/M7C9-GC4P (providing argument of the bill’s proponents). Proponents were also in favor of this bill because it would protect children from online child pornography. See *id.* (noting other affirmative reasons for the bill’s passage).

¹²³ See Chapman, *supra* note 63, at 327 (noting companies’ concerns that the INDUCE Act would “trigger lawsuits aimed at any emerging technology and would eliminate the substantial non-infringing safeguards established by the Supreme Court in *Betamax*”).

¹²⁴ See McCullagh, *supra* note 122 (providing additional arguments against the INDUCE Act).

INDUCE Act has not yet passed and Congress is to consider whether this law furthers promotion of science and useful arts.¹²⁵

III. FACTS AND PREMISE

Pinterest was created with the hopes of connecting the world by their interests.¹²⁶ As of late 2013, it has raised \$225 million dollars and is now worth about \$3.8 billion dollars.¹²⁷ It prioritizes site quality over monetary gain by securing funding from outside sources rather than requiring financial contributions from its users.¹²⁸ It allows for the sharing of content found across the Internet on public online bulletin boards¹²⁹ that are usually organized by topic.¹³⁰ The images can be pinned without obtaining prior permission, are copied in their full size to Pinterest's servers,¹³¹ and images cannot be pinned to pinboards without adding a comment to the pinned content.¹³² It was initially only available to users by invitation-only,¹³³ however now an-

¹²⁵ See Chapman, *supra* note 63, at 330 (explaining subsequent history of the INDUCE Act after its initial introduction to Congress).

¹²⁶ See PINTEREST, *supra* note 1 (displaying the Pinterest website).

¹²⁷ See Perez, *supra* note 3 (stating Pinterest's current monetary value).

¹²⁸ See *How Does Pinterest Make Money?*, PINTEREST (last visited Feb. 10, 2014), archived at www.perma.cc/ZPL7-V4WK (addressing how Pinterest makes money). Pinterest disclosed that its priority was improving the quality of the site rather than making money, thus it sustains funding from outside financing sources and not users. See *id.*; see also MCGRADY, *supra* note 4, at § 34.06 (explaining how Pinterest is funded); Leytes & Legge, *supra* note 1 (acknowledging that Pinterest is free to all users and brand owners).

¹²⁹ See MCGRADY, *supra* note 4, at § 34.01; *Pinterest Basics*, PINTEREST (last visited Feb. 10, 2014), archived at www.perma.cc/VN3T-DX9A (defining Pinterest and how it works).

¹³⁰ See Leytes & Legge, *supra* note 1 (explaining pinboards and providing examples of pinboard topics).

¹³¹ See Leytes & Legge, *supra* note 1 (describing content posted to Pinterest, and asserting that "[t]his is where the danger of copyright infringement lurks").

¹³² See MCGRADY, *supra* note 4, at § 34.01 (noting users ability to comment on their own and other users' pins).

¹³³ See MCGRADY, *supra* note 4, at § 34.03 (outlining how user accounts are established). Previously, users had to either request an invite directly from Pinterest or have someone else invite them to use the site. See MCGRADY, *supra* note 4, at § 34.03 (describing the identity of users).

yone with a Facebook or Twitter account can register a Pinterest account.¹³⁴

As Pinterest continues to develop and grow, its Terms of Service recently underwent changes though certain aspects of the Terms remain the same.¹³⁵ The previous Terms were effective until April 6, 2012,¹³⁶ and granted Pinterest the privilege to sell User Content.¹³⁷ However, this privilege no longer exists to allow users full control over their content.¹³⁸ Another section that is missing from the current Terms is "How Pinterest Works" which set forth the various acceptable ways to share content.¹³⁹ The indemnification clause remained in its Terms.¹⁴⁰ This section holds users accountable for agreeing not to hold Pinterest liable for any lawsuits, proceedings, or damages stemming from their use or content on Pinterest.¹⁴¹ While Pinterest consistently allows users to retain ownership in their content, Pinterest states it has a "non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, display, modify, . . . and distribute . . . User Content."¹⁴² Furthermore, Pinterest emphasizes that it is a public site, thus users should be aware that their content may be seen,

¹³⁴ See John Constine, *Pinterest Finally Ditches Invitations, Now Lets Anyone Sign Up*, TECHCRUNCH (Aug. 8, 2012), archived at www.perma.cc/VH6R-P4PG (announcing Pinterest's shift out of beta mode and getting rid of its invitation-only requirement).

¹³⁵ See *Terms*, *supra* note 1 (announcing new Terms of Service effective April 6, 2012).

¹³⁶ See *Terms*, *supra* note 1 (announcing new Terms of Service effective this date).

¹³⁷ See Zach Walton, *Pinterest Changes Terms of Service in a Pro-Consumer Way*, WEBPRONEWS (Mar. 26, 2012), archived at www.perma.cc/LQU9-FENB (discussing the privilege to sell User Content as part of its former Terms of Service).

¹³⁸ See *Terms*, *supra* note 1 (describing the terms and conditions); Walton, *supra* note 137 (noting the reason for this particular change in the new Terms). Furthermore, the Pinterest team claims these new Terms "are 'easier to understand and better reflect the direction our company is headed in the future.'" See Walton, *supra* note 137 (explaining the reason for implementing new Terms of Service).

¹³⁹ See *Terms*, *supra* note 1 (explaining that visual collections can be created by: (1) uploading images from the computer; (2) taking and uploading images on cell phones; or installing the Pin It browser toolbar button and uploading online images).

¹⁴⁰ See *Terms*, *supra* note 1 (noting Pinterest's indemnification clause).

¹⁴¹ See *Terms*, *supra* note 1 (describing the burden users bear if both a user and Pinterest were sued for copyright violation).

¹⁴² See *Terms*, *supra* note 1 (illustrating how Pinterest uses user content).

used, or repinned by any other users.¹⁴³ Yet, one of the new sections added to the Terms states that content can remain on the site essentially indefinitely even after an account is terminated or deactivated.¹⁴⁴

Within the Terms, the Pinterest community agrees to abide by the Acceptable Use Policy, and “Pin Etiquette.”¹⁴⁵ The Acceptable Use Policy states that users agree not to infringe intellectual property rights including copyrights.¹⁴⁶ In addition to the Terms of Service, Pinterest has a set of five guidelines,¹⁴⁷ known as “Pin Etiquette” that users agree to abide by, with one in particular encouraging users to credit their sources.¹⁴⁸ However, crediting sources does not substitute for authorized permission to use or copy online content.¹⁴⁹

The Pin It button allows users to grab images from various websites without requesting permission first, though it automatically links to the original source.¹⁵⁰ There is also a Pin It button for large web-

¹⁴³ See *Terms*, *supra* note 1 (discussing how other users can use content on Pinterest).

¹⁴⁴ See *Terms*, *supra* note 1 (explaining that Pinterest “may retain . . . User Content for a commercially reasonable period of time for backup, archival, or audit purposes[.]” and, furthermore, that Pinterest and other users can continue displaying and using content even after a user deactivates his or her account).

¹⁴⁵ See *Terms*, *supra* note 1 (setting forth users’ responsibility for their content).

¹⁴⁶ See MCGRADY, *supra* note 4, at § 34.07; *Terms & Privacy: Acceptable Use Policy*, PINTEREST, archived at www.perma.cc/HE6W-MW33 [hereinafter *Acceptable Use*] (describing use and access restrictions).

¹⁴⁷ See *Pin Etiquette*, PINTEREST, archived at www.perma.cc/YPF5-5C6D (setting forth use guidelines). The five rules that make up Pin Etiquette are: “(1) Be Respectful; (2) Be Authentic; (3) Credit Your Sources; (4) Report Objectionable Content; and (5) Tell [Pinterest] How to Make Pinterest Better.” *Id.*; see also MCGRADY, *supra* note 4, at § 34.07 (summarizing Pin Etiquette).

¹⁴⁸ See *Pin Etiquette*, *supra* note 147 (opining that pins referring to their original sources are more useful).

¹⁴⁹ See *Fair Use*, U.S. COPYRIGHT OFFICE, June 2012, archived at www.perma.cc/S26J-84MV (affirming importance of requesting permission from copyright holder). Even though fair use is a defense for violating exclusive copyrights, determining what constitutes fair use versus infringement is not clear-cut and there is no set amount of content that can be taken or used without permission so it is best to ask for permission prior to use of copyright material. See *id.* (suggesting people request permission prior to reproducing or distributing copyrighted content and if this is not possible or feasible the content should not be used).

¹⁵⁰ See *Goodies*, PINTEREST, archived at www.perma.cc/P6V-SQZF (describing the button’s function and how it is installed). See also Poletti, *supra* note 7 (distinguishing

sites, such as Amazon and eBay, creating ease of accessibility to these sites' images.¹⁵¹ However, websites that implemented the Pin It button into their online domains should establish permission for Pinterest users to pin these images.¹⁵² Pinterest also provides website owners and ISPs with the choice to opt out of the Pin It button's ability to grab its content and upload it to Pinterest.¹⁵³ This is one proactive method copyright holders can implement to guard their online copyrighted work.¹⁵⁴

Pinterest's copyright policy is straight-forward and fairly short. In it, Pinterest promises to disable or terminate repeat infringers' ac-

guishing between uploading images via computer versus the Pin It button). This function could cause copyright infringement to occur "instantly and unthinkingly." See Allen Smith, *Pinterest Might Facilitate Copyright Infringement*, SOC'Y FOR HUM. RESOURCES MGMT. (May 29, 2012), archived at www.perma.cc/Q5Q4-ABTR (describing the ease with which images are uploaded onto Pinterest).

¹⁵¹ See Goodies, *supra* note 150 (inferring how the button should be placed near other social sharing tools and that it grants site users or readers the convenience in sharing its content on Pinterest). More and more major companies and websites, such as Amazon and eBay, are adding this Pin It button to their sites. See Lance Whitney, *Pinterest Buttons Pop Up on Amazon, eBay*, CNET NEWS (Apr. 11, 2012), archived at www.perma.cc/NQY3-LL7D (indicating Pin It button's popularity on websites is due to Pinterest's continuous user growth). Compare Leena Rao, *Flickr Adds Pinterest Buttons To Photo Sharing; All Images Will Be Pinned With Attributions*, TECHCRUNCH (May 1, 2012), archived at www.perma.cc/9ALD-XCZX (discussing Flickr's addition of the Pin It button with the ability to share content remaining in the hands of content owners), with David Murphy, *Flickr Adopts Pinterest 'Kill Switch' to Prevent Photo Sharing*, PC MAGAZINE.COM (Feb. 25, 2012), archived at www.perma.cc/LFB7-R9BV (noting Flickr's initial stance prohibiting the Pin It button's capabilities in order to protect user content).

¹⁵² See Smith, *supra* note 150 (opining that sharing tools on websites constitute permission to copy).

¹⁵³ See *Preventing Pinning From Your Site*, PINTEREST (last visited Feb. 12, 2014), archived at www.perma.cc/D7KX-AWAL (displaying the HTML code websites can add to stop images from being pinned). When an image on a website that has opted out is unsuccessfully pinned, a message will come up stating, "[t]his site doesn't allow pinning to Pinterest. Please contact the owner with any questions. Thanks for visiting!" *Id.*; see also Dara Kerr, *Pinterest Addresses Copyright Issues with Opt-Out Option*, CNET NEWS (Feb. 20, 2012), archived at www.perma.cc/PSP2-K7YW (announcing opt-out code's release).

¹⁵⁴ See *supra* notes 149-59 and accompanying text (describing one of the methods that copyright holders can implement).

counts.¹⁵⁵ The policy also consists of a take-down procedure upon proper notification from copyright holders that is based on DMCA requirements.¹⁵⁶

IV. ANALYSIS

The preceding sections provided an introduction to some of the concerns regarding Pinterest's potential liability for copyright infringement. Pinterest, by its Pin It button and satisfactory policies, is aware of the balancing act between encouraging and participating in the ever-prevalent culture of sharing while doing what it can to honor the copyrights of artists, photographers, and businesses.¹⁵⁷ The following subsections analyze Pinterest's potential liability within the three tiers of liability—direct, contributory or vicarious—as well as under the INDUCE Act if it were to pass, comparing Pinterest with precedent, and providing possible solutions that would make Pinterest more conformed to copyright law.¹⁵⁸ This Note will conclude that while the culture of online sharing is not going anywhere and while Pinterest is protected from liability for infringement, Pinterest should consider making its site conform more closely to copyright law to prevent potential lawsuits against it for secondary infringement.

¹⁵⁵ See *Copyright*, PINTEREST (last visited Feb. 17, 2014), archived at www.perma.cc/XL6Q-ZYUM [hereinafter *Pinterest Copyright*]; MCGRADY, *supra* note 4, at § 34.08 (summarizing the site's general copyright policy).

¹⁵⁶ Compare MCGRADY, *supra* note 4, at § 34.09, and *Pinterest Copyright*, *supra* note 155 (outlining Pinterest's DMCA Notice of Alleged Infringement to be completed by copyright holders), with *supra* notes 90-91 and accompanying text (setting forth statutory requirements for online service providers). Furthermore, a Pinterest user may contest the removal of its content by filing a counter-notice if it feels the removal was erroneous. See MCGRADY *supra* note 4, at § 34.09 (describing Pinterest's DMCA Counter-Notice, and noting the "legal and financial consequences for fraudulent and/or bad faith submissions" advising users to ensure they are actual rights holders or have a good faith belief that removal was erroneous).

¹⁵⁷ See *Pin Etiquette*, *supra* note 147 (describing simple rules to help users "pin with care").

¹⁵⁸ See discussion *infra* Part IV. A-D. (analyzing various levels of Pinterest's potential liability).

A. Pinterest Only Potentially Liable Under Contributory Infringement

A court would not likely find Pinterest directly liable for copyright infringement. Direct infringement requires active participation on behalf of the infringer and Pinterest itself does not infringe upon the copyrights of others.¹⁵⁹ While Pinterest provides site features, such as the Pin It button, which could be used for infringing purposes, it is still the users who actually copy and post the copyrighted content onto Pinterest.¹⁶⁰ Unlike in *Playboy*, where the site operator uploaded and distributed the copyrighted photographs, Pinterest is not actively involved in the uploading or distribution of user content.¹⁶¹ Furthermore, Pinterest users agree to respect the intellectual property rights of others, thus direct infringement of these rights occurs as a result of users' conduct, not Pinterest's.¹⁶² Therefore, a court would have difficulty finding Pinterest directly liable for copyright infringement because of its Pin It button.

A court would likely not find Pinterest vicariously liable for copyright infringement. Liability for vicarious infringement requires Pinterest to reap a direct financial benefit from its users' directly infringing activity, and to fail to exercise its right and ability to super-

¹⁵⁹ See *supra* note 37 and accompanying text (describing the active conduct requirement of direct infringement and using *CoStar* and *Wolk* as case examples of how this concept was applied by courts). Like *Wolk*, a court would likely not hold Pinterest directly liable for the conduct of its users. See *Wolk*, 840 F. Supp. 2d at 742 (reasoning that the provider merely supplied the tools for copying with no active infringing conduct). See also MCGRADY, *supra* note 4, at § 34.01 (stating that pictures and other content is uploaded to Pinterest by its users who create pinboards).

¹⁶⁰ See Poletti, *supra* note 7 (contending that how and when content is shared or posted onto Pinterest is completely up to its users); see also MCGRADY, *supra* note 4, at § 34.01 (stating that pictures and other content is uploaded to Pinterest by its users who create pinboards).

¹⁶¹ See *Playboy*, 839 F. Supp. at 1554 (summarizing the facts of the case); *supra* note 129 with accompanying text (defining Pinterest as an online content sharing site). Pinterest does retain a license in user content however they lack control over what content is uploaded to the site. See *Terms*, *supra* note 1 (explaining Pinterest's non-exclusive license to user content allowing users to retain ownership of uploaded or shared content).

¹⁶² See *Pinterest Copyright*, *supra* note 155 (describing Pinterest's copyright policy).

viser or control the infringing conduct.¹⁶³ However, Pinterest does not directly profit from user content as an entertainment venue profits off of its performers.¹⁶⁴ Furthermore, it does not have the ability to control user conduct, but it does have the ability to respond to infringing conduct, and to keep content on the site in spite of account termination or deactivation.¹⁶⁵ Pinterest cannot control whether a user operates the Pin It Button to add media it owns copyrights to or grabs a copyrighted image from another individual's website without permission.¹⁶⁶ But it can control whether infringing content pinned by its Pin It button remains on the site once properly notified.¹⁶⁷ Consequently, based on the way Pinterest is organized and funded, it is highly unlikely to be found vicariously liable for its users' conduct.

¹⁶³ See *Aimster*, 334 F.3d at 654 (noting that vicarious liability may apply where principal fails to supervise the agent's conduct); see also *Gershwin*, 443 F.2d at 1162-63 (explaining requirements for vicarious liability to apply); *Arista*, 2011 U.S. Dist. LEXIS 109668, at *140 (articulating vicarious liability as requiring a direct financial benefit from the infringing acts of another).

¹⁶⁴ See *How Does Pinterest Make Money?*, *supra* note 128 (addressing how Pinterest makes money). Pinterest disclosed that its priority was improving the quality of the site rather than making money, thus it sustains funding from outside financing sources and not users. See MCGRADY, *supra* note 4, at § 34.06 (explaining how Pinterest is funded); see also Leytes & Legge, *supra* note 1 (acknowledging that Pinterest is free to all users and brand owners).

¹⁶⁵ See *supra* note 144 and accompanying text (noting one aspect of the Terms of Service which allows user content to remain on site for various purposes after account deactivation or termination); see also *Pinterest Copyright*, *supra* note 155 (asserting its promise to take down infringing content and disable or terminate the accounts of repeat infringers upon proper notification).

¹⁶⁶ See *supra* note 150 and accompanying text (describing how the Pin It button works). The button is installed onto the user's browser toolbar. See MCGRADY, *supra* note 4, at § 34.04 (explaining how the Pin It button is installed and used); see also Walton, *supra* note 137 (recalling how the end of Pinterest's privilege to sell user content left users with greater control over their content). Additionally, Pinterest has a consensual relationship with its users: it gives users the freedom over what and how content is added to their pinboards and users agree to abide by the Acceptable Use Policy and "Pin Etiquette." See *Terms*, *supra* note 1 (providing for multiple ways users can freely add or user content and setting forth terms of user agreement to be respectful, noninfringing users).

¹⁶⁷ See *Pinterest Copyright*, *supra* note 155 (acknowledging Pinterest's take-down procedure).

Yet, a court may find Pinterest liable for contributory infringement because its Pin It button induces infringement.¹⁶⁸ While Pinterest is not a peer-to-peer network, its Pin It button eases users' accessibility and ability to pin copyrighted content to the site.¹⁶⁹ In order for Pinterest to be found liable for contributory infringement, it would need to know about the infringing conduct, and induce or materially contribute to the infringement.¹⁷⁰

First, the question is whether Pinterest knows or should know about infringing conduct.¹⁷¹ Since Pinterest only responds to reported notifications of policy violations, it lacks knowledge of who posts infringing content and when infringing content is posted.¹⁷² However, constructive knowledge is not sufficient for satisfying the knowledge element in the context of Pinterest because the Pin It button has multiple, noninfringing uses.¹⁷³ Furthermore, Pinterest should know that users will likely grab from other sites copyrighted images they do not own or where there is no prior authorization to copy, distribute or display.¹⁷⁴ Further, evidence that Pinterest should know that some users infringe copyrights is seen in its "Pin Eti-

¹⁶⁸ See *infra* notes 168-183 and accompanying text (discussing implications of "inducing infringement" and offering possible legal arguments against Pinterest's favor).

¹⁶⁹ See *A&M*, 239 F.3d at 1011 (describing how a typical peer-to-peer network, such as Napster, works); see *Leytes & Legge*, *supra* note 1 (noting that images are hosted on Pinterest's servers, and also noting that one reason Napster was held liable is because it replaced the market for music).

¹⁷⁰ See *supra* note 46 and accompanying text (summarizing elements of contributory infringement).

¹⁷¹ See *Arista*, 2011 U.S. Dist. LEXIS 109668, at *136-37 (noting the objective standard for determining the existence of knowledge).

¹⁷² See *supra* notes 156-155 and accompanying text (explaining how Pinterest handles issues of policy violations, specifically copyright violations). See also *Pin Etiquette*, *supra* note 147 (listing use guidelines, including one that calls users to report objectionable content).

¹⁷³ See *Betamax*, 464 U.S. at 426 (reasoning that though manufacturers knew that the machine could be used for infringing purposes, due to its multiple other uses it could not find the knowledge element satisfied); see, e.g., *supra* notes 150-151 and accompanying text (describing various uses of the Pin It button).

¹⁷⁴ See *Smith*, *supra* note 150 (noting how the Pin It button can cause instant infringement by users). See also *Poletti*, *supra* note 7 ("[Pinterest's] lawyers say you can't pin anything that you don't own . . . but the site is saying you can. It's very confusing to users").

quette”—advising users to credit their sources.¹⁷⁵ Pinterest users may need more than source crediting to ensure they are not infringing copyrights because crediting sources implies that such sources stem from other individuals with the possibility that users lack permission to post certain images; thus Pinterest has constructive knowledge of its users’ conduct due to its source crediting requirement.¹⁷⁶

Next, the question is whether Pinterest by its Pin It button induces or materially contributes to users’ infringing conduct. Since the Pin It button allows users to copy full-size images from websites across the Internet onto Pinterest without requiring permission from copyright holders, a court could find that this feature makes it easy and accessible for users to violate copyrights by publicly displaying and distributing content they do not own.¹⁷⁷ However, Pinterest differs from Napster because its content is arguably not replacing the market for photography and artwork.¹⁷⁸ However, the object of the Pin It button is not to promote copyright infringement but to ease the process of creating a public forum for users to find and share their common interests.¹⁷⁹ Furthermore, the Pinterest does not advertise or so-

¹⁷⁵ See *Pin Etiquette*, *supra* note 148 and accompanying text (identifying the function of the Pin It button); *Goodies* *supra* note 150 and accompanying text (summarizing the Pin It button’s function and how it opens the door for infringement in spite of credit given when users lack permission to copy content onto Pinterest); see also *Fair Use*, *supra* note 149 (advising people not to use or copy copyrighted works if they cannot obtain prior permission to use such content). See *Betamax*, 464 U.S. at 426 (reasoning that though manufacturers knew that the machine could be used for infringing purpose, due to its multiple other uses it could not find the knowledge element satisfied).

¹⁷⁶ See Michael Goad, *Copyright and Plagiarism*, PDDOC.COM (2005), archived at www.perma.cc/B4KX-YX6W (noting that copyright infringement is concerned with more than just properly crediting sources).

¹⁷⁷ See Leytes & Legge, *supra* note 1 and accompanying text (identifying the type of content posted to Pinterest); Smith, *supra* note 150 (reiterating that the Pin It button does not require permission from copyright holders and that images added to Pinterest are hosted on Pinterest’s servers in their full size); compare *A&M*, 239 F.3d at 1022 (finding Napster facilitated infringement by easing users’ ability to engage in infringing activity), with Smith, *supra* note 150 (comparing Pinterest to similar sites such as Instagram and YouTube require uploads and thus make it harder to copy images from online).

¹⁷⁸ See Poletti, *supra* note 7 (contrasting Pinterest with Napster).

¹⁷⁹ See PINTEREST, *supra* note 1 (showing that Pinterest encourages its users to respect the copyright of other users); see also *MGM Studios*, 545 U.S. at 936-37 (arguing for secondary liability when the purpose of a device is to promote infringement by third parties).

licit its users to infringe others' copyrights, though they have tried to make money through affiliate links.¹⁸⁰ The "opt out" feature could be considered a mechanism to help prevent copyright infringement and thus, the Pin It button may not be considered a material contribution to users' direct infringement.¹⁸¹ The Pin It button subconsciously rather than actively encourages infringement.¹⁸² Therefore, an argument, though weak, could be made that Pinterest induces its users' infringing conduct.

Although, in line with ISPs' fears, if the INDUCE Act is passed, a court could find Pinterest liable under the separate category of secondary infringement: inducement. Inducing infringement under the INDUCE Act calls for a lower standard of determining intent to induce.¹⁸³ Intent to induce could be shown by the words used to describe the Pin It button: allowing users "to grab an image from any website."¹⁸⁴ Furthermore, determining the existence of intent to in-

¹⁸⁰ See MCGRADY, *supra* note 4, at § 34.04 (noting that advertising is not part of Pinterest's revenue model though it may be used in the future); *but see Columbia Pictures*, 2009 U.S. Dist. LEXIS 122661, at *36 (stating that advertisement is a common example of inducing infringement). See also *How Does Pinterest Make Money?*, *supra* note 128 (noting new revenue-generating methods Pinterest has used or may consider using).

¹⁸¹ See Smith, *supra* note 153 and accompanying text (illustrating how the "opt out" code prevents certain content from being "pinned" to Pinterest); Weinstein, *supra* note 27, at 595 (reiterating that one way material contribution to direct infringement occurs is when a provider knows of infringing activity, can control it and does not act to prevent such activity).

¹⁸² See *Flava Works*, 689 F.3d at 760 (describing uploaders of copyrighted content as direct infringers, and myVidster as a "tertiary" infringer, not recognized by copyright law); see also *id.* at *9 (noting how some myVidster users may not be infringers since they merely watch uploaded videos rather copying content); *but see supra* note 132 and accompanying text (noting how users use and share content on Pinterest). Unlike myVidster where there exists passive users, those who just watch videos, all Pinterest users are active participants uploading, copying and re-pinning images. See *supra* notes 142, and accompanying text (summarizing Pinterest user activity). Though copyright holders can opt out of the Pin It ability, the opt out function does not completely eliminate Pinterest's potential liability. See Leytes & Legge, *supra* note 1 and accompanying text (noting Pinterest's potential liability for infringement in spite of opt out function).

¹⁸³ See Chapman, *supra* note 63, at 326 (noting the change in determining inducement between contributory infringement and inducing infringement under the INDUCE Act).

¹⁸⁴ See Nimmer, *supra* note 117 (defining inducement liability); see also Goodies, *supra* note 150 (quoting Pinterest's description of the Pin It button).

duce is a question of fact so it is possible for a jury to find Pinterest users liable for infringing conduct when using the Pin It button because of Pinterest's acts and words in inviting users to use the button.¹⁸⁵ Since the INDUCE Act is still under consideration by Congress, Pinterest is currently in most danger of fitting in the contributory infringement tier of liability.

B. Pin It Button: Another Form of Technology Ahead of Copyright Law

The DMCA was enacted in part to serve the purpose of handling copyright issues regarding online content however, sometimes courts struggle to adapt copyright laws to new forms of technology. Pinterest is not comparable to Google's Image Search as a form of copy-reliant technology, though they both contain opt-out mechanisms.¹⁸⁶ On one hand, Google Image Search is a non-expressive mechanism that routinely copies copyrighted images displayed as thumbnail images; on the other hand, Pinterest hosts full-sized images that users copy from websites using the Pin It button in a less transformative way.¹⁸⁷ The Pin It button does not automatically copy content but rather facilitates users' copying activity and thus, a court may not be consider it analogous to Google Image Search, where the *Perfect 10* court found its thumbnail images highly transformative within the fair use defense.¹⁸⁸ However, Pinterest's requirement that users must

¹⁸⁵ See Nimmer, *supra* note 117 (noting that intent to induce is usually a question of fact).

¹⁸⁶ See Sag, *supra* note 30, at 1619 (noting that Google's opt-out mechanism influenced the court's decision); *supra* Smith note 153 and accompanying text (illustrating how Pinterest's "opt out" mechanism works).

¹⁸⁷ See Sag, *supra* note 30, at 1619 (reiterating the *Perfect 10* court's finding that thumbnail images served a different, more nonexpressive function than their full-sized, original versions, and thus holding that images on a search engine were not infringing); *but see* Leytes & Legge, *supra* note 1 (noting that Pinterest hosts full-size images on its server).

¹⁸⁸ See Sag, *supra* note 30, at 1617 (explaining how Google routinely copies expressive works to connect users to specific images based on their search terms, and hence the search engine does not enjoy the images as humans would); *see Perfect 10*, *supra* note 111 and accompanying text (explaining *Perfect 10*'s holding and defining transformative works); *see also Pin Etiquette*, *supra* note 148 and accompanying text (describing the Pin In button as a feature creating ease of access to images for users to post to Pinterest).

add comments to their content may provide a different fair use defense, allowing copying for purposes of criticism or commentary.¹⁸⁹

At times technology is ahead of copyright law, affecting how and when courts handle copyright issues, as seen in *Betamax*.¹⁹⁰ A court addressing Pinterest in a copyright infringement suit may face similar issues as the *Betamax* court in determining whether innovative technology induces infringement on behalf of the users of such technology or whether the technology's non-infringing purposes will prevail.¹⁹¹ Like the manufacturers in *Betamax*, Pinterest lacks direct control over its users' activity.¹⁹² In addition, rather than advertising the Pin It button as a tool for copyright infringement, Pinterest advises its users against infringing activity.¹⁹³ Hence, a court may likely hold Pinterest to be a contemporary version of *Betamax* finding in favor of Pinterest because copyright law is still catching up to online content sharing.

C. Pinterest's Take-Down Procedures May Protect It From Liability But Not Possible Lawsuits

Even if a court determines that Pinterest was liable for secondary copyright infringement, a court would still likely rule in favor of Pinterest because it complies with DMCA safe harbor provisions. It seems as though social media websites will be protected by safe harbors as long as they implement a termination policy against infringing users and their users are aware that such a policy exists.¹⁹⁴ This

¹⁸⁹ See 17 U.S.C. § 107 (stating fair use defense may be established when work is used for commentary purposes); McGRADY, *supra* note 4, at § 34.01 (noting users ability to comment on their own and other users' pins).

¹⁹⁰ See Leytes & Legge, *supra* note 1 (stating "[i]t may be a few more years before case law on copyright catches up to online content-sharing platforms").

¹⁹¹ See Leytes & Legge, *supra* note 1 (summarizing *Betamax* and noting how the Supreme Court took the innovativeness of "time shifting" into consideration in determining whether the VCR as new technology caused infringement).

¹⁹² See *Betamax*, 464 U.S. at 426 (reiterating the court's holding); *Hendrickson*, 165 F. Supp. 2d at 1093 (defining control to require more than that mere ability to terminate or block access to infringing content); see Poletti, *supra* note 7 and accompanying text (asserting Pinterest's lack of active control over users).

¹⁹³ See *supra* note 145 and accompanying text (stressing need for users to respect others' intellectual property rights).

¹⁹⁴ See Cloak, *supra* note 24, at 1581 (reiterating conditions for safe harbor eligibility). Furthermore, courts have liberally interpreted the conditions under Section

is a low standard for these websites to meet.¹⁹⁵ Therefore, based on its policies, Pinterest seems to be protected by the safe harbor provision,¹⁹⁶ and Pinterest believes it is. However, Pinterest could be in danger of not getting safe harbor protection because its business is “based almost entirely on using images without permission.”¹⁹⁷

In spite of Pinterest’s seeming protection from secondary liability for copyright infringement, there is no guarantee that Pinterest will still not be sued for copyright infringement. “Pinterest has not [yet] been a party in any reported cases”¹⁹⁸ however, since Pinterest has grown to be a mega social media site, many think it is just a matter of time before it is part of a massive lawsuit.¹⁹⁹ Large entities continue to forgo infringement claims against Pinterest for the sake of advertising and free promotion, while local artists and photographers remain anxious as their images continue to circulate without any benefit to them.²⁰⁰ Additionally, large companies, such as Flickr, take a surrendered approach by adding Pin It buttons to their websites rather than fighting them for Pinterest users’ infringement.²⁰¹ For the most part, social media platforms, including Pinterest, continue to escape liability and lawsuits for copyright infringement merely by its policies and procedures, although this may be subject to change in the future.

512(i) “holding that it requires more than a warning to users in their terms of use statements of their repeat-infringer policy.” *See White, supra* note 67, at 825 (noting courts’ standard for meeting conditions of safe harbor eligibility).

¹⁹⁵ *See Cloak, supra* note 24, at 1582 (noting that Section 512’s requirements constitute a “bare minimum” standard).

¹⁹⁶ *See Cloak, supra* note 24 (stating the bare minimum section 512 requires); Murphy, *supra* note 151 (suggesting that Pinterest should be granted safe harbor protection just as other social media sites).

¹⁹⁷ *See Murphy, supra* note 151 (acknowledging continuing risk of liability based on Pinterest’s nature).

¹⁹⁸ MCGRADY, *supra* note 44, at § 34.14.

¹⁹⁹ *See Thomas, supra* note 3 (comparing Pinterest to YouTube in 2006 and contending that its large bank account makes it a target for lawsuits in the future).

²⁰⁰ *See Leytes & Legge, supra* note 1 (comparing large brand owners’ and photographers or graphics artists’ reactions to Pinterest’s display of copyrighted content).

²⁰¹ *See Whitney, supra* note 151 (pointing to large companies who added the Pin It button to their websites); *supra* note 151 and accompanying text (describing Flickr’s changing relationship to Pinterest).

D. Suggested Solutions for Pinterest to Prevent a Big Copyright Lawsuit

Pinterest should consider revising the site and how the Pin It button functions to decrease its likelihood of being sued. One suggestion is to have Pinterest restrict the images displayed on the site to thumbnail-sized images as Google's Image Search did, thus strengthening Pinterest's fair use defense.²⁰² Since that is unlikely, another measure Pinterest could consider, is aiding in copyright holders' responsibility to regulate risks of infringement by implementing monitoring technology that would notify Pinterest of: discredited content, and when copyrighted images are uploaded or verification of content ownership.²⁰³ Implementing some of the above measures could further protect Pinterest from being liable for copyright infringement because the site would conform more to copyright law. Though the costs of implementing these measures is excessive, Pinterest may willingly risk the chance of litigation rather than expend funds for increased protection.

V. CONCLUSION

This generation's urge to share its daily life, interests and desires is only becoming more prevalent. Technology, such as social media and content-sharing sites, continue to adapt to this expanding culture of sharing. The Pin It button was created to ease users' ability to share images with friends, family, and other public Pinterest followers. Furthermore, the Pin It button subconsciously encourages users to copy images without first obtaining consent to do so. The button leaves the door open to potential secondary liability for copyright infringement because Pinterest relies on shared content from any and all websites. However, Pinterest's take-down procedures make the

²⁰² See Leytes & Legge, *supra* note 1 (providing possible solutions for Pinterest).

²⁰³ See Weinstein, *supra* note 27, at 609 (discussing monitoring software as part of a prospective three-pronged reasonableness test for service providers to encourage expeditious take-down procedures). "Requiring a minimum industry standard of copyright detection technology to be used by ISPs would further" Congress's mission behind the DMCA and its goal to prevent service providers from facilitating or contributing to infringement. See Weinstein, *supra* note 27, at 610 (discussing how monitoring technology could promote Congress's policy in enacting the DMCA).

site eligible for DMCA safe harbor protection. Due to Pinterest's growing popularity and exponential monetary value, its take-down procedures are not enough to stop Pinterest from being the new target for a big copyright lawsuit. Furthermore, since courts have not adapted copyright law to this culture of sharing through technology like the Pin It button, they will likely struggle to balance the interests of both copyright holders and technological innovators. In hopes of continuing to avoid a lawsuit for copyright infringement, Pinterest should consider reforming the Pin It button and how the site functions to conform more to current copyright law.